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The Wicked Problem of Zoning

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The Wicked Problem of Zoning

*Christopher Serkin**

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INTRODUCTION

Zoning is the quintessential wicked problem. Professors Rittel and Webber, writing in the 1970s, identified as “wicked” those problems that technocratic expertise cannot necessarily solve.¹ Wicked problems arise when the very definition of the problem is contested and outcomes are not measured by “right and wrong” but rather by messier contests between winners and losers.² This accurately characterizes the state of zoning and land use today.

Zoning is under vigorous and sustained attack from all sides. Conservatives have long decried regulatory interference with private development rights.³ More recently, progressive housing advocates have begun to criticize zoning for making thriving cities unaffordable

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1. Horst W.J. Rittel & Melvin M. Webber, *Dilemmas in a General Theory of Planning*, 4 POL’Y SCIS. 155, 160–62 (1973).

2. *Id.* at 160–69.

3. See, e.g., Jan Z. Krasnowiecki, *Abolish Zoning*, 31 SYRACUSE L. REV. 719, 722 (1980) (“[W]e should try the alternative of less regulation and a better delivery system”); Orlando E. Delogu, *Local Land Use Controls: An Idea Whose Time Has Passed*, 36 ME. L. REV. 261, 263 (1984) (“[Land use] controls cut against the grain of our historical penchant to allow people (property owners) the freedom to use their property as they choose.”); Douglas W. Kmiec, *Deregulating Land Use: An Alternative Free Enterprise Development System*, 130 U. PA. L. REV. 28, 30–31 (1981) (contending that a free enterprise system of land development would be superior to the status quo because it would “confine government to the role of preserving order and fundamental liberties”).

and for exacerbating racial segregation.⁴ Environmentalists argue that zoning is responsible for urban sprawl and for increasing carbon emissions.⁵ Economists blame zoning for restricting residential mobility, which limits fluidity in labor markets and thereby reduces the agglomeration surplus that thriving places like New York and San Francisco should be producing.⁶ And these are just some of the concerns. The breadth of these criticisms reveals the multiplicity of issues implicated by modern zoning—from the balance of public power and private rights, to distributional concerns, environmental interests, economic efficiency, and externalities along many dimensions. Most do not admit of a single “right” answer. Zoning is a wicked problem, indeed.

In true “wicked” fashion, it is difficult even to explore answers because of the predictable and entrenched interests in almost any zoning dispute. Invariably, efforts to loosen zoning restrictions in order to increase density will face fierce opposition from nearby neighbors who oppose change—so-called NIMBYs (“Not in My Back Yard”) or Neighborhood Defenders.⁷ Such neighbors typically object to changes to the character of their community, increased burdens on local infrastructure, changing demographics, community affordability, and change for its own sake.

4. See, e.g., Jason Furman, Chairman, Council of Econ. Advisers, *Barriers to Shared Growth: The Case of Land Use Regulation and Economic Rents* 1 (Nov. 20, 2015), https://obama.whitehouse.archives.gov/sites/default/files/page/files/20151120_barriers_shared_growth_land_use_regulation_and_economic_rents.pdf [<https://perma.cc/6TEW-JGF5>] (“In today’s remarks, I will focus on how excessive or unnecessary land use or zoning regulations have consequences that go beyond the housing market to impede mobility and thus contribute to rising inequality and declining productivity growth.”); Paul Krugman, Opinion, *Inequality and the City*, N.Y. TIMES (Nov. 30, 2015), <https://www.nytimes.com/2015/11/30/opinion/inequality-and-the-city.html> [<https://perma.cc/8TAA-MNL9>] (“Yes, [zoning] is an issue on which you don’t have to be a conservative to believe that we have too much regulation.”); Matthew Yglesias, *You Can’t Talk Housing Costs Without Talking About Zoning*, SLATE (Dec. 10, 2013, 8:50 AM), <https://slate.com/business/2013/12/housing-costs-it-s-the-zoning-stupid.html> [<https://perma.cc/TAV6-TL9P>] (describing the relationship between zoning and housing supply).

5. See SMART GROWTH IN A CHANGING WORLD (Jonathan Barnett ed., 2007); see also Michael P. Johnson, *Environmental Impacts of Urban Sprawl: A Survey of the Literature and Proposed Research Agenda*, 33 ENV’T & PLAN. A 717, 721–23 (2001) (reviewing research regarding the environmental impacts of urban sprawl); TRANSP. RSCH. BD., NAT’L RSCH. COUNCIL OF THE NAT’L ACADS., *DRIVING AND THE BUILT ENVIRONMENT: THE EFFECTS OF COMPACT DEVELOPMENT ON MOTORIZED TRAVEL, ENERGY USE, AND CO₂ EMISSIONS* 144–84 (2009) (arguing that land development patterns lead to increased automobile usage, thereby increasing greenhouse gas emissions).

6. See, e.g., Wendell Pritchett & Shitong Qiao, *Exclusionary Megacities*, 91 S. CALIF. L. REV. 467, 469 (2018) (“Human beings should live in places where they are most productive, and megacities, where information, innovation, and opportunities congregate, would be the optimal choice.” (footnotes omitted)).

7. See KATHERINE LEVINE EINSTEIN, DAVID M. GLICK & MAXWELL PALMER, *NEIGHBORHOOD DEFENDERS: PARTICIPATORY POLITICS AND AMERICA’S HOUSING CRISIS* 4, 34 (2020).

The resulting fights can be knock-down, drag-out affairs. Existing residents often oppose change as if the very survival of the neighborhood and community were at stake. Development proponents respond with accusations of “opportunity hoarding,” selfishness, and sometimes racism.⁸ Zoning is the battleground, and both sides act as if it reflects a zero-sum binary choice: more development or less, neighborhood transformation or preservation. It does not have to be this way. Both sides in these fights misapprehend the role that zoning can play in mediating these disputes. Zoning need not be either pro-growth or anti-growth. Instead, when properly understood and applied, zoning is a tool to moderate the *pace* of neighborhood change.⁹

In the wicked problems literature, incremental change is viewed as a necessary compromise when problems are insurmountably complex. Where problems cannot be solved wholesale, actors are advised at least to whittle away.¹⁰ Yet some scholars argue that a wicked problem, by definition, is not amenable to incremental change.¹¹ One of the characteristics that makes problems “wicked” is their dynamic response to interventions, making piecemeal solutions impossible.¹² But zoning should be viewed differently. Slow, incremental change is not a compromise because holistic solutions are impossible. Rather, it appropriately balances the interests of neighbors and newcomers; it is the best approach to neighborhood change, not a necessary evil. Understanding the importance of the pace of change ratchets down the stakes of zoning disputes and suggests a new conception of municipal land use regulations.

8. See, e.g., RICHARD V. REEVES, *DREAM HOARDERS: HOW THE AMERICAN UPPER MIDDLE CLASS IS LEAVING EVERYONE ELSE IN THE DUST, WHY THAT IS A PROBLEM, AND WHAT TO DO ABOUT IT* 95–98, 102–05 (2017) (“The rise of ‘exclusionary zoning,’ designed to protect the home values, schools, and neighborhoods of the affluent, has badly distorted the American property market.”); see also Olatunde C.A. Johnson, *Inclusion, Exclusion, and the “New” Economic Inequality*, 94 TEX. L. REV. 1647, 1655 (2016) (describing “opportunity hoarding”). For an eight-bit cartoon demonstration of the phenomenon, see Carrie Engel, *Play the Dream Hoarders Game*, BROOKINGS: BROOKINGS NOW (July 13, 2017), <https://www.brookings.edu/blog/brookings-now/2017/07/13/play-the-dream-hoarders-game/> [https://perma.cc/D6R8-M26R].

9. See Christopher Serkin, *A Case for Zoning*, NOTRE DAME L. REV. (forthcoming 2020) (arguing that the purpose of modern zoning is to constrain the pace of neighborhood change).

10. See, e.g., J.B. Ruhl & James Salzman, *Climate Change, Dead Zones, and Massive Problems in the Administrative State: A Guide for Whittling Away*, 98 CALIF. L. REV. 59, 65 (2010) (“The Court’s observation that agencies have to whittle away at some problems is no doubt accurate . . .”).

11. See Falk Daviter, *Coping, Taming or Solving: Alternative Approaches to the Governance of Wicked Problems*, 38 POL’Y STUD. 571, 583 (2017) (“In the face of certain types of risks, for example, a strategy of incremental adjustments and reconstructive analysis may be ill-advised if it means to accept potentially irreversible repercussions.”).

12. See, e.g., Ian Sanderson, *Intelligent Policy Making for a Complex World: Pragmatism, Evidence and Learning*, 57 POL. STUD. 699, 705–06 (2009) (describing how complex systems cannot be understood by decomposing them to their constituent elements).

Many people seem to think that the goal of zoning is to identify optimal land development patterns and then regulate towards those outcomes.¹³ Disputes are then over the ultimate vision of the community and the density and intensity of allowable land uses.¹⁴ But change that happens slowly actually imposes fewer costs on neighbors than the same change over a shorter period of time. Slow, deliberate, incremental change interferes less with people's expectations than does rapid, dramatic change—even if the end result is the same.¹⁵ Neighborhood evolution affects people differently depending on the speed at which it occurs.

Giving neighbors time for their expectations to shift incrementally can reduce the disruption caused by new development. Neighbor opposition to new projects is often vehement. Protests, community activism, and even litigation may try to stop a development in its tracks.¹⁶ But if the development happens, it may blend relatively quickly into the community background.¹⁷ People's expectations shift, and what was once an affront to the character of the community can become a welcome addition, or at least part of the unnoticed background. Even more importantly, neighbor opposition to new development is sometimes based less on objections to the specific project than on concerns that it represents a kind of slippery slope. It is not the particular project that threatens the community but rather the additional changes that it foreshadows.¹⁸

Zoning, when properly implemented and designed, should give communities time to absorb changes gradually and should provide reassurance to neighbors that one new project will not trigger other new ones too quickly. But zoning should facilitate change and not lock in the status quo. In other words, using zoning to moderate the pace of community change can act as a lubricant to some development by

13. See Christopher Serkin & Gregg P. Macey, *Post-zoning: Alternative Forms of Public Land Use Controls*, 78 BROOK. L. REV. 305, 307–08 (2013) (describing ecological origins of “end-state” planning); see also Eric R. Claeys, Essay, *Euclid Lives? The Uneasy Legacy of Progressivism in Zoning*, 73 FORDHAM L. REV. 731, 750 (2004) (“Because Progressives measured a city’s well being by the extent to which it was planned in advance, they saw nineteenth-century regulation as an invitation to anarchy.”).

14. See Serkin & Macey, *supra* note 13, at 308.

15. See Christopher Serkin, *Property and Change* (2020) (unpublished manuscript) (on file with author).

16. See *infra* notes 138–141 and accompanying text (describing opposition to development of Barclays Center in Brooklyn).

17. See *infra* notes 142–144 and accompanying text (describing the subsequent community acceptance of the Barclays Center in Brooklyn).

18. Cf. *Chinese Staff & Workers Ass’n v. City of New York*, 502 N.E.2d 176, 180–81 (N.Y. 1986) (upholding challenged environmental review of development on grounds that the city failed to consider likely changes in the neighborhood as a result).

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THE WICKED PROBLEM OF ZONING

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lowering the stakes for community opposition and protecting incumbent expectations. People should not expect zoning to prevent change, but people can reasonably expect that changes will happen at an appropriate pace.

Part I describes the current uses and justifications for zoning and reveals the profound disagreements at the heart of land use regulations today. Part II explores how slow, incremental change minimizes zoning's interference with expectations. Part III identifies specific land use tools and doctrines that can help to minimize disruption by controlling the pace of community change.

I. THE WICKED PROBLEM OF ZONING

A. Historical Uses and Justifications of Zoning

Zoning in the United States began in the first quarter of the twentieth century as a seemingly technocratic exercise in urban and suburban design.¹⁹ It was an era marked by increasing confidence in scientific and social scientific pursuits of rational order in the world.²⁰ Early planners, motivated in part by ecology and its embrace of “end state” planning, promoted a vision of a well-ordered city.²¹ They championed the view that ecological change was progressing to a “climax state” of perfect equilibrium.²² They thought the same was true of urban design and that cities would evolve to some climax state where everything was in its optimal place.²³ Zoning was intended to implement that goal.²⁴

Zoning, as developed and promulgated by the Commerce Department in the 1920s, provided a blueprint for local governments to divide their municipalities into different zones that prescribed maximum uses and densities.²⁵ The Standard Zoning Enabling Act

19. See Wendell E. Pritchett, *The “Public Menace” of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL’Y REV. 1, 15 (2003) (describing Herbert Hoover’s support of and collaborations with planning professionals).

20. See Claeys, *supra* note 13, at 750 (discussing the influence of Progressive ideology on zoning).

21. Serkin & Macey, *supra* note 13, at 307–08; see also John Mixon & Kathleen McGlynn, *A New Zoning and Planning Metaphor: Chaos and Complexity Theory*, 42 HOUS. L. REV. 1221, 1247 (2006) (“Land use planning that postulates a terminal state of affairs—a defined land use future—may be as likely, or even more likely, to produce adverse consequences as to produce an ideal environment.”).

22. Serkin & Macey, *supra* note 13, at 307–08.

23. *Id.* at 308.

24. *Id.*

25. See, e.g., Patricia E. Salkin, *The Quiet Revolution and Federalism: Into the Future*, 45 J. MARSHALL L. REV. 253, 266–67 (2012).

(SZEAs) provides zoning's fundamental DNA. It created "use districts" consisting of broad categories—residential, commercial, and industrial—and then subcategories specifying different intensities of uses—single-family, duplex, multifamily, and so forth.²⁶ In addition, it defined "bulk" limits, like maximum height limits, lot coverage, and setbacks from property lines, all of which combine to define buildable envelopes.²⁷ The goal was a neatly organized city, segregated by use, with people living in one area, working in another, and shopping in still another. Moreover, the system was designed to privilege uses in an explicit hierarchy, with single-family residential zones at the top and industrial uses at the very bottom.²⁸

Zoning's early defenders focused on zoning as a kind of ex ante nuisance prevention.²⁹ The goal, very explicitly, was to use planning expertise to prevent conflicting uses of land before they arose.³⁰ The 1920s were a time of industrialization and urbanization, and the traditional judicial remedy of nuisance law seemed ill suited to the intensity of the new land use conflicts. By preventing those conflicts ahead of time and assigning uses to the places where they were best suited, zoning aimed at efficiency.³¹

Consistent with the evolution of wicked problems in other fields, this faith in technocratic efficiency seems entirely anachronistic today. The traditional vision of zoning has as much in common with modern land use controls as *It's a Wonderful Life* has in common with modern banking.³² Of course, zoning still plays an important role in keeping noxious uses—gas stations, factories, adult businesses—out of bucolic residential settings. But local governments increasingly favor walkable mixed-use neighborhoods that combine residential and commercial uses.³³ Complex overlays, whether for historic preservation or urban

26. *Id.* at 265; see also Claeys, *supra* note 13, at 739–40 ("Euclidean zoning institutes a centralized, command-and-control style of land-use regulation. It operates on the principle, 'a place for everything, and everything in its place.'").

27. See, e.g., SONIA A. HIRT, ZONED IN THE USA: THE ORIGINS AND IMPLICATIONS OF AMERICAN LAND-USE REGULATION 32 (2014) (describing original zoning limits).

28. See Gerald A. Fischer, *The Comprehensive Plan Is an Indispensable Compass for Navigating Mixed-Use Zoning Decisions Through the Precepts of the Due Process, Takings, and Equal Protection Clauses*, 40 URB. LAW. 831, 835–36 (2008) (describing a cumulative "pyramid" system of zoning with single-family classification the highest use).

29. See, e.g., *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926) (describing zoning as excluding structures and practices likely to cause nuisances).

30. *Id.* at 394–95 (detailing the benefits of zoning considered by commissions).

31. 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.").

32. *IT'S A WONDERFUL LIFE* (Liberty Films 1946).

33. See, e.g., Nicole Stelle Garnett, *Ordering (and Order in) the City*, 57 STAN. L. REV. 1, 32–33 (2004) ("The new urbanists champion dense, 'mixed use' neighborhoods . . ."); Brian W. Ohm

design specification, impose different sets of land use goals on top of traditional zoning.³⁴ And local governments today deploy zoning as a mechanism for fiscal purposes, incorporating exactions and impact fees that force developers to pay for infrastructure improvements as a condition for land use approvals.³⁵

In classic wicked-problem fashion, even the goals of zoning are increasingly contested, and conflicts between various stakeholders have come to dominate current debates about zoning: between insiders and outsiders and between environmentalists and proponents of historic preservation, among many others.³⁶ Simply unpacking these disparate interests and conflicts reveals the complexity—the wickedness—of the zoning problem.³⁷

Zoning began with a focus on idealized end-state goals: implementing technocratic planning and preventing land use conflicts before they arise.³⁸ Those objectives were complementary and existed as a kind of aspirational point that everyone could agree was zoning’s target. As faith in technocratic solutions began to wane, zoning’s objectives increased from one- to two-dimensional but still could be spread relatively neatly along a single line from prodevelopment to antidevelopment. Harvey Molotch argued in 1976 that many local governments—and their zoning functions—were controlled by a “growth machine,” which included the developers, architects, real estate brokers, lawyers, and anyone else with a direct economic stake

& Robert J. Sitkowski, *The Influence of New Urbanism on Local Ordinances: The Twilight of Zoning?*, 25 URB. LAW. 783, 785 (2003) (asserting that new urbanists identified “the failure of Euclidean zoning to allow for mixed-uses”).

34. See generally Dorothy Ariail, *Property Topics and Concepts*, AM. PLAN. ASS’N, <https://www.planning.org/divisions/planningandlaw/propertytopics.htm#Overlay> (last visited Sept. 14, 2020) [<https://perma.cc/25TC-XZ68>].

35. See ROBERT C. ELICKSON, VICKI L. BEEN, RODERICK M. HILLS & CHRISTOPHER SERKIN, *LAND USE CONTROLS: CASES AND MATERIALS* 647, 670 (4th ed. 2013) (“[I]n most jurisdictions, public land use regulation has evolved into a system of fiscal protection and fund-raising.”).

36. See *infra* Part I.B (detailing conflicts among modern approaches to zoning).

37. In their seminal piece, Rittel and Webber focus on urban policy as a wicked problem. Rittel & Webber, *supra* note 1, at 158. That seems like a broader frame than zoning, but, in fact, the most intractable disputes in urban policy map perfectly on to land use and zoning disputes. Focusing specifically on zoning reveals one of the central features of wicked problems, that the definition of the problem is in constant and recursive conversation with solutions, both of which are contested. As Rittel and Webber put it, “The information needed to *understand* [a wicked] problem depends on one’s idea for *solving* it.” *Id.* at 161. Here, to frame problems of urban policy as zoning problems is already to narrow it and to suggest a large but limited range of solutions (land use reform), at the expense of others (social safety net, tax policy, antitrust reform, etc.). But zoning is wicked enough and reveals the same trajectory and complexity as a classic wicked problem.

38. See Galle, *supra* note 31, at 1724 (explaining that zoning restricts land use to prevent nuisances).

in growth and development.³⁹ This translated into a relatively straightforward opposition to regulatory barriers to development.

On the other end of the spectrum were antidevelopment local governments. William Fischel drew a sharp distinction between municipalities dominated by the Molotch Growth Machine and those dominated by what he called “homevoters”—that is, homeowners who vote.⁴⁰ Quintessentially, these were exclusionary suburbs that became the destination of white flight from the urban core.⁴¹ Homevoters crave stability, if not stasis, both because of the mini cartel the status quo creates for existing housing stock (increasing property values) and also because of a more generalized and sometimes pernicious resistance to changes to community character.⁴² Zoning is the primary regulatory mechanism for resisting growth and change.

B. Contemporary Uses of Zoning

Zoning is still sometimes viewed as a zero-sum battleground between progrowth and antigrowth factions.⁴³ But the objectives of zoning have become much more diverse than this simple two-dimensional spectrum. Moreover, the “planning” model of zoning has increasingly been replaced by a “dealing” model, where zoning is the regulatory context for increasingly sophisticated negotiations between developers and local officials.⁴⁴ In a dealing model, the zoning of any particular parcel should be seen as a kind of opening offer that is subject to change if the developer can offer enough inducement.⁴⁵ The resulting

39. Harvey Molotch, *The City as a Growth Machine: Toward a Political Economy of Place*, 82 AM. J. SOCIO. 309, 309–10 (1976).

40. WILLIAM A. FISCHEL, THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES 80–81 (2001).

41. Cf. Lee Anne Fennell, *Homes Rule*, 112 YALE L.J. 617, 635 (2002) (reviewing FISCHEL, *supra* note 40, at 80–81) (describing exclusionary practices in “homevoter” jurisdictions).

42. See, e.g., FISCHEL, *supra* note 40, at 80–82 (showing how homevoters were able to combat rent control).

43. See, e.g., Daniel Hertz, *Homevoters v. the Growth Machine*, CITYCOMMENTARY (June 11, 2018), <https://cityobservatory.org/homevoters-v-growth-machine/> [<https://perma.cc/C6AN-648W>] (describing competing pro-growth and anti-growth pressures).

44. Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 CALIF. L. REV. 837, 890–91 (1983); see also Steven J. Eagle, *Land Use Regulation and Good Intentions*, 33 J. LAND USE & ENV'T L. 87, 105–09 (2017) (describing how “[t]he movement away from long-term comprehensive planning and Euclidean zoning” effected a rise in “schemes to facilitate land use planning and bargaining”); 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) (“[C]urrent practices demonstrate that land use decision-making has shifted significantly from the planned toward the particularized . . .”).

45. See, e.g., Christopher Serkin, *Divergence in Land Use Regulations and Property Rights*, 92 S. CALIF. L. REV. 1055, 1065 (2019) (“Under the dealing model, land use regulations should be seen as a kind of opening offer.”).

landscape is much more complex. These are not zero-sum tradeoffs but instead orthogonal policy concerns.

To bring some order to the chaos, it is possible to discern several overarching categories of municipal motivations for zoning: planning, municipal finance, market interventions, preservation, and exclusion.⁴⁶ But subcategories tell the real story of disparate policy goals. Not every community pursues each of the goals below, nor are they (for the most part) mutually exclusive. Moreover, municipalities sometimes pursue different dichotomous goals in different neighborhoods. This list is not exhaustive, but it is meant to capture the most common municipal objectives. They will be immediately familiar to most people and will reveal the wickedness of the zoning problem.

Planning

1. *Separating incompatible uses.* Zoning retains at least vestiges of its origins in ex ante nuisance prevention. According to a traditional planning model, zoning promotes efficiency by preventing conflicts before they arise and avoiding the deadweight costs of litigation.⁴⁷

2. *Rational planning.* Urban planners—whose plans usually serve as the basis for zoning—are faced with much broader considerations than simply preventing land use conflicts among neighbors. The search for rational development includes such considerations as infrastructure planning and the appropriateness of different places for different uses.⁴⁸ Zoning, then, reflects the policy choices of planners and local officials seeking to promote certain kinds of development or businesses in certain places in order to promote a rational city. For example, transit-oriented development, or increased density on arterial roads, is consistent with this objective.⁴⁹

3. *Satisfying consumer preferences.* Rational development may not be appealing development to housing consumers. For example, cul-de-sacs make for terrible urban design. They impede traffic, make police

46. In previous work, I have identified the most common goals as minimizing harm from neighbors, promoting new design forms, encouraging growth, discouraging growth, fiscal zoning, zoning as bargaining, zoning to increase property values, affordability, historic preservation, community preservation, aesthetic regulation, environmental protection of various sorts, economic intervention, and exclusion and segregation. *See id.*, at 1075.

47. *See* *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926) (discussing zoning's early rationale as a form of ex ante nuisance prevention).

48. *See, e.g.*, ALEXANDER GARVIN, *THE AMERICAN CITY: WHAT WORKS, WHAT DOESN'T* 3–4 (2d ed. 2002) (discussing public investment in infrastructure as well as size and character regulations as typical of urban planning).

49. *See* Oliver A. Pollard, III, *Smart Growth and Sustainable Transportation: Can We Get There from Here?*, 29 *FORDHAM URB. L.J.* 1529, 1539 (2002) (describing a more sustainable approach to transportation that focuses on accessibility and livability as part of a “smart growth” development policy).

and fire protection more difficult, and can interfere with creating walkable places.⁵⁰ Planners are usually opposed to cul-de-sacs,⁵¹ but housing consumers often love them.⁵² Property values in cul-de-sacs are systemically higher precisely because of the lack of cut-through traffic and the sense of neighborhood control over streets.⁵³ The divergence between planning goals and housing consumer goals is a theme in the land use and planning literature.⁵⁴ The point here is that zoning aspires sometimes to the goals of planning and sometimes to the goals of consumers, and the two are not necessarily the same.

Municipal Finance

4. *Tax revenue.* Zoning can also be implemented to try to enhance local tax revenue, which means attracting uses that produce the greatest net fiscal benefits to a local government.⁵⁵ Translating this into policy depends on local context. In places where property taxes are capped, for example, local officials may try to attract more commercial uses that generate sales tax. Most local governments depend primarily on property taxes, however, and maximizing tax revenue often means trying to restrict or exclude inexpensive multifamily housing.⁵⁶ In purely fiscal terms, lower-income households with children who attend local public schools are often net negatives for local governments; whereas, wealthy empty nesters in expensive houses are net positives.⁵⁷

50. See, e.g., Paul Cozens & David Hillier, *The Shape of Things to Come: New Urbanism, the Grid and the Cul-De-Sac*, 13 INT'L PLAN. STUD. 51, 51 (2008) (arguing that grid layouts enhance walkability more than cul-de-sac layouts); Paul K. Asabere, *The Value of Neighborhood Street with Reference to the Cul-De-Sac*, 3 J. REAL EST. FIN. & ECON. 185, 186 (1990) (indicating that cul-de-sacs reduce pedestrian traffic and make maneuvering for fire department vehicles more difficult).

51. See, e.g., Paul Cozens & David Hillier, *supra* note 50, at 51.

52. See Paul K. Asabere, *supra* note 50, at 191 (finding positive property values associated with cul-de-sac street layout).

53. *Id.* at 186, 191.

54. See, e.g., Lon L. Fuller, *Freedom—A Suggested Analysis*, 68 HARV. L. REV. 1305, 1325 (1955) (observing that planning footpaths in advance removes the opportunity to see where residents will walk most often); John Rahenkamp, *Land Use Management: An Alternative to Controls*, in FUTURE LAND USE: ENERGY, ENVIRONMENTAL, AND LEGAL CONSTRAINTS 191, 191–92 (Robert W. Burchell & David Listokin eds., 1975) (arguing that planners are historically bad at predicting consumer behavior).

55. 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) (discussing how localities often make zoning choices in order to increase their tax base to fund public services such as education).

56. See Serkin, *supra* note 45, at 1064–65 (explaining that local governments seek to minimize low-income households due to the burden on municipal services).

57. See Christopher Serkin & Leslie Wellington, *Putting Exclusionary Zoning in Its Place: Affordable Housing and Geographical Scale*, 40 FORDHAM URB. L.J. 1667, 1670 (2013) (describing how wealthier property owners' higher property taxes implicitly subsidize public services for low-income families).

The mix of land uses in a municipality will have a significant impact on its tax base, its expenditures, and therefore its bottom line.

5. *Fees and exactions.* In addition to tax revenue, land use regulation can have a more direct impact on municipal finances by producing fees and exactions.⁵⁸ Exactions are conditions that a local government imposes before granting permission to develop property, and they vary widely in form.⁵⁹ For example, a local government may require certain infrastructure improvements or abatement of certain impacts before allowing development to proceed. These improvements can include street or stormwater upgrades, investments in transit, or even development of new schools, in addition to direct cash payments.⁶⁰ The Constitution limits exactions by requiring them to be related to, and proportional to, the burden being imposed by the new development.⁶¹ In other words, a local government cannot extort money from developers, but it can force them to internalize the marginal cost of the development on municipal services and infrastructure. In so doing, a local government can shift the costs of growth from insiders—existing property owners who would pay through increases in property taxes—to newcomers and outsiders, who pay in the form of higher housing costs.⁶²

Market Interventions

6. *Increasing property values.* One of the self-interested reasons that in-place property owners may want to restrict growth is to increase local property values.⁶³ By definition, zoning operates as a restriction on supply, which tends to increase housing costs, all else being equal.⁶⁴ The effect of zoning on property values is deeply dependent on context. Sometimes attracting development is necessary to spur investment or

58. Serkin, *supra* note 45, at 1065–66.

59. See Jim Rossi & Christopher Serkin, *Energy Exactions*, 104 CORNELL L. REV. 643, 654–58 (2019) (describing the use of exactions).

60. See *id.* at 658 (“Other common legislated exactions in other jurisdictions include fees for schools, wastewater, parks, and fire departments, to name just a few.”).

61. See *id.* at 703–04 (describing constitutional limits on exactions).

62. See Serkin, *supra* note 9 (manuscript at 31–32) (on file with author) (describing the use of zoning to shift costs of growth).

63. See FISCHER, *supra* note 40, at 6 (explaining how concern for home values leads home owners to advocate for and against zoning changes); see also Christopher Serkin, *Big Differences for Small Governments: Local Governments and the Takings Clause*, 81 N.Y.U. L. REV. 1624, 1648 (2006) (stating that because a home is often a person’s most significant financial asset, homeowners are incentivized to police local government land use decisions).

64. See Edward Glaeser & Joseph Gyourko, *Zoning’s Steep Price*, 25 REG. 24, 26 (2002) (finding evidence that zoning is responsible for high housing costs in certain markets); see also Rolf Pendall, *Local Land Use Regulation and the Chain of Exclusion*, 66 J. AM. PLAN. ASS’N 125, 129, 138 (2000) (describing how zoning laws can increase housing costs and exclude minority groups).

reinvestment in a place.⁶⁵ But there is no question that zoning plays an important role in enhancing local property values, and indeed for some, that quality is its central animating purpose.⁶⁶

7. *Promoting affordability.* For others, the opposite goal is more important: zoning to promote affordability.⁶⁷ Affordability can be addressed directly within a zoning ordinance. For example, inclusionary zoning can require or incentivize the production of affordable housing units as part of the development of market-rate units.⁶⁸ But zoning can also encourage affordability simply by loosening development restrictions and unlocking additional supply.⁶⁹

8. *Economic Protectionism.* Local governments can also use zoning to favor (or disfavor) particular businesses or economic interests. Efforts to exclude large box stores—the Wal-Mart Wars⁷⁰—are emblematic of efforts to protect downtown businesses. Other cases are legion, from excluding new office buildings to protect owners of existing vacant office space, to prohibitions of all kinds of uses coupled with grandfathering protection for those that already exist.⁷¹

Preservation

9. *Historic preservation.* Historic preservation has become an abiding concern of land use regulations, if not zoning per se.⁷² Historic

65. See, e.g., Vicki Been, “Exit” as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine, 91 COLUM. L. REV. 473, 513–14 (1991) (describing local efforts to attract new development).

66. See, e.g., John Mangin, *The New Exclusionary Zoning*, 25 STAN. L. & POL’Y REV. 91, 93 (2014) (describing relationship between supply restrictions and price).

67. See, e.g., KEITH WARDRIP, LAURA WILLIAMS & SUZANNE HAGUE, CTR. FOR HOUS. POL’Y, THE ROLE OF AFFORDABLE HOUSING IN CREATING JOBS AND STIMULATING LOCAL ECONOMIC DEVELOPMENT: A REVIEW OF THE LITERATURE 10–13 (2011), <https://providencehousing.org/wp-content/uploads/2014/03/Housing-and-Economic-Development-Report-2011.pdf> [https://perma.cc/SN7E-V83E] (indicating that localities may consider the promotion of affordable housing when making zoning decisions).

68. See, e.g., Christopher Serkin, *The New Politics of New Property and the Takings Clause*, 42 VT. L. REV. 1, 14–15 (2017) (stating that many liberal scholars and policymakers advocate for zoning that increases population density and prevents gentrification).

69. Vicki Been, Ingrid Gould Ellen & Katherine O’Regan, *Supply Skepticism: Housing Supply and Affordability*, 29 HOUS. POL’Y DEBATE 25, 29 (2018).

70. See ELLICKSON ET AL., *supra* note 35, at 120–21 (providing a legal history of the Wal-Mart Wars); see also DAVID PORTER & CHESTER L. MIRSKY, MEGAMALL ON THE HUDSON: PLANNING, WAL-MART, AND GRASSROOTS RESISTANCE (2003) (examining one community’s efforts to prevent construction of a Wal-Mart); William E. Roper & Elizabeth Humstone, *Wal-Mart in Vermont—The Case Against Sprawl*, 22 VT. L. REV. 755, 758 (1998) (describing efforts to prevent the building of a Wal-Mart in the Town of St. Albans, Vermont).

71. See, e.g., *Coniston Corp. v. Vill. of Hoffman Estates*, 844 F.2d 461, 467 (7th Cir. 1988) (excluding new office building to protect existing office buildings from competition); Christopher Serkin, *Existing Uses and the Limits of Land Use Regulations*, 84 N.Y.U. L. REV. 1222, 1223–24 (2009) (describing the dynamics surrounding legal protections for existing uses).

72. See, e.g., Serkin, *supra* note 45, at 1068–69 (describing historic preservation).

preservation is often a separate regulatory regime, although historic overlays and other designations are sometimes built into zoning ordinances.⁷³ Whatever the mechanism, local governments often seek to protect historic buildings and neighborhoods and so prevent their destruction or redevelopment.⁷⁴

11. *Community preservation.* Historic preservation is often a proxy for community preservation. That is, some local governments preserve buildings or neighborhoods regardless of their actual historical value because what they genuinely care about is resisting change. In some states, local governments have a mechanism to accomplish this directly through the designation of community preservation districts.⁷⁵ More commonly, local governments create a historic overlay on a neighborhood that they are trying to protect from redevelopment—not so much for the history of the place but instead to make it more difficult to subdivide and redevelop.⁷⁶

13. *Environmental preservation.* Local governments also use zoning and land use regulations to preserve open space and to protect the environment. This can take two different, and often conflicting, forms. More conventionally, zoning ordinances would designate swaths of property for low-density uses in order to preserve vegetation, fields, or other vulnerable habitats.⁷⁷ In previous work, I dubbed this “aesthetic environmentalism,” which seeks primarily to preserve the feel of a place as rural instead of urban or suburban.⁷⁸ Increasingly, however, people have realized that strict density limits meant to preserve open space often result in sprawl. Preserving one place as relatively rural means pushing development elsewhere, often further from jobs and into places where commutes increase.⁷⁹ The end result is an increase in vehicle miles traveled and carbon emissions, which is decidedly not environmentally friendly. As a result, other places seek to promote dense development near transit in order to pursue

73. *Id.*

74. See, e.g., J. Dennis Doyle, *Historic Preservation Zoning in Maryland*, 5 MD. L.F. 100, 101–05 (1976) (explaining the mechanics of historic zoning).

75. See William A. Fischel, *Neighborhood Conservation Districts: The New Belt and Suspenders of Municipal Zoning*, 78 BROOK. L. REV. 339, 347–49 (2013) (providing background information regarding community preservation districts).

76. See Serkin, *supra* note 45, at 1069 (“[H]istoric preservation is often a kind of rough proxy for the real concern of preventing displacement of the existing community.”).

77. See *id.* at 1071–72 (indicating that zoning ordinances are traditionally used to protect environmental resources such as wetlands).

78. See Serkin, *supra* note 9 (manuscript at 16) (on file with author).

79. See Serkin, *supra* note 45, at 1071 (describing the sprawl associated with single-family residential suburbs and the increased distance from city centers).

environmental goals.⁸⁰ Still others use zoning to try to exclude carbon-intensive uses, like energy extraction.⁸¹ The form therefore varies tremendously across local governments, but environmental concerns nevertheless animate zoning in many places.

Exclusion

14. *Race.* Zoning has been bound up with pernicious racist exclusion since its very origin.⁸² The first attempts at zoning in this country were not to create the use-based zones of the SZEA but were instead to create racial zoning that sought to segregate explicitly by race.⁸³ The Supreme Court invalidated that practice very quickly, so explicit race-based zoning has been squarely unconstitutional for over a century.⁸⁴ Nevertheless, zoning in some places remains motivated by racial hostility.⁸⁵ Because of the close connection between race and wealth, some communities seek to exclude affordable, low-income housing in order to try to exclude minorities.⁸⁶ Others engage in what is called “expulsive zoning,” which sites noxious industrial uses in majority-minority neighborhoods.⁸⁷ And still others use blight designations, or other redevelopment strategies, to try to force out in-place minority communities.⁸⁸ The mechanisms for exclusion and expulsion are myriad. Zoning, unfortunately, can be deployed to promote racial segregation and exclusion.

80. 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 ENV'T L. & POL'Y REV. 121, 153 (2009).

81. See *Wallach v. Town of Dryden*, 16 N.E.3d 1188, 1203 (N.Y. 2014) (holding that local governments can zone to exclude oil and gas production within municipal boundaries).

82. See Serkin, *supra* note 9 (manuscript at 7) (on file with author); see also Christopher Silver, *The Racial Origins of Zoning in American Cities*, in URBAN PLANNING AND THE AFRICAN AMERICAN COMMUNITY: IN THE SHADOWS 23, 24 (June Manning Thomas & Masha Ritzdorf eds., 1997) (explaining zoning's origins as a mechanism for excluding “undesirables”).

83. See Gretchen Boger, *The Meaning of Neighborhood in the Modern City: Baltimore's Residential Segregation Ordinances, 1910–1913*, 35 J. URB. HIST. 236, 237 (2009) (describing Baltimore, Maryland's residential segregation ordinances as “the first attempt in the United States to legally separate the living space of blacks and whites”); Garrett Power, *Apartheid Baltimore Style: The Residential Segregation Ordinances of 1910–1913*, 42 MD. L. REV. 289, 289 (1983) (detailing how the mayor of Baltimore enacted an ordinance in 1911 legalizing housing segregation).

84. See *Buchanan v. Warley*, 245 U.S. 60, 69, 82 (1917) (invalidating Louisville, Kentucky's segregated housing ordinance on Fourteenth Amendment grounds).

85. Cf. John Infranca, *Differentiating Exclusionary Tendencies*, 72 FLA. L. REV. (forthcoming 2020) (discussing pernicious and benign uses of zoning).

86. *Id.* (manuscript at 3–4), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3549364 [<https://perma.cc/JUE2-8X8U>].

87. Jon C. Dubin, *From Junktards to Gentrification: Explicating a Right to Protective Zoning in Low-Income Communities of Color*, 77 MINN. L. REV. 739, 742 (1993).

88. E.g., Pritchett, *supra* note 19, at 47.

15. *Income.* Sometimes exclusion is not race based but is instead income based. Local governments may seek to exclude low-income or affordable housing in order to try to exclude the poor.⁸⁹ This exclusion is consistent with the objective of maximizing property tax revenue, as articulated above, but can be based on more invidious distaste. That is, some local governments may exclude affordable multifamily housing in order to try to maximize net property taxes, while others may do so because they simply do not want poor people living nearby.⁹⁰ This can be orthogonal to purely economic motives, based instead on prejudices around crime, social capital, and lifestyle.

16. *Marginalized groups.* Exclusion, of course, can be directed at other groups as well. Zoning often seeks to exclude group homes for the mentally ill, youth rehabilitation facilities, or methadone or other drug recovery clinics.⁹¹ These kinds of uses can have an adverse impact on local property values if for no other reason than the stigma associated with them.⁹² Sometimes, of course, they are associated with increased criminal activity, or at least the presence of more transient people in the community, and so are a frequent target of exclusion.⁹³

17. *Morality.* Zoning is also often directed at other uses for reasons of moral disapprobation. Adult uses, like strip clubs and adult bookstores, are often targets of zoning.⁹⁴ While the First Amendment quintessentially prohibits regulation based on the substantive content of expressive activity, the Supreme Court has upheld land use regulations directed at the secondary effects of adult uses, like crime prevention.⁹⁵ But such morality-infused zoning can also target religious minorities, like efforts to ban a mosque in Murfreesboro, Tennessee.⁹⁶

89. See, e.g., *S. Burlington Cnty. NAACP v. Twp. of Mount Laurel*, 336 A.2d 713, 734 (N.J. 1975) (holding that local governments could not exclude low income housing from the community).

90. *Id.* at 723.

91. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 435 (1985) (discussing exclusion of a group home); *RHJ Med. Ctr., Inc. v. City of DuBois*, 754 F. Supp. 2d 723, 726–27 (W.D. Pa. 2010) (discussing exclusion of a methadone clinic).

92. *City of Cleburne*, 473 U.S. at 455 (Stevens, J., concurring).

93. *RHJ Med. Ctr.*, 754 F. Supp. 2d at 739.

94. See, e.g., *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 429–30 (2002) (upholding city ordinance prohibiting operation of multiple adult businesses in a single building).

95. See *id.* For critiques, see Daniel Linz, Kenneth C. Land, Jay R. Williams, Bryant Paul & Michael E. Ezell, *An Examination of the Assumption that Adult Businesses Are Associated with Crime in Surrounding Areas: A Secondary Effects Study in Charlotte, North Carolina*, 38 LAW & SOC'Y REV. 69 (2004); and Bryant Paul, Daniel Linz & Bradley J. Shafer, *Government Regulation of "Adult" Businesses Through Zoning and Anti-Nudity Ordinances: Debunking the Legal Myth of Negative Secondary Effects*, 6 COMM'N L. & POL'Y 355 (2001).

96. See *United States v. Rutherford Cnty.*, No. 3:12-0737, 2012 WL 2930076, at *2 (M.D. Tenn. July 18, 2012) (issuing a temporary restraining order to require that the county process a mosque's certificate of occupancy).

C. Contested Land Use

The proliferation of land use goals means that zoning fights have become particularly difficult to resolve. Proponents and opponents of development often find themselves talking past each other or having ulterior motives ascribed to them. Preservationists are branded racists; developers are labeled community busters.⁹⁷ Fights splinter and fragment along many dimensions.⁹⁸ Consider the complex relationship between the interrelated issues of affordability, parochialism, preservation, and property values.

There is an emerging elite consensus that zoning is too restrictive in many of America's thriving cities.⁹⁹ By limiting the supply of new development, zoning keeps prices high and therefore out of reach for many people looking for affordable places to live.¹⁰⁰ The solution, according to many policymakers and scholars, is to relax zoning restrictions and allow greater density.¹⁰¹ This will address issues of equity by allowing more people to access desirable communities. However, increasing density can change the character of a community and displace expectations of in-place residents who may have chosen where to live because of a specific set of characteristics.¹⁰² It may reduce local governments' ability to control the fiscal impacts of growth. And it will also tend to put downward pressure on property values (or at least keep them from increasing quite so quickly).¹⁰³ Whether this last one is

97. See, e.g., Andrew Keatts, *Single-Family Zoning's Century of Supremacy in San Diego*, VOICE OF SAN DIEGO (Aug. 26, 2020), <https://www.voiceofsandiego.org/topics/land-use/single-family-zonings-century-of-supremacy-in-san-diego/> [<https://perma.cc/J4PQ-BCBH>] (“‘Exclusionary zoning, like single-family zoning, is used as a planning tool by local cities around the nation to segregate Black, Brown and poor residents from wealthier and whiter neighborhoods’ . . .”); Dennis McGurk, *Letter How to Destroy a City*, GLOUCESTER DAILY TIMES, (Aug. 28, 2020), https://www.gloucestertimes.com/opinion/letters_to_the_editor/letter-how-to-destroy-a-city/article_7723f24e-cb75-51c2-b6e7-eb88fd184499.html [<https://perma.cc/MW3P-URGT>] (complaining about the destructive impact of unchecked development).

98. See, e.g., Serkin, *supra* note 45, at 1080–85 (describing the complex politics of a development fight in Nashville's Music Row).

99. See, e.g., Ganesh Sitaraman, Morgan Ricks & Christopher Serkin, *Regulation and the Geography of Inequality*, DUKE L.J. (forthcoming).

100. See Been et al., *supra* note 69, at 26 (“[T]he preponderance of evidence suggests that easing barriers to new construction will moderate price increases and therefore make housing more affordable to low- and moderate-income families.”).

101. See Edward Glaeser, *Reforming Land Use Regulations*, BROOKINGS (Apr. 24, 2017), <https://www.brookings.edu/research/reforming-land-use-regulations/> [<https://perma.cc/9Y7R-4YR9>] (arguing that land use controls inflate housing prices); Moira O'Neill, Giulia Gualco-Nelson & Eric Biber, *Developing Policy from the Ground Up: Examining Entitlement in the Bay Area to Inform California's Housing Policy Debates*, 25 HASTINGS ENV'T L.J. 1, 72–74 (2019) (suggesting that state policymakers change local land-use approval regulations in order to improve housing production).

102. See Glaeser, *supra* note 101 (“Restricting growth is often locally popular.”).

103. See *supra* notes 58–66 and accompanying text.

a feature or a bug depends on one's perspective as an aspiring resident versus an in-place property owner.

There are also externalities to consider. While choosing whether to upzone a neighborhood may seem like a quintessentially local decision, the effects of similar decisions within a region can be profound. For one, restrictions on supply in some "superstar" cities can drive up prices and thereby reduce the incentive of workers to move to those places with booming economies.¹⁰⁴ Indeed, interregional mobility has actually declined, even as geographic inequality has increased, because there is less motivation to move to a place with higher wages if housing costs will consume most or all of that advantage.¹⁰⁵ The resulting mismatch between labor supply and demand has economic consequences for the economy as a whole. Some scholars have calculated a reduction in national GDP of trillions of dollars because of local zoning decisions restricting housing supply in the nation's superstar cities.¹⁰⁶

Additionally, zoning often has discriminatory effects and exacerbates patterns of housing segregation.¹⁰⁷ Some of the most bitter land use fights involve the siting of affordable housing. Affluent communities in particular will go to sometimes extreme lengths to prevent the development of affordable housing.¹⁰⁸ Simultaneously, more intensive development, as well as noxious uses, are often concentrated in minority communities that have fewer resources and

104. Richard Florida, *Why America's Richest Cities Keep Getting Richer*, ATLANTIC (Apr. 12, 2017), <https://www.theatlantic.com/business/archive/2017/04/richard-florida-winner-take-all-new-urban-crisis/522630/> [<https://perma.cc/399Q-AKXC>]; see also Peter Ganong & Daniel Shoag, *Why Has Regional Income Convergence in the U.S. Declined?*, 102 J. URB. ECON. 76, 89–90 (2017) (finding that housing price increase affect migration patterns).

105. See Sitaraman et al., *supra* note 99; see also Florida, *supra* note 104 (explaining that real-estate prices in superstar cities are a key factor in economic inequality).

106. See Chang-Tai Hsieh & Enrico Moretti, *Housing Constraints and Spatial Misallocation*, 11 AM. ECON. J. 1, 26 n.28 (2019) (indicating that a change in housing supply policy could lead to a GDP increase of 8.9 percent); see also *Space and the City: Poor Land Use in the World's Greatest Cities Carries a Huge Cost*, ECONOMIST (Apr. 4, 2015), <https://www.economist.com/leaders/2015/04/04/space-and-the-city> [<https://perma.cc/H8VQ-CUVQ>] ("Lifting all the barriers to urban growth in America could raise the country's GDP by between 6.5% and 13.5%, or by about \$1 trillion-2 trillion.").

107. Jessica Trounstine, *The Geography of Inequality: How Land Use Regulation Produces Segregation*, 114 AM. POL. SCI. REV. 443, 443 (2020) (discussing the role of zoning in promoting racial segregation); see also RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* (2017) (describing role of zoning in housing segregation).

108. See, e.g., Sarah Maslin Nir, *For Westchester, 11th Time Is Charm in Fight over Fair Housing*, N.Y. TIMES (July 21, 2017), <https://www.nytimes.com/2017/07/21/nyregion/westchester-fair-housing-hud-trump.html> [<https://perma.cc/YUG9-FAW8>] (describing Westchester County's opposition to affordable housing).

less ability to resist.¹⁰⁹ This combination puts pressure on patterns of segregation. While nationwide trends show that racial segregation has decreased somewhat over the last few decades, many places remain largely segregated.¹¹⁰

Battlegrounds in these fights over density are not limited to minimum lot sizes and other explicit density restrictions. For example, parking requirements for new development can regulate density.¹¹¹ Likewise, historic preservation can be a significant barrier to development.¹¹² Disputes over historic preservation pit the past, present, and future against each other in complex configurations of interests. Often, existing residents invoke historic preservation to protect the past for future generations but are actually interested in preserving the existing character of the community for themselves. Other battlegrounds are larger with more sweeping effects. Minneapolis and the entire state of Oregon have all but banned single-family residential neighborhoods, allowing multifamily development as of right.¹¹³ That is a sea change in conventional zoning, which privileged single-family housing above all else.

This is just a taste of the complexity of zoning disputes. And these disputes are usually focused on a single development controversy. When a local government contemplates rezoning land for some large new project, proponents and opponents come out of the woodwork invoking all of these concerns and more. So what is a local government

109. See, e.g., Vicki Been, *What's Fairness Got to Do with It? Environmental Justice and the Siting of Locally Undesirable Land Uses*, 78 CORNELL L. REV. 1001, 1012–13 (1993) (indicating that the Los Angeles County zip code with the largest amount of chemical discharge is 59 percent African-American); Alice Kaswan, *Distributive Justice and the Environment*, 81 N.C. L. REV. 1031, 1041 (2003) (“[A]cademics, government agencies, and others undertook systematic studies that suggested that LULU distributions were correlated with race and income.”).

110. William H. Frey, *Black-White Segregation Edges Downward Since 2000, Census Shows*, BROOKINGS (Dec. 17, 2018), <https://www.brookings.edu/blog/the-avenue/2018/12/17/black-white-segregation-edges-downward-since-2000-census-shows/> [<https://perma.cc/TDU4-6KYZ>].

111. See, e.g., Joshua Sabatini, *Minimum Parking Requirements on Their Way Out in SF*, S.F. EXAMINER (Dec. 4, 2018, 12:00 AM), <http://www.sfexaminer.com/minimum-parking-requirements-way-sf/> [<https://perma.cc/3KWB-2WRV>] (describing how eliminating parking requirements can make cities more walkable).

112. See David E. Clark & William E. Herrin, *Historical Preservation Districts and Home Sale Prices: Evidence from the Sacramento Housing Market*, 27 REV. REG’L STUD. 29, 30 (1997) (explaining the regulatory hurdles developers must undergo in historic preservation districts); see also DANIEL KAY HERTZ, *THE BATTLE OF LINCOLN PARK: URBAN RENEWAL AND GENTRIFICATION IN CHICAGO* 59 (2018) (describing the role of historic preservation in the gentrification of Lincoln Park).

113. Will Parker, *Does Oregon Have the Answers to High Housing Costs?*, WALL ST. J., <https://www.wsj.com/articles/does-oregon-have-the-answer-to-high-housing-costs-11571823001>, (last updated Oct. 23, 2019, 3:42 PM), [<https://perma.cc/ND2B-SE7Q>]; Henry Grabar, *Minneapolis Confronts Its History of Housing Segregation*, SLATE (Dec. 7, 2018, 4:48 PM), <https://slate.com/business/2018/12/minneapolis-single-family-zoning-housing-racism.html> [<https://perma.cc/F6SH-HHCG>].

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THE WICKED PROBLEM OF ZONING

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to do? How can local officials manage these conflicting interests and demands? When local governments are confronted with the wicked problem of zoning, there is rarely an easy solution.

II. ZONING AND INCREMENTAL CHANGE

One of the hallmarks of wicked problems, as traditionally formulated, is that they cannot be solved incrementally (if they can be solved at all).¹¹⁴ Experimentation is impossible (or difficult) because each small change alters the nature of the problem.¹¹⁵ As Rittel and Webber explained, “Every solution to a wicked problem is a ‘one-shot operation’; because there is no opportunity to learn by trial and error, every attempt counts significantly.”¹¹⁶ Perhaps as a result, most people working on wicked problems tend to focus on moonshots, or other broad global solutions.¹¹⁷

This is certainly true in zoning and land use regulation. Scholars have also proposed a variety of innovations, many of which would require wholesale change. Professors Rick Hills and David Schleicher, for example, have proposed adopting a “zoning budget” that would require downzoning be accompanied by upzoning in other places.¹¹⁸ Professors Elmendorf and Schanske have proposed “auctioning upzonings” so that local governments can benefit from allowing increased development.¹¹⁹ Lee Fennell would create an options market allowing people to hedge against community change,¹²⁰ and Richard Epstein would eliminate most land use regulations altogether.¹²¹ Such

114. See, e.g., Daviter, *supra* note 11, at 572 (“This type of policy problem is frequently seen to defy problem-solving by definition.”).

115. See, e.g., Ian Sanderson, *Intelligent Policy Making for a Complex World: Pragmatism, Evidence and Learning*, 57 POL. STUD. 699, 705–06 (2009) (“[E]lements of systems are mutually dependent, interactions between them are non-linear and therefore the response of the system to change in one element may be highly disproportionate.”).

116. Rittel & Webber, *supra* note 1, at 163.

117. See Daviter, *supra* note 11, at 574 (“In stark contrast to the widely shared notion that solving wicked problems is not a viable option, a sizable part of the more recent debate appears to promote strategies that are designed to accomplish exactly that.”).

118. Roderick M. Hills, Jr. & David N. Schleicher, *Balancing the “Zoning Budget,”* 62 CASE W. RESV. L. REV. 81, 120 (2011).

119. Christopher S. Elmendorf & Darien Shanske, *Auctioning the Upzone*, 69 CASE W. RESV. L. REV. (forthcoming 2020).

120. Lee Anne Fennell & Julie A. Roin, *Controlling Residential Stakes*, 77 U. CHI. L. REV. 143, 165–71 (2010).

121. See Richard A. Epstein, *A Conceptual Approach to Zoning: What’s Wrong with Euclid*, 5 N.Y.U. ENV’T L.J. 277, 291 (1996) (“Can zoning provide an improvement to the common-law system in proportion to its increase in costs and delay? I suspect that the answer to this question is negative . . .”).

large-scale solutions have gained little traction, but more modest changes have their own challenges.

There is a literature on incremental solutions to wicked or complex problems.¹²² Some embrace step-by-step solutions, either out of necessity because of technological limitations or to avoid committing to a path that turns out to be a mistake.¹²³ Embracing incremental solutions is therefore usually presented as a kind of compromise: a second-best approach when a comprehensive solution is out of reach. The Supreme Court framed the problem precisely this way in *Massachusetts v. EPA*, reasoning that agencies cannot “resolve massive problems in one fell swoop. They instead whittle away at them over time”¹²⁴ Others, however, argue that such incremental approaches cannot succeed. The very act of whittling can change the nature of the problem, making it even more difficult to solve.¹²⁵ In other words, incremental solutions are never ideal; the question is whether they make matters worse.

Zoning is different. Incrementalism in this context is not baby steps towards an elusive solution to the problem of land use regulation. It is, instead, its own independent virtue. Reframing the purpose of zoning to focus on regulating the pace of change means that slow incremental changes to community character are a way of balancing competing interests.¹²⁶

Incremental change in this context does not mean the piecemeal trial and error of zoning through the policy laboratory of states and local governments. Lessons from San Francisco or New York are not necessarily applicable to Ames, Iowa or Nashville, Tennessee, let alone to rural towns in Vermont or Kentucky. The lessons of trials in one place are not likely to prevent errors in another because contexts are so different. And land use decisions are not amenable to trial and error

122. See, e.g., Charles E. Lindblom, *The Science of “Muddling Through,”* 19 PUB. ADMIN. REV. 79, 79–81 (1959) (arguing for an incremental approach); MICHAEL T. HAYES, INCREMENTALISM AND PUBLIC POLICY 4 (1992) (discussing Lindblom’s theory of incremental policy change); see also Moira Zellner & Scott D. Campbell, *Planning for Deep-Rooted Problems: What Can We Learn from Aligning Complex Systems and Wicked Problems?*, 16 PLAN. THEORY & PRAC. 457, 465 (2015) (describing the literature on incremental solutions).

123. See generally Daviter, *supra* note 11, at 571–87 (discussing strategies of coping, taming, and solving).

124. 549 U.S. 497, 524 (2007) (citation omitted); see also Ruhl & Salzman, *supra* note 10, at 65 (describing the process of “whittling away” at wicked problems).

125. See, e.g., Rittel & Webber, *supra* note 1, at 165 (criticizing incrementalism and arguing that it “may result in making things worse, because it may become more difficult to deal with the higher problems. Marginal improvement does not guarantee overall improvement.”).

126. See Serkin, *supra* note 9.

because regulatory changes trigger development decisions that are not easily undone. The built environment constrains subsequent change.¹²⁷

Incrementalism, instead, refers to a particular local government's use of zoning to ensure that development in a neighborhood occurs at an appropriate pace given the local context. Regulating the pace of change is a way of balancing the expectations of stability with the competing needs of dynamism and change.¹²⁸ This focus on pace of change is usually missing from land use fights.

Consider a typical fight over some proposed new development that will reconfigure the use of some swath of land. In suburbs and exurbs, imagine the conversion of agricultural land to a new condominium development. In an urban setting, imagine the infill redevelopment of an old industrial building into a large mixed-use tower. In either case, local residents will often object. They may dislike the change in aesthetics. They may worry about the change in population or demographics—often, a euphemism for race—or they may worry about increased burdens on local infrastructure, like roads and schools. And, fundamentally, they often worry about changes in the character of the community.

Time, however, is important. Change that happens quickly is more disruptive to expectations than change that happens slowly, even if the end results are the same.¹²⁹ Indeed, there are a number of property doctrines that serve to incorporate slow changes but resist quick ones. Consider, for example, the arcane common law rules governing accretion and avulsion. Where property boundaries are defined by water—either a river or the ocean—those boundaries are fluid.¹³⁰ Rivers and shorelines change through the slow process of accretion and erosion.¹³¹ And where that occurs, the legal property lines shift, sometimes expanding and sometimes shrinking the area of someone's land.¹³² On the shoreline, for example, the boundary between public and private land is defined as the mean high-water line, a

127. See Eduardo M. Peñalver, *Land Virtues*, 94 CORNELL L. REV. 821, 829 (2009) (“In addition to its complexity, land has memory. Changes that human beings make to the land have a tendency to remain in place until they are affirmatively removed.”).

128. See generally Serkin, *supra* note 9.

129. See Serkin, *supra* note 15.

130. Joseph L. Sax, *The Accretion/Avulsion Puzzle: Its Past Revealed, Its Future Proposed*, 23 TUL. ENV'T L.J. 305, 306 (2009) (“The law provides that when the water's edge shifts ‘gradually and imperceptibly’ (accretion), the property boundary moves with it.” (footnote omitted)).

131. Phillip Wm. Lear, *Accretion, Reliction, Erosion, and Avulsion: A Survey of Riparian and Littoral Title Problems*, 11 J. ENERGY NAT. RES. & ENV'T L. 265, 275–76 (1991) (discussing the effects of accretion and erosion upon land boundaries).

132. See *id.* (explaining the “universal rule” that the owner of the bank or shore becomes the owner of “accreted lands” while also risking the loss of land due to erosion).

natural phenomenon that can change over time.¹³³ Accretion will extend the private lot out towards the sea, and erosion will do the opposite. Occasionally, however, that boundary changes quickly and dramatically, like in a hurricane or a flood. Where the process is not slow accretion but is instead dramatic “avulsion,” the rules are different, and legal property lines will resist the ecological change.¹³⁴ The property owner (or the government) can push the river back to its preavulsive course or the shoreline back into place. Professor Sax, in his leading writing on this subject, found the distinction between accretion and avulsion inexplicable.¹³⁵ Why, he asked, should it matter whether the change happens all at once or gradually? The end result is the same, and the law should not distinguish between them.¹³⁶ But it does matter because changes that occur gradually are more easily incorporated into expectations.

People are often wrong about what will bother them in the future and do not accurately predict how quickly they will adjust to change.¹³⁷ Faced with some large new development next door, neighbors often react with hostility, imagining that they will wake up every morning mortified by the changes to the neighborhood. They imagine some new eyesore blocking the horizon and changing the character of the community; one day, they live in their bucolic neighborhood surrounded by people they know, and the next day they do not. That would, indeed, be jarring and dislocating. But they are likely to be wrong.

One extreme example is the fight over Atlantic Yards in Brooklyn, New York, an expansive uncovered rail yard in the heart of downtown Brooklyn.¹³⁸ In order to spur revitalization in the area, New York City partnered with a developer, Bruce Ratner, to develop the entire area, including the construction of the Barclay’s Center to house the Brooklyn (then New Jersey) Nets basketball team, massive new residential towers, hundreds of thousands of square feet of commercial

133. Sax, *supra* note 130, at 306.

134. *Stop the Beach Renourishment, Inc., v. Fla. Dep’t. of Env’t Prot.*, 560 U.S. 702, 709 (2010) (“[W]hen a new strip of land has been added to the shore by avulsion, the littoral owner has no right to subsequent accretions.”).

135. *See* Sax, *supra* note 130, at 351 (describing the doctrinal “accretion/avulsion” distinction as a problem that leads to disputes).

136. *Id.* (“[The distinction between accretion and avulsion] will doubtless arise repeatedly in sea level-rise controversies, and it continues to generate a good deal of wasteful litigation, with pointless and expensive lay and expert testimony, and dispute over distinctions that ought to make no difference.”).

137. *See* DANIEL GILBERT, *STUMBLING ON HAPPINESS* 92 (2006) (indicating that humans often incorrectly imagine future events).

138. *See* *Goldstein v. N.Y. State Urb. Dev. Corp.*, 921 N.E.2d 164, 165–66 (N.Y. 2009) (describing the Atlantic Yards development).

office space, and other elements.¹³⁹ The envisioned changes to the neighborhood were dramatic. And it engendered commensurate opposition. Legal and political battles broke out, challenging the use of eminent domain, the bidding process, and the new vision for the area.¹⁴⁰ A local theater company produced a musical detailing the community outrage.¹⁴¹ Local protests spread throughout the city and even the country. “Develop Don’t Destroy Brooklyn” T-shirts popped up everywhere, hipster status symbols objecting to the scale of the development and the gentrification it was sure to bring.

Retelling that story is not important here. What is important is what happened afterwards. Many of the opponents’ pessimistic predictions in fact came to pass. Promises to include affordable and inclusionary housing turned ephemeral.¹⁴² Gentrification dramatically changed the mix of nearby commercial uses.¹⁴³ Property values increased. And yet, ten years later, the development has become just part of the city’s background. Neighbors may still get annoyed on hockey night, but many nearby residents—including some of the most ardent opponents—now no longer notice the changes the development brought. Certainly, some communities were displaced, and other harms are simply invisible. But the hysteria has largely disappeared, and some have even embraced the space.¹⁴⁴ Given enough time, neighbors’ expectations adapted to the new urban landscape.

139. *See id.*

140. *See* Charles V. Bagli, *\$3 Million Deal Ends a Holdout in Brooklyn*, N.Y. TIMES (Apr. 21, 2010), <https://www.nytimes.com/2010/04/22/nyregion/22yards.html> [<https://perma.cc/NV33-V6SV>] (describing the history of the opposition to the Atlantic Yards project).

141. *See* Melena Ryzik, *In Brooklyn, Dramatizing Real Discord*, N.Y. TIMES (Nov. 9, 2010), <https://www.nytimes.com/2010/11/10/theater/10footprint.html> [<https://perma.cc/4PZQ-SUZJ>] (“[The show] is based on interviews with business owners, neighbors, politicians, bloggers and activists touched by Atlantic Yards, the developer Bruce Ratner’s divisive project to reconfigure 22 acres of urban landscape in Brooklyn, displacing scores of residents and small businesses in the process.”).

142. *See* Norman Oder, *Brooklyn Lawmakers Seek Pacific Park Affordable Housing Schedule*, BROOKLYN DAILY EAGLE (June 4, 2019), <https://brooklyneagle.com/articles/2019/06/04/pacific-park-affordable-housing-schedule/> [<https://perma.cc/M6RK-PNC3>] (describing promised affordable housing units in Atlantic Yards); Norman Oder, *Ever-Shifting Pacific Park Plan Highlights Uncertainty of Big Development Schemes*, CITY LIMITS (Apr. 3, 2019), <https://citylimits.org/2019/04/03/ever-shifting-pacific-park-plan-highlights-uncertainty-of-big-development-schemes/> [<https://perma.cc/C6WR-9RPJ>] (describing delays and uncertainty surrounding the building of affordable housing units in Atlantic Yards).

143. *See, e.g.*, Paul Leonard, *‘This Arena Is a Gentrifying Machine’: Atlantic Yards Critics Rally at Barclays*, PATCH (Sept. 28, 2012, 5:21 PM), <https://patch.com/new-york/fortgreene/this-arena-is-a-gentrifying-machine-atlantic-yards-cr29603c7696> [<https://perma.cc/38DG-ET22>] (indicating that the Atlantic Yards project accelerated gentrification in Brooklyn).

144. *See, e.g.*, Andy Newman, *How a Once-Loathed Brooklyn Arena Became a Protest Epicenter*, N.Y. TIMES (June 16, 2020), <https://nyti.ms/3fwiG5w> [<https://perma.cc/9K9B-BPW9>] (describing how the controversial Barclays plaza in Atlantic Yards became a center point of the community’s Black Lives Matter protests).

This adaptability to change is backed by psychological literature. A number of studies of consumer behavior have demonstrated that humans do not do a very good job predicting future happiness and unhappiness.¹⁴⁵ People expect that some new purchase will bring them joy, and while it may momentarily,¹⁴⁶ such emotions tend to be much more fleeting than people expect.¹⁴⁷ The same is true of harms.¹⁴⁸ Studies of hedonic adaption suggest that people adjust to new realities—including even catastrophic injuries—more quickly than they might predict.¹⁴⁹

This does not mean that people's preferences or objections should simply be ignored. Housing advocates can point to examples like Atlantic Yards and argue that people will adapt to change, so their hostility should be ignored in the planning process. That argument goes too far, however, because the harm is real even if impermanent. Community transitions impose costs, and regulating the pace of change can minimize those costs.

One of the leading justifications for local control over property taxation and spending comes from the pioneering work of Charles Tiebout in the 1950s.¹⁵⁰ In his famous Tiebout Hypothesis, he explored whether and why to expect local governments to provide efficient levels of public services in the absence of a price signal.¹⁵¹ That is, one might expect that local governments' ability to impose an involuntary property tax might lead to the oversupply of municipal services, with local governments providing benefits that people do not, in fact, value. Tiebout demonstrated, however, that the ability of consumers to vote

145. See, e.g., Elizabeth W. Dunn, Daniel T. Gilbert & Timothy D. Wilson, *If Money Doesn't Make You Happy, Then You Probably Aren't Spending It Right*, 21 J. CONSUMER PSYCH. 115, 115 (2011) ("When people make predictions about the hedonic consequences of future events they are said to be making *affective forecasts*, and a sizeable literature shows that these forecasts are often wrong.").

146. Dave Fagundes, *Why Less Property Is More: Inclusion, Dispossession, & Subjective Well-being*, 103 IOWA L. REV. 1361, 1378 (2018).

147. *Id.*

148. Sean Hannon Williams, *Self-Altering Injury: The Hidden Harms of Hedonic Adaptation*, 96 CORNELL L. REV. 535, 539–40 (2011).

149. See, e.g., Fagundes, *supra* note 146, at 1378 (describing how quickly people adjust to new possessions and become conscious of the downsides of their new acquisitions); Yang Yang & Jeff Galak, *Sentimental Value and Its Influence on Hedonic Adaptation*, 109 J. PERSONALITY & SOC. PSYCH. 767, 769 (2015) (noting that hedonic adaptation can also apply to life-changing events like incarceration).

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

151. See Christopher Serkin, *Capitalization and Exclusionary Zoning*, in MEASURING THE EFFECTIVENESS OF REAL ESTATE REGULATION: INTERDISCIPLINARY PERSPECTIVES 15, 21 (Ronit Levine-Schnur ed., 2020) (explaining that, according to the Tiebout Hypothesis, people will vote with their feet and choose to live where their preferences are best satisfied).

with their feet can operate as an essential restraint on government taxing and spending.¹⁵² He hypothesized that people choose where to live based on the specific taxes and services that a location offers.¹⁵³ In his model, people could choose between an infinite number of local governments, at which point he predicted that people would sort into perfectly homogenous enclaves.¹⁵⁴ Subsequent work extended his model into heterogenous places, demonstrating that the capitalization of property taxes and services into property values can still produce the same kind of outcome.¹⁵⁵ The result is that this form of foot voting serves as a central justification for local control and an important mechanism for satisfying people's preferences.¹⁵⁶

The Tiebout Hypothesis depends, however, on stability in local taxes and spending priorities—in short, on stability in the character of the local government.¹⁵⁷ Changes in the mix can mean that housing consumers who selected a place for one set of characteristics may find that the place changes over time, sometimes dramatically. Their choices, then, are to suffer the disutility of living in a place that no longer meets their priorities or to incur the costs of moving. Both are costly. Zoning can help protect the interests of housing consumers who selected a place for a particular set of characteristics by constraining the pace of change.¹⁵⁸ This is zoning simply as a brake on change, not in the service of any particular agenda.

III. ENACTING INCREMENTALISM

People resist fast change more than slow, accretive change. Opposition to development is often based, in part, on concerns over the *next* project—the slippery slope of community change. People often unreasonably expect zoning to protect the status quo and prevent all change to neighborhood character. But they are reasonably concerned if local officials grant variances or reasonings too easily, undermining

152. *See id.* at 21–22 (describing the model Tiebout created for the Tiebout Hypothesis).

153. Tiebout, *supra* note 150, at 418.

154. *See, e.g.,* Serkin, *supra* note 63, at 1659 (“Given an infinite supply of jurisdictions and total elasticity in the housing market, the Tiebout Hypothesis predicts perfect sorting by homeowners and, thus, a perfectly efficient system.”).

155. *See generally* Wallace E. Oates, *The Effects of Property Taxes and Local Public Spending on Property Values: An Empirical Study of Tax Capitalization and the Tiebout Hypothesis*, 77 *J. POL. ECON.* 957, 968 (1969) (demonstrating that an increase in property taxes unaccompanied by an increase in public services will depress property values).

156. *See* ILYA SOMIN, *FREE TO MOVE: FOOT VOTING, MIGRATION, AND POLITICAL FREEDOM* (2020).

157. *See* Serkin, *supra* note 9 (manuscript at 24) (on file with author).

158. Serkin, *supra* note 151, at 22–23.

stability in expectations. A useful focus, then, is on zoning tools that regulate the pace of change.

The first and most obvious tool is concurrency, or adequate public facilities ordinances.¹⁵⁹ Concurrency is a land use regime that imposes phased expectations of growth.¹⁶⁰ Adopted most notably in Florida in the 1980s, concurrency was designed to ensure that development did not outpace infrastructure capacity.¹⁶¹ In essence, a concurrency regime requires local governments to plan for reasonable expansions of infrastructure, like roads and wastewater (or even schools), and then limit development in any given year to levels consistent with those infrastructure plans.¹⁶² Importantly, however, developers could buy their way out of concurrency caps by paying directly for additional infrastructure capacity.¹⁶³ For example, a municipality might plan for extending sewer lines to an area to serve five hundred additional housing units, to be paid from general property tax revenue. If a developer wanted to build one thousand units (or any additional units once the five hundred new ones had already been permitted), the developer would have to pay a kind of impact fee to expand the sewer beyond what had been planned.¹⁶⁴

The purpose of concurrency was not to limit growth for the sake of preserving community character. Rather, it was to bring a degree of rationality and planning to infrastructure buildout.¹⁶⁵ It also served fiscal purposes, forcing developers to shoulder some of the cost of

159. See Jamie Baker Roskie & Janna Blasingame Custer, *Adequate Public Facilities Ordinances: A Comparison of Their Use in Georgia and North Carolina*, 15 SE. ENV'T L.J. 345, 346–47 (2007) (describing adequate public facilities ordinances); S. Mark White & Elisa L. Paster, *Creating Effective Land Use Regulations Through Concurrency*, 43 NAT. RES. J. 753, 754–57 (2003) (describing concurrency regulations).

160. Rossi & Serkin, *supra* note 59, at 673.

161. See, e.g., David L. Powell, *Recent Changes in Concurrency*, FLA. BAR J., Nov. 1994, at 67, 67 (“[Concurrency] seeks to ensure that infrastructure is ready when needed. Concurrency is the ‘teeth’ of Florida’s growth management system.”); Timothy S. Chapin, *Local Governments as Policy Entrepreneurs: Evaluating Florida’s “Concurrency Experiment,”* 42 URB. AFFS. REV. 505, 507, 519–27 (2007) (providing a summary of Florida’s concurrency practices).

162. See Susan L. Trevarthen & Chad Friedman, *Senate Bill 360: Growth Management Reform Arrives and It Is All About Infrastructure*, FLA. BAR J., Oct. 2005, at 39, 40 (2005) (“In the mid- to late-90s, the legislature enacted a series of provisions that ultimately created a statutory option for school concurrency and an optional school facilities element.”).

163. Robert M. Rhodes, *Florida Growth Management: Past, Present, Future*, 9 FLA. COASTAL L. REV. 107, 118 (2007); see also Kacie A. Hohnadell, Note, *Community Planning Act: The End of Meaningful Growth Management in Florida*, 42 STETSON L. REV. 715, 724–25 (2013) (explaining how concurrency provisions require developers to provide necessary infrastructure or pay a fee to ensure that facilities meet a designated level of service).

164. Hohnadell, *supra* note 163, at 725.

165. See Rossi & Serkin, *supra* note 59, at 673–74 (describing concurrency).

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infrastructure expansion beyond that which was preplanned.¹⁶⁶ Although, this of course created perverse incentives for local officials to adopt infrastructure planning that was too conservative precisely to shift those costs.¹⁶⁷

Nevertheless, concurrency (and the related adequate public facilities doctrines) is one of the few land use regimes that focuses explicitly on the pace of change, not simply on the amount of change.¹⁶⁸ As a result, concurrency can be easily repurposed to ensure that growth does not outpace community expectations for stability instead of merely infrastructure capacity. Local governments should engage in planning not just around the amount of development to permit but also the timing of that development in order to navigate the thin path between encouraging development and protecting stability.

The risk, of course, is that when municipalities adopt plans for growth, they will plan for much too little growth. They will err on the side of protecting expectations of in-place owners and will do very little to address the acute problems that restrictive zoning can create.¹⁶⁹ There must be a stick as well as a carrot. Courts and state legislatures have developed many approaches to this problem, from builder remedies to assigning fair share obligations.¹⁷⁰ There is no need to rehash those here, and most have proven ineffectual or problematic.¹⁷¹ But states have the power to force deals.¹⁷² They could, for example, threaten more sweeping land use reforms if local officials fail to plan for

166. Hohnadell, *supra* note 163, at 725 (“In effect, the concurrency system required developers to help pay for the facilities, schools, and roads needed to accommodate the growth generated by their projects so that local governments would not be stuck footing the entire bill.”).

167. *Id.* at 726.

168. See Thomas G. Pelham, *From the Ramapo Plan to Florida’s Statewide Concurrency System: Ramapo’s Influence on Infrastructure Planning*, 35 URB. LAW. 113, 113 (2003) (describing concurrency’s origins in *Golden v. Planning Board of Ramapo*, 285 N.E.2d 291 (N.Y. 1972), which involved “the first comprehensive system to integrate local capital improvements activities and the local land planning and regulatory process by coordinating the timing and phasing of development with the provision of public facilities.”).

169. See, e.g., FISCHEL, *supra* note 40, at 80–81 (discussing local incentives to zone too restrictively).

170. See, e.g., *S. Burlington Cnty. NAACP v. Twp. of Mount Laurel*, 336 A.2d 713, 732–33 (N.J. 1975) (holding that municipalities must provide their “fair share” of a region’s needs for decent and adequate low and moderate income housing).

171. See, e.g., Katrin C. Rowan, *Anti-exclusionary Zoning in Pennsylvania: A Weapon for Developers, A Loss for Low-Income Pennsylvanians*, 80 TEMP. L. REV. 1271, 1299–300 (2007) (“When developers surreptitiously propose to build multifamily housing or mobile homes, in hopes that the municipality will agree to single-family homes instead, developers seize on fears that low-income people will inhabit the wealthy suburbs by ‘wav[ing] the bloody flag of affordable housing.’” (quoting Diane Mastrull & Evan Halper, *Land-Use Battles Frustrate Pa. Towns*, PHILA. INQUIRER, Mar. 12, 2000, at A1)).

172. Nestor M. Davidson, *The Dilemma of Localism in an Era of Polarization*, 128 YALE L.J. 954, 957–58 (2019).

adequate change, eliminating single-family zoning or allowing increased density as of right.¹⁷³ In-place property owners and the local officials responsive to them might well prefer a kind of phased growth model to losing control altogether. The details are beyond the scope of this short essay. The point is simply that concurrency regimes provide a model for regulating the pace as well as the amount of growth.

Likewise, the idea of a “zoning budget,” set forth by Professors Rick Hills and David Schleicher, can be conscripted to the pace of change.¹⁷⁴ As they insightfully argued, local officials typically consider zoning decisions piecemeal.¹⁷⁵ Given the concentrated interests of neighbors in resisting nearby development, local officials often bend to pressure to down-zone property without regard for the overall systemwide effects of too many down-zonings.¹⁷⁶ Hills and Schleicher therefore proposed a zoning budget, according to which each down-zoning would have to be accompanied by a corresponding up-zoning elsewhere.¹⁷⁷ This creates meaningful interest groups aligned on both sides of every rezoning and forces local officials to consider some of the systemwide consequences of their individual land use decisions.¹⁷⁸

Hills and Schleicher, however, suggest that each local government be forced to adopt a zoning budget annually.¹⁷⁹ They advocate an independent agency, like a local planning commission, to set an annual budget.¹⁸⁰ That commission would be charged with “devising a ratio of up-zonings to down-zonings in light of its zoning ‘budget.’”¹⁸¹ This focus on an annual budget makes sense if the concern is responding to dynamic changes in development pressures.¹⁸² It makes less sense, however, if the focus is expanded to include the value of protecting community stability. A longer-term apparatus needs to be developed for that purpose. Multiyear, intertemporal bargains over the pace of change require zoning budgets lasting beyond a single year. Imagine, for example, a ten- or fifteen-year zoning budget, anticipating growth and requiring accommodations for development and change but giving local officials the ability to decide when that change will occur within that long budget cycle. Maybe the dynamic would be the same

173. See Parker, *supra* note 113 (describing restrictions on single-family zones in Oregon); cf. Davidson, *supra* note 172, at 964–72 (discussing the opportunities and risks of state preemption).

174. Hills & Schleicher, *supra* note 118, at 120.

175. *Id.* at 86.

176. *Id.* at 86–87.

177. *Id.*

178. *Id.* at 125–26.

179. *Id.* at 124–25.

180. *Id.*

181. *Id.* at 125.

182. *Id.* at 124–25.

as with municipal debt, and local officials would push development off as long as possible, burdening the future to protect their own interests.¹⁸³ But if people (voters, homeowners) recognize the benefits of incremental change—the ability to adapt to new development, the opportunity to revisit planning decisions in light of changes on the ground, and so forth—then local officials might try to spread the costs out over time. At the very least, a longer time horizon for zoning budgets could help in managing the pace of change.

Finally, courts could factor in the pace of change when evaluating local zoning decisions. Typically, the proliferation of development in a community is viewed as a reason to allow *more* development.¹⁸⁴ A number of land use tests—whether under constitutional, statutory, or judge-made rules—focus on the treatment of others in the community.¹⁸⁵ The obvious concern is treating similarly situated property owners alike, and courts tend to worry if one property owner is allowed to develop in ways that a similarly situated neighbor is not.¹⁸⁶ But perhaps this is wrong or, at least, incomplete.

Other developments in a neighborhood are reasons *not* to allow an additional project too quickly out of concern for community members' expectations. The goal is to phase change in more slowly. Courts should look at the extent of community change and put a thumb on the scale against additional development if change is occurring quickly. How fast is too fast when it comes to neighborhood transformation? That depends on issues like the transience of the community, the extent of existing owners' expectations around dynamism and change, local and regional development pressures, and the like. There is no set formula. But the point here is simply that courts can and should examine how quickly a neighborhood is changing when evaluating legal challenges to new development.

183. See Christopher Serkin, *Public Entrenchment Through Private Law: Binding Local Governments*, 78 U. CHI. L. REV. 879, 906–07 (2011) (explaining the dynamics around municipal debt).

184. See, e.g., *Island Silver & Spice, Inc. v. Islamorada*, 542 F.3d 844, 846–48 (11th Cir. 2008) (invalidating efforts to exclude new commercial development on grounds that area had already been developed and lacked small-town feel).

185. See, e.g., *Twigg v. Cnty. of Will*, 627 N.E.2d 742, 745 (Ill. App. Ct. 1994) (focusing on compatibility of zoning with surrounding uses).

186. This is clearest in the context of Equal Protection challenges to zoning. See, e.g., *Congregation Kol Ami v. Abington Twp.*, 309 F.3d 120, 137 (3d Cir. 2002) (“[I]f, the entities are similarly situated, then the city must justify its different treatment of the two . . .”).

CONCLUSION

Zoning is a wicked problem. The contested stakes, the absence of clear goals, and the dynamic interactions between interest groups make land use a seemingly inevitable battleground as local officials pursue the competing goals of affordability, community preservation, environmental protection, economic gains, and others. But at least some of these fights can be avoided—or the vehemence diminished—if zoning is deployed to manage the pace of neighborhood change, instead of the product (or goal) of end-state planning. Using zoning to allow, and even encourage, regular but incremental change ensures a measure of dynamism while also protecting the expectations of in-place owners—expectations that adapt more easily to slow and steady changes than to quick, avulsive ones. This is not incrementalism because of the difficulty of global solutions. Instead, when it comes to land use regulations, slow and steady change is itself a kind of solution to the wicked problem of zoning.