



WORKING PAPER #12 / AUGUST, 2014

PHIL ROEDER / VIA FLICKR

# CITY REPLANNING

+ RODERICK M. HILLS, JR.<sup>1</sup> & DAVID SCHLEICHER<sup>2</sup>

## ABSTRACT

In this paper we provide a new defense for one of the most criticized ideas in land use law, that city plans should constitute settled deals about the proper uses of land that should be sticky against subsequent zoning amendments. In the middle of the last century, several prominent scholars argued that courts should find zoning amendments that were contrary to city plans ultra vires. But this idea was largely rejected by courts and scholars alike, with leading figures like Carol Rose, Robert Nelson and Bill Fischel arguing that parcel-specific zoning amendments provide space for the give-and-take of democracy and lead to the efficient amount of development by encouraging negotiations between developers and residents over externalities from new building projects. Their case against plans and in favor of deals suggested that zoning authorities act either as arbiters in land use disputes or as agents for existing residents to encourage negotiated solutions.

We argue, by contrast, that the dismissal of plans was shortsighted and has helped contribute to the excessive strictness of zoning in our richest and most productive cities and regions, which has driven up housing prices excessively and produced outcomes that are economically inefficient and distributively unattractive. In contrast with both planning's critics and supporters, we argue that plans and comprehensive remappings are best understood as deals. Plans and remappings facilitate trades between city councilmembers who understand the need for new development but refuse to have their neighborhoods be dumping grounds for all new construction. Further, by setting forth what can be constructed as of right, plans reduce the information costs borne by purchasers of land and developers, broadening the market for new construction. We argue that land use law should embrace a version of plans as a procedural tool that packages together policies and sets of zoning changes in a number of neighborhoods simultaneously through procedures that make such packages difficult to unwind.

We conclude by arguing that modern property law scholarship has failed to recognize that real property law is now substantially a public law subject and should be studied using the tools of public law. Leading scholars, most notably Tom Merrill and Henry Smith, have developed sophisticated tools for analyzing the ways in which the common law of property is designed to reduce information costs, which we employ here. But the field has ignored the fact that the common law of property is far less important than it once was as a method for regulating real property ownership and use. Legislatures and administrative agencies at a variety of levels determine most of the rules governing how real property is used and purchased. In order to understand how today's property law increases or reduces the information costs facing owners, users, potential purchasers and third-parties to property, the field must make an "institutional turn," studying the likely effects on policy of different institutional arrangements and procedures.

## CONTACT

<sup>1</sup>Roderick M. Hill  
William T. Comfort, III, Professor of Law,  
New York University Law School  
roderick.hills@nyu.edu

<sup>2</sup>David Schleicher  
Associate Professor, George Mason University School of Law  
Irving S. Ribicoff Visiting Associate Professor of Law, Yale Law School  
davids@resolvellaw.com

*Many thanks are due to Vicki Been, Annie Decker, Bob Ellickson, Chris Elmendorf, David Fontana, Heather Gerken, John Mangin, Carol Rose, Kenneth Stahl, John Witt, Thomas Witt, Katrina Wyman and participants at workshops at Yale Law School and the Furman Center for Real Estate and Urban Policy for their comments. Also to Jeremy Greenberg, Daniel Rauch, and Bryn Williams for their terrific research assistance.*



NYU

Marron Institute  
of Urban Management

**“Plans are worthless, but planning is everything.”**

**-Dwight D. Eisenhower<sup>3</sup>**

Is there any point to comprehensive land use planning? State zoning enabling laws almost universally require that local zoning ordinances be drawn “in accordance with a comprehensive plan.”<sup>4</sup> In the middle of the last century, scholars like Charles Haar and Daniel Mandelker argued this phrase requires cities to enact plans outlining permitted land uses and policies before passing any zoning regulations.<sup>5</sup> Courts, they claimed, should treat a comprehensive plan as an “impermanent constitution,” a representation of a city’s permanent ideals and values, and zoning amendments inconsistent with the plan should be struck down as ultra vires. Yet most courts give the phrase “in accordance with a comprehensive plan” little meaning, and academics treat planning mandates with a skepticism bordering on contempt. For legal scholars like Carol Rose, enforcing comprehensive plans against the ad hoc bargains of politicians and developers prevents the give-and-take of democracy without improving land-use policy.<sup>6</sup> Economists like Bill Fischel and Robert Nelson argue that parcel-by-parcel bargains lead to efficient allocations of land uses by encouraging negotiations between developers and residents over externalities from new building projects.<sup>7</sup> Comprehensive planning and remapping efforts are seen as undemocratic and inefficient, at best superfluous and at worst pernicious.<sup>8</sup>

We disagree. We will offer a qualified defense of planning requirements, at least in the context of our increasingly supply-constrained major cities. Our claim is that planning and citywide remappings can be useful tools in the face of a political process in big cities that leads to excessive land use restrictions. Over the past three decades, the price of housing and office space in many of the biggest and richest cities in America has increased

wildly, a result of both increasing demand and substantial zoning and other restrictions on new construction.<sup>9</sup> These large cities are not governed by “growth machine” coalitions of developers and their allies, contrary to the expectations of most scholars in the field. Instead, these cities increasingly look like collections of exclusive suburbs, with neighborhood opposition stopping the construction of needed commercial and residential development.<sup>10</sup>

Big-city land use constraints have had a serious negative effect on efficiency of regional property markets and even for national economic growth. Such restrictions force people away from prosperous cities and regions towards areas where housing is cheaper but human capital spillovers are lower and jobs are less plentiful and remunerative.<sup>11</sup> These excessive regulations have a distributive effect as well. The poor and middle class pay a higher percentage of their income for housing and are increasingly priced out of human capital-rich cities and regions.

This paper argues that citywide mapping and planning can help alleviate these problems. We offer a new defense of city plans, one very different from the traditional case for plans.

The argument proceeds in two parts. First, we argue that, under certain conditions commonly found in big city legislatures, comprehensive planning and remapping will likely generate more liberal land use policy because plans allow legislators to make binding citywide deals.<sup>12</sup> Preferences on land use issues frequently take what one might call NIMBY form.<sup>13</sup> While voters and legislators acknowledge the need for more development rather than less, they strongly prefer not to have such needed development in their districts. These preferences can lead to universal logrolls, as each legislator is sufficiently worried about

<sup>3</sup> *Speech to the National Defense Executive Reserve Conference in Washington, D.C. (November 14, 1957)*, in *Public Papers of the Presidents of the United States*, 818 (National Archives and Records Service, 1957).

<sup>4</sup> The term originated in A Standard State Zoning Enabling Act § 3, Advisory Committee on Zoning and City Planning, Department of Commerce (1926) (henceforth SZEa).

<sup>5</sup> Charles Haar, *In Accordance with a Comprehensive Plan*, 68 HARV. L. REV. 1154, 1157 (1955); Charles Haar, *The Master Plan: An Impermanent Constitution*, 20 LAW & CONTEMP. PROBS. 353, 365-66 (1955); Daniel R. Mandelker, *The Comprehensive Planning Requirement in Urban Renewal*, 116 U. PA. L. REV. 25 (1967).

<sup>6</sup> Carol Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 CAL. L. REV. 837 (1983); Carol M. Rose, *New Models for Local Land Use Decisions*, 79 NW. U. L. REV. 1155 (1985).

<sup>7</sup> Robert H. Nelson, *Zoning and Property Rights* 22-51 (1977); William A. Fischel, *The Economics of Zoning Laws: A Property Rights Approach to American Land Use Controls* 75-101 (1985).

<sup>8</sup> The classic criticisms of planning in the legal and economic scholarship do not make much of the difference between plans and efforts to draw citywide zoning maps in advance of specific proposals. See notes 68-90 and accompanying text. We discuss the interaction between planning and remapping in Section III.

<sup>9</sup> See David Schleicher, *City Unplanning*, 122 YALE L.J. 1670, 1692-98 (2012); RYAN AVENT, *GATED CITIES* 883-98 (2012); Roderick J. Hills, Jr. & David N. Schleicher, *Balancing the “Zoning Budget,”* 42 CASE W. RES. L. REV. 81, 85 (2011); Edward L. Glaeser, et al., *Why Is Manhattan So Expensive? Regulation and the Rise in Housing Prices*, 48 J.L. & ECON. 331 (2005).

<sup>10</sup> The theory that big cities are dominated by “growth machine” coalitions of developers and allies in labor and elsewhere comes from Harvey Molotch, *The City as a Growth Machine: Toward a Political Economy of Place*, 82 AM. J. SOC. 309, 309-310 (1976). Molotch’s view was pretty universally held until a few years ago. See Schleicher, *City Unplanning*, supra note 9, at 1670-71. For empirical evidence that many big cities do not look like growth machines, see Vicki Been et al., *Urban Land Use Regulation: Are Homevoters Overtaking the Growth Machine?*, J. EMPIRICAL LEG. STUD. (forthcoming 2014).

<sup>11</sup> See Schleicher, *City Unplanning*, supra note 9, at 1692-98; Avent, supra note 9, at 883-98; Peter Ganong & Daniel Shoag, *Why Has Regional Convergence in the U.S. Stopped?*, 1 (Harvard Kennedy Sch., Working Paper No. RWP12-028, 2012). Edward L. Glaeser, *Houston, New York Has a Problem*, CITY J. at 62, 67 (2008).

<sup>12</sup> This is not to say comprehensive rezoning are necessarily deregulatory; often they will not be. Instead, the claim is conditional and probabilistic. Given NIMBY preferences among legislators, comprehensive maps and plans will generally be more liberal than seriatim zoning changes, and repeatedly using comprehensive rezonings will result in more liberal policies.

<sup>13</sup> Not In My Backyard. See notes 101-103 and accompanying text



development being dumped in their district that they agree to restrictions everywhere. As we have argued previously, the result can be “aldermanic privilege,” or a system where each legislator has complete control over land use decisions in their districts, with little weight given to the broader interest in development.<sup>14</sup>

Because of the absence of competitive political parties in many urban legislatures, there are few tools for solving this type of prisoner’s dilemma-style conflict. But binding plans – that is, plans and maps that are difficult to unwind with subsequent amendments in the tradition of Haar and Mandelker – can offer a way out. Plans allow legislators to create “contracts” to ensure that new building and locally unwanted land uses will be spread across a city. Moreover, new comprehensive maps generally are drawn up by mayors, who, as a result of their citywide constituencies, are usually the most pro-development figures in local governments.<sup>15</sup> Thus, at least within the range the City Council collectively is willing to accept, the Mayor can propose maps that maximize development.<sup>16</sup> When Rose and others argued that there was not much difference in the politics of zoning amendments and plans, they failed to acknowledge that citywide planning and remapping can serve as a tool for creating deals that serve the general interest in legislatures where the absence of party competition makes such deals hard to come by.

Second, we argue that proposals for developers to buy their way out of zoning restrictions through parcel-by-parcel bargains ignore the information costs such a system imposes on outside investors. The most important move in modern property theory has been to focus on the ways traditional property law limits the ability of property owners to customize their rights through private contracts. Thomas Merrill and Henry Smith have argued that, because property rights are good against the world, not just one party, the customization of rights creates costs for outsiders trying to determine their entitlements or duties with respect to property holders.<sup>17</sup>

<sup>14</sup> See Schleicher, *City Unplanning*, *supra* note 9, at 1670; Rob Gurwitt, *Are City Councils a Relic of the Past?*, *GOVERNING MAG.*, Apr. 2003, <http://www.governing.com/topics/politics/are-city-councils-relic-past.html>;

<sup>15</sup> Of course, citywide property-holder cartels could form. But in big cities, it is just more likely that citywide solutions will allow for more development than neighborhood specific ones.

<sup>16</sup> We will also discuss why residents’ power of exit is insufficient to discourage the excessive restrictiveness resulting from piecemeal land use decisions in big cities.

<sup>17</sup> See, e.g. Thomas W. Merrill & Henry E. Smith, *Making Coasean Property More Coasean*, 54 *J. L. & ECON.* 77 (2012); Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 *YALE L. J.* 357 (2001); Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 *YALE L. J.* 1 (2000).

Making zoning changes amendment-by-amendment creates similar costs for outsiders. Where the ability to build is determined through an amendment process rather than *ex ante* through a planning or broad mapping process, outsiders face heavy costs in determining what they might be able to build. Before they can begin negotiations with a city – before they even decide to buy property – developers must learn a great deal about a city’s political process and resident preferences. As a result, Fischel and Nelson are wrong to believe that negotiations between existing residents and developers over the nuisances created by an individual project lead to efficient results.<sup>18</sup> Making zoning decisions *ex ante* can expand the market for local property by reducing the cost of information for potential purchasers and developers.

Our claims have important implications both for policy and for scholarship. First, it suggests a different role and form for city plans. Ideally, we would see Mayors and city planning departments regularly redrawing the zoning map citywide, a process that would look something like an annual budgeting process. But the gains from remappings can be eaten away quickly with the re-emergence of the ordinary politics of piecemeal re-zoning. Courts could theoretically enforce the city-wide deals inherent in zoning maps or plans, as Haar suggested, but they often refuse to get too far into the weeds of zoning policy. We argue that a reform-minded legislature or Mayor in a city with excessive land use restrictions should adopt a reformed planning mandate, as it could help entrench the benefits of citywide remapping.<sup>19</sup>

To encourage deals, mayors should propose plans that include enforceable numerical targets for housing or office space growth, such that down-zonings will not be considered by the city planning staff until the target is met. The growth targets could be allocated across the city so legislators know their neighborhoods are not dumping grounds. Such plans could also, where necessary, tie growth targets to fixed packages of whatever side payments are needed to sell needed growth to a skeptical audience, whether they take the form of transit improvements,

<sup>18</sup> That is, city officials can have time-inconsistent preferences. Each amendment may provide benefits, but collectively amendments can reduce the value of property and the amount of development.

<sup>19</sup> Work like this that uses a public choice/positive political theory methodology to study political institutions has been criticized for including policy proposals that the positive analysis shows would be impossible to enact. Eric A. Posner and Adrian Vermuele, *Inside or Outside the System?*, 80 *U. CHI. L. REV.* 1744 (2013). This type of proposal – relying on random variation in elections and the stickiness of procedural changes – is safe from this critique.



tax changes, or affordable housing mandates. Placing side payments and citywide zoning changes in a single bundle, preferably voted on using a “fast track” voting rule, will help protect deals against unraveling in the face of the demands of distributive politics.

In order to reduce information costs for investors and developers, we recommend that city plans include citywide rules on the presumptive conversion of existing zoning to under-supplied uses. Where the city seeks to sell air rights or require conditions on permitting, it should do so by a set mechanism rather than seeking to maximize the revenue or conditions in any given case. Pricing transparency will expand the market for property, although, as we discuss, it may invite some scrutiny on constitutional grounds.

While the paper is specifically about planning, it suggests a way of thinking about the problems in land use and property law that is different from most work in the field. We conclude the paper with an argument that in order to understand modern property law, scholars must devote as much attention to process as it does to substantive rules. Scholars like Merrill and Smith focus their important analytical work on the common law and on the relationship between generic “legislatures” and “courts.” But the common law of property is just far less important than it once was because of the large role played by overlapping federal, state and local regulation. In order to say much about the information-cost issues that play such a large role in modern scholarship, or about the broader efficacy and efficiency of property law, property scholarship needs to understand how the wide variety of property-law making institutions operate, how they relate to one another, and the processes by which they make decisions. To assess today’s system of real property regulation, property law theory must make an “institutional turn.”<sup>20</sup> This paper is an effort in this institutional direction.

The paper proceeds as follows. Section I reviews the cases for and against treating plans as “impermanent constitutions.” Section II lays out our argument that plans provide a mechanism for making deals across neighborhoods and reducing information costs for investors. Section III offers several policy proposals.

<sup>20</sup> Cf. Cass Sunstein and Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 889 (2003) (“The central question is not ‘how, in principle, should a text be interpreted?’ The question instead is ‘how should certain institutions, with their distinctive abilities and limitations, interpret certain texts?’”).

Section IV serves as a conclusion and contrasts our approach with work in modern property theory.

## I. THE DEBATE OVER PLANS AS IMPERMANENT CONSTITUTIONS

Although, as Stewart Sterk has noted, it has “fallen from academic favor during the last quarter century,” the idea that master plans would be used as a standard by which subsequent zoning decisions would be judged was once at the center of thinking about land use law in America.<sup>21</sup> This section will discuss the rise and fall of plans as “impermanent constitutions,” both in theory and practice.

### A. CHARLES HAAR’S CASE FOR “IMPERMANENT CONSTITUTIONS”

The history of zoning has frequently been recounted.<sup>22</sup> Wherever the story starts, virtually everyone agrees that zoning in America really took off with the promulgation of the Standard State Zoning Enabling Act (SZEA) in 1926.<sup>23</sup> Under Herbert Hoover, the Commerce Department published, and pushed states to adopt, the SZEA as a method for controlling development and protecting residential neighborhoods from urban intrusions. It was one of the most successful model acts in history, adopted in almost all states and, for decades, barely changed by state legislatures.

The SZEA laid out the now-familiar architecture of zoning procedure.<sup>24</sup> Cities were empowered to develop zoning maps, which determined the allowable uses of property and height and density of buildings in lots in their jurisdiction, either in whole or in part. These maps could be changed in their entirety or in part through a “map amendment.”<sup>25</sup> Amendments would be proposed to something called the planning commission, a lay body which would make recommendations to the city council. The council then voted on the amendment.<sup>26</sup>

<sup>21</sup> Stewart E. Sterk, *Structural Obstacles to Settlement of Land Use Disputes*, 91 B.U. L. REV. 227, 246 n. 118 (2011).

<sup>22</sup> Among our favorites are ERAN BEN-JOSEPH, *THE CODE OF THE CITY: STANDARDS AND THE HIDDEN LANGUAGE OF PLACE MAKING* 10-74 (laying out a history of city planning); SEYMOUR I. TOLL, *ZONED AMERICAN* (1969) (reviewing the early history of zoning); RICHARD F. BABCOCK, *THE ZONING GAME, MUNICIPAL PRACTICES AND POLICIES* 3-19 (1966) (the classic work on the history of the politics of zoning).

<sup>23</sup> For some discussions of the history and provisions of the Standard State Zoning Enabling Act (SZEA) and its runaway success, see Toll, *supra* note 22, at 201-05; VICKI BEEN AND ROBERT ELLICKSON, *LAND USE CONTROLS, CASES AND MATERIALS* 75-76 (3d ed 2005); Chad D. Emerson, *Making Main Street Legal Again: The SmartCode Solution to Sprawl*, 71 MO. L. REV. 637, 652-55 (2006). See also Herbert Hoover, *Foreword, Standard State Zoning Enabling Act (1926)*, available at <http://landuselaw.wustl.edu/StdZoningEnablingAct1926.pdf> (“The importance of this standard State zoning enabling act can not well be overemphasized.”)

<sup>24</sup> See SZEA §§ 1-5.

<sup>25</sup> *Id.* at § 7;

<sup>26</sup> A separate body, the board of adjustment, was to rule on applications for minor “variances” from zoning rules due to hardship and interpret the zoning ordinance’s ambiguities on appeal from the building inspector’s initial ruling. BEEN AND ELLICKSON, *supra* note 23, at 285.



The SZEA also included the cryptic phrase that the zoning ordinances shall be drawn “in accordance with a comprehensive plan.”<sup>27</sup> Two years later, the Commerce Department tried to give some content to this phrase with a related model statute, the Standard City Planning Enabling Act (SCPEA), which gave cities the power to develop a “master plan” including a “zoning plan.”<sup>28</sup> The SCPEA was, however, less widely adopted by state legislatures, and many local governments continued to exercise zoning authority without promulgating any master plan separate from the zoning ordinance itself.<sup>29</sup> Until the 1950s, the relationship between planning and zoning was not particularly clear or important as a legal matter. Most courts followed local governments’ lead in treating zoning maps themselves as comprehensive plans.<sup>30</sup>

With the rise of federal programs that required localities and regions to make master plans as a condition of receiving federal funds, lawyers and scholars began to reconsider the relationship between planning and zoning.<sup>31</sup> The central figure was Charles Haar, who argued that the “in accordance” language in the SZEA meant courts should review map amendments for failure to comply with a city’s comprehensive or master plan.<sup>32</sup> In his famous phrase, a master plan should be treated as an “impermanant constitution.”

What was so “constitutional” about plans? For Haar, plans supplied the long-term thinking that ought to undergird zoning. They were the textual embodiment of “information, judgments, and objectives collected and formulated by experts to serve as both a guiding and predictive force” for the future development of a city.<sup>33</sup> Plans could coordinate the decisions of the variety of local government agencies and private actors who determined the location of everything in a city, from roads to public housing to private buildings. Haar had a sunny optimism about the cognitive capacities of planners to set the course for every physical detail of a city. “The various land-uses and physical installations -- the physical expression of the myriad activities

<sup>27</sup> SZEA § 3.

<sup>28</sup> A Standard City Planning Enabling Act, Advisory Committee on Zoning and City Planning, Department of Commerce §6 (1928), available at <http://www.planning.org/growingsmart/pdf/CPEnabling%20Act1928.pdf>.

<sup>29</sup> Haar, *In Accordance*, supra note 5, at 1157.

<sup>30</sup> See notes 46-63 and accompanying text.

<sup>31</sup> This classic article on this is Mandelker, *Planning Requirement*, supra note 5, at 25.

<sup>32</sup> Haar, *In Accordance*, supra note 5, at 1157; Haar, *Impermanant Constitution*, supra note 5, at 365-66.

<sup>33</sup> Haar, *In Accordance*, supra note 5, at 1155.

in the city -- are combined into a coordinated system,” Harr declared. “In so far as possible, each piece of property is to be in the right location for its particular use.”<sup>34</sup>

From a legal point of view, Haar was not merely elevating the role of the plan: He also sought to transform the purpose of zoning.<sup>35</sup> The traditional justification for zoning, as explained by the Supreme Court in *Village of Euclid v. Amber Realty*, was that it was an ex ante variant on nuisance law, barring incompatible uses and restricting building height and density in the name of reducing externalities among neighboring property owners.<sup>36</sup> But Haar viewed determinations about the best uses of land as so interdependent and value-driven that communities needed to engage in a conscious and collective decision-making process to determine their future development, quite apart from simply suppressing local nuisances.<sup>37</sup> The private market was unsatisfactory to the extent that it departed from this collective vision of the community’s development, and zoning was a legal tool by which markets were brought back into line with the communal plan.<sup>38</sup>

It logically followed that plans preceded zoning maps in Haar’s vision. Cities should be required to pass master plans before engaging in any zoning regulation, because plans would guide zoning policy, “providing scope and perspective” for day-to-day land use decisions.<sup>39</sup> This made sense of the “in accordance” language in the SZEA. Courts should review zoning amendments, particularly small “spot zoning” amendments, and reject those

<sup>34</sup> Haar, *Impermanant Constitution*, supra note 3, at 360.

<sup>35</sup> That zoning was a tool of planning was always part of the public justifications for zoning, but key figures like Edward Bassett, co-author of New York City 1913 zoning code and the probably the most important figure in pushing zoning across the country, acknowledged as early as the 1920s that zoning, in practice, had little to do with broad principles of planning. TOLL, *ZONED AMERICA*, supra note 22, at 189-95.

<sup>36</sup> 272 U.S. 365 (1926). Needless to say, the Court in *Euclid* did not limit zoning ordinances to resolving common-law nuisances, but rather says that the common law provides a “helpful aid of its analogies in the process of ascertaining the scope of ...the power.” *Id.* at 382.

<sup>37</sup> See Haar, *The Master Plan*, supra note 5, at 1156 (“Objectives should be set in terms of what kind of city the community wants.”). See also Charles M. Haar, *Reflections on Euclid: Social Contract and Private Purpose in ZONING AND THE AMERICAN DREAM: PROMISES STILL TO KEEP* 333 (ed. Charles M. Haar and Jerold S. Kayden, 1989); DANIEL R. MANDELLKER, *THE ZONING DILEMMA* 23-55 (1971). (“It was here, especially, that we found a more positive role for the planning and zoning process than the mere regulation of externalities at the neighborhood level ...”). For a contemporary argument that the interdependence of land uses requires extensive comprehensive planning, see LEWIS D. HOPKINS, *URBAN DEVELOPMENT: THE LOGIC OF MAKING PLANS* (2001). To see why this argument does not make much sense, see Daniel B. Rodriguez & David Schleicher, *The Location Market*, 19 *GEO. MASON L. REV.* 637, 652-62 (2012).

<sup>38</sup> Haar, *In Accordance*, supra note 5, at 1175. Haar’s hostility to developers was substantial even when he later soured on much of zoning practice due to exclusionary practices in the suburbs. Haar, *Reflections on Euclid*, supra note 37, at 344-48, 351 (“If the original and fragile coalition’s broadly shared assumption about the certainty of progress and the perfectability of city life have fallen victim to a less sanguine reality, one binding element in the consensus still persists and could operate today to foster a new coalition: an agreement on the evil of uncontrolled growth ...the principle of profit maximization can, in the land development market more than in other markets, take on a distinctly ugly face ...”) He also seems never to have quite grasped the relationship between supply and price, arguing that new development leads to the “pricing of land so high that adequate and decent housing is denied to large sectors of the population.” *Id.*

<sup>39</sup> Haar, *In Accordance*, supra note 5, at 1155-73.



that were not in accordance with the broader plan a city has set out for itself. This quality of trumping local law gave plans their “constitutional” status.

Underlying all of these specific reforms of planning was the fundamental principle that planning would improve local politics by forcing local governments to consider long-term goals when making day-to-day decisions. Intense popular engagement in planning would ensure that master plans represented the community’s deliberate vision for its future. But individualized determinations about specific plots or projects, Haar thought, were insufficiently salient to draw public attention. Local officials and lobbyists took advantage of this lack of salience, making zoning amendments sources of “discrimination, granting of special privileges and the denial of equal protection of the law.”<sup>40</sup> Of course, cities could amend their master plans. But Haar thought requiring the city to approve a new plan, as opposed to passing a mere map amendment, would ensure that the city council kept the communal, long-term vision in mind, resulting in land use policy that relied more on expertise and important principles than on the immediate desires of developers and politicians.

Daniel Mandelker took up Haar’s banner, becoming the leading legal academic advocate for city planning in the 1970s.<sup>41</sup> Mandelker argued that comprehensive plans were needed to achieve new policy goals like environmental protection, to coordinate land use with federal spending in areas like housing and transportation, and to avoid haphazard development on the urban fringe. However, local governments were undermining these goals by creating “holding zones” that permitted development only after the city approved a specific development proposal. To curb such ad hoc deal-making, Mandelker called for courts to treat small-scale rezonings by city councils as administrative (“quasi-judicial”) acts to be evaluated by their consistency with the local plan.<sup>42</sup>

<sup>40</sup> Haar, *In Accordance*, *supra* note 5, at 1174.

<sup>41</sup> Edward J. Sullivan, *The Rise of Reason in Planning Law: Daniel R. Mandelker and the Comprehensive Plan in Land Use Regulation*, 3 WASH. U. J. L. & POLY 323, 336-38 (2000) (noting influence of Daniel R. Mandelker, *The Role of the Local Comprehensive Plan in Land Use Regulation*, 74 MICH. L. REV. 899 (1975-76)).

<sup>42</sup> Mandelker, *The Role*, *supra* note 41, at 910. Mandelker and Haar differed sharply on how to deal with the problem of exclusionary zoning. Mandelker thought cities should be required to consider the need for housing for all income groups, but opposed any effort to require towns to provide a “fair share” of a region’s need for affordable housing. As a result, Mandelker attacked the New Jersey’s Supreme Court’s decision in the Mount Laurel cases for judicial “disrupt[ion] of the planning policies of local governments.” Daniel R. Mandelker, *The Affordable Housing Element in Comprehensive Plans*, 30 B.C. ENVTL. AFF. L. REV. 555, 564 (2003). Haar disagreed, supporting the Mt. Laurel decisions as “among the significant judicial opinions of our time...on a par with *Brown v. Board of Education*.” See CHARLES M. HAAR, *SUBURBS UNDER SIEGE: RACE, SPACE, AND AUDACIOUS JUDGES* 10 (1996).

The central paradox in Haar’s and Mandelker’s ideas about plans is that the same flawed local legislature that made determinations about amendments and planned unit developments would be responsible for passing comprehensive plans. Haar felt that developers were able to get what they wanted from compliant local governments and that legislatures were dominated by “parochial” incentives to exclude minorities and low-income households.<sup>43</sup> Yet Haar also believed that planning approved by these same local legislatures was necessary to avoid “the evil of uncontrolled growth.”<sup>44</sup> Later in life, Haar tried to solve the paradox by putting his faith in judicial oversight to rectify the shortcomings of local legislatures: The local legislature would make the first cut at planning, but the courts would step in as a “disinterested and objective referee” to correct the distortions created by local legislative incentives.<sup>45</sup> As we will see in the next section, this belief turned out to be unwarranted.

## B. THE LAW’S EQUIVOCAL ADOPTION OF THE PLAN AS IMPERMANENT CONSTITUTION

The idea that a “comprehensive plan” ought to guide zoning did not originate with any law professor but rather was built into the concept of zoning from zoning’s inception. As noted above, Section 3 of the SZEA, which authorizes local legislatures to enact zoning ordinances, requires such ordinances be drawn “in accordance with a comprehensive plan.” This language remains ensconced in three quarters of the states’ zoning enabling acts.

Beyond the SZEA, various other state laws require local governments to adopt a written plan distinct from their zoning ordinances.<sup>46</sup> Further, since the 1950s the federal government has required localities to adopt transportation and housing plans as conditions for receiving various federal grants. This has given local governments with aspirations for federal largesse a strong incentive to draft and ratify planning documents (even if they are often ultimately ignored). Some states – most notably, New

<sup>43</sup> Haar, *Reflections*, *supra* note 37, at 335. HAAR, *SUBURBS UNDER SIEGE*, *supra* note 42, at 194.

<sup>44</sup> Haar, *Reflections*, *supra* note 37, at 351.

<sup>45</sup> Haar, *Reflections*, *supra* note 37, at 347. Haar’s belief in the unimpeachable quality of court decision-making is somewhat astounding. In 1996, he wrote: “[T]he court by its nature is a disinterested and objective referee in cases of major institutional breakdown, answerable to no special interests or narrow loyalties and subservient only to the fair and equitable application of the law as formulated by the framers of the constitution and legislators and as construed by judges.” HAAR, *SUBURBS UNDER SIEGE*, *supra* note 42 at 176.

<sup>46</sup> Patricia E. Salkin, *From Euclid to Growing Smart*, 20 Pace Envtl. L. Rev. 109 (2002). For three examples, see California (Cal. Gov’t Code §§65300 (West 2012), first enacted in 1965) (“[T]he legislative body of each county and city shall adopt a comprehensive, long-term general plan for the physical development of the county or city. . . .”); Florida (Fla. Stat. ch. 163, §167(2) (2013), first enacted in 1975) (“Each local government shall maintain a comprehensive plan. . . .”); and Maine (Me. Rev. Stat. Ann. tit. 30A, §§4312(2)(A) (West 2012), first enacted in 1989) (“The Legislature declares that it is the purpose of this Act to: A. Establish, in each municipality of the State, local comprehensive planning and land use management”).



York and California – require local governments to prepare an environmental impact statement whenever they grant a developer permission to build a structure with “significant” impacts on the environment.<sup>47</sup> (While environmental impact statements might properly be considered plans, they are sufficiently distinct that we will not address them here.)

Clearly, planning mandates come in a bewildering variety. Despite these differences, however, these enactments can be usefully understood as varying along three parameters -- in their scope (the number and detail of topics the final plan must contain), force (the degree to which the plan binds the local government’s decisions), and beneficiaries (whether the plan’s benefits accrue to current residents or other groups, such as future homebuyers or neighboring communities). Through the lens of these three factors, we can more rigorously assess some of the familiar structures of city planning:

#### a. The requirement that zoning be “in accordance with a comprehensive plan”

As construed by most state courts, the SZEAs requirement that zoning be drawn “in accordance with a comprehensive plan” is a mandate of weak force, limited scope, and a generally narrow category of beneficiaries. In terms of scope, most state courts do not require that the comprehensive plan be codified in a separate written document distinct from the zoning ordinance. Instead, if a zoning map designates a neighborhood as a residential zone, then this classification is said to contain an “immanent” plan that the neighborhood be residential. Moreover, as generally construed by state courts, the obligation imposed by such “immanent” land use guidance is extremely weak: A parcel’s zoning is said to be “in accordance with a comprehensive plan” so long as its treatment serves the “general welfare” and is not dramatically different from nearby sites.<sup>48</sup> This is not a rigorous standard. Indeed, such a doctrinal limit amounts to little more than the usual restrictions imposed by baseline constitutional concepts like the doctrine of substantive due process, which prevents governments from irrationally benefiting one private party by expropriating value from another. Thus, SZEAs

<sup>47</sup> Such statements can run into the hundreds of thousands of pages and constitute a “plan” of sorts, albeit not a “comprehensive” one but rather a plan for mitigating environmental impacts with respect to a particular neighborhood and parcel

<sup>48</sup> See, e.g., *Rodgers v. Village of Tarrytown*, 302 N.Y. 115, 123-24, 96 N.E.2d 731, 734-735 (1951) (describing zoning that is not in accordance with comprehensive plan as the “singling out a small parcel of land for a use classification totally different from that of the surrounding area, for the benefit of the owner of such property and to the detriment of other owners”).

requirement that zoning be “in accordance with a comprehensive planning” is largely superfluous and not particularly impactful, despite Haar’s theory that it should.<sup>49</sup>

#### b. State mandates that local governments promulgate written plans with specified “elements”

In addition to the enabling acts’ “in accordance with a comprehensive plan” language, some state legislatures have also required local governments to adopt elaborately specified written plans containing detailed “elements” governing topics like capital expenditures, affordable housing, open space, and environmental quality.<sup>50</sup> These mandated planning requirements can occupy dozens of pages of the state code,<sup>51</sup> and courts do occasionally enforce such requirements.<sup>52</sup> In terms of their scope, therefore, such planning mandates can be broad and detailed.

What force do these diverse planning mandates have? As a general matter, states with specific statutes requiring detailed plans tend to review local zoning consistency more aggressively than others, but still without the force that Haar would have wanted. The Oregon Supreme Court provided a pioneering decision on this front in *Baker v. City of Milwaukie*<sup>53</sup>, concluding that the city’s plan was a “constitution for all future development of the city,” citing the work of Charles Haar, and held that the plan “must be given preference over conflicting prior zoning ordinances” because “[z]oning ... is the means by which the comprehensive plan is effectuated.”<sup>54</sup> In so holding, Baker reinforced the Oregon Court’s earlier decision in *Fasano v. Board of County Comm’rs*, which held that a parcel-specific map amendment’s consistency with the local plan must be evaluated as an administrative or “quasi-judicial” matter.<sup>55</sup> Under the

<sup>49</sup> Of course, even such limited clauses do confer some marginal additional safeguards beyond substantive due process protections, since they eliminate the constitutional requirement that neighbors show a protected property interest or “vested right” in the maintenance of zoning restrictions. Put differently, neighbors can invoke the enabling act’s protection of a comprehensive plan without showing that they have a “property right” to the existence of zoning restrictions on their neighbors’ land.

<sup>50</sup> See, e.g., Fla. Stat. §163.3177 (2013); R.I. Gen. Laws §§42-11-10, 45-22.2-4 (2012); Miss. Code Ann. §17-1-1(c) (2012); Minn. M.S.A. §473.859(1) (2013).

<sup>51</sup> Florida’s enumeration of elements is especially detailed, mandating, for instance, that the future land use plan element meet eight criteria ranging from “encourag[ing] the location of schools proximate to urban residential areas to the extent possible” to “[e]nsur[ing] the protection of natural and historic resources.” §163.3177(6)(a)(3)(a)–(h). On top of these criteria, the statute also mandates that the land use element “discourage sprawl,” helpfully defining such discouragement with 13 “primary indicators” of not discouraging sprawl such as “[p]romot[ing], allow[ing], or designat[ing] for development substantial areas of the jurisdiction to develop as low-intensity, low-density, or single-use development or uses.” §163.3177(6)(a)(9)(I)–(XIII).

<sup>52</sup> See, e.g., *Miami Sierra Club v. State Admin. Com’n*, 721 So.2d 829 (Fla. Dist. Ct. App. 1998) (holding invalid state commission’s approval of county plan for reuse of former Homestead military base for lacking plans for stormwater, wildlife and its habitats, and noise). For a review of scholarship on the effectiveness of actual comprehensive plans, see Emily Talen, *Do Plans Get Implemented? A Review of Evaluation in Planning*, 10 J. Plan. Liter. 248 (1996).

<sup>53</sup> 533 P.2d 772 (Or. 1975)

<sup>54</sup> *Id.* at 775-776.

<sup>55</sup> 507 P.2d 23 (1973)



Fasano, standard, a local legislative body's rezoning decisions must be supported by some specific evidence in the record. In principle, therefore, mandates for local plans with specific "elements" open the door for more vigorous court involvement.

Yet this is not the end of the story, for even under doctrines like those of Baker and Fasano, court enforcement will often depend substantially on the identity of the plan's beneficiaries. In particular, court intervention will vary significantly based on unwritten assumptions about who the plan is supposed to protect from whom. Therefore, the question of "who, whom," is critical for understanding when and why courts take planning seriously.

For example, the 1970s, when Oregon was first developing the notion of a plan as a "constitution" controlling zoning, the plan was intended largely a tool with which environmentalists could fight proposed developments.<sup>56</sup> In light of this, Oregon courts in this period placed special emphasis on enforcing the plan when doing so led to greater restrictions on development than ordinary zoning would have imposed. At the same time, plans that provided landowners with more building rights than the zoning ordinance were not found to trump the zoning, because in those cases the legislature was said to have discretion in deciding whether the time was ripe to implement the plan's prescription for more development.<sup>57</sup>

As planning requirements matured, however, they were enlisted not only in the cause of environmental protection but also in the cause of affordable housing. In Oregon, developers and environmentalists entered into an uneasy alliance in the 1980s under which the latter would support greater residential densities in urban areas in return for protection of areas outside the urban growth boundary from development.<sup>58</sup> The result of this alliance was the Metro Housing Rule<sup>59</sup> requiring local plans to accommodate minimum residential densities ranging from six to ten units per acre depending on the size

<sup>56</sup> Governor Tom McCall called for statewide land-use planning in a 1973 speech to the legislature castigating "sagebrush subdivisions, coastal condomania, and the ravenous rampages of suburbia." (Audio available at [http://www.oregon.gov/LCD/docs/history/mccall\\_speech\\_1973.wav](http://www.oregon.gov/LCD/docs/history/mccall_speech_1973.wav))

<sup>57</sup> *Marracci v. City of Scappoose*, 552 P.2d 552, 553 (Or. Ct. App. 1976) (The plan "contains no timetable or other guidance on the question of when more restrictive zoning ordinances will evolve toward conformity with more permissive provisions of the plan").

<sup>58</sup> PETER A. WALKER & PATRICK T. HURLEY, *PLANNING PARADISE: POLITICS AND VISIONING OF LAND USE IN OREGON* 43-75, 114-18 (2011).

<sup>59</sup> Or. Admin. R. 660-007-0035 (West, Westlaw through Oregon Bulletin dated July 1, 2013).. For an overview of Oregon's system of urban growth boundaries and mandated densities, see Edward J. Sullivan, *The Quiet Revolution Goes West: The Oregon Planning Program 1961-2011*, 45 J. MARSHALL L. REV. 357 (2012).

of the city. In New Jersey, the New Jersey Supreme Court and, later, the Council on Affordable Housing mandated that local plans accommodate specific percentages of a state-defined regional need for low- and moderate income housing. Both measures proved politically controversial, as they pitted neighbors' desire to preserve the zoning status quo against prospective renters and homeowners seeking new construction of cheaper units.<sup>60</sup> In Florida, a lower court self-consciously enlist planning requirements as a tool to limit what it took to be the overweening power of neighbors in zoning fights but was reversed on appeal.<sup>61</sup> The California courts have occasionally used state planning mandates to strike down egregiously populist measures that radically limited growth,<sup>62</sup> but state planning mandates requiring affordable housing seem to have trivial effects on California's housing supply.

That judicial attitudes towards plans as "constitutions" can vary based on beneficiary is hardly surprising: It is a commonplace that constitutions are intended to protect persons who are otherwise vulnerable to under-representation in the ordinary political process. Courts that view local politics as dominated by deal-making developers cast a cold eye on zoning that exceeded the plan's limits but shrugged nonchalantly over zoning that was more restrictive than the plan. As courts' misgivings about the power and incentives of neighbors to exclude affordable housing grew, their willingness to enforce plans as ceilings on zoning restrictiveness grew as well.

Further, it is not surprising that, even where states mandate plans and where courts declare parcel-specific map amendments to be quasi-judicial, their review for consistency with plans is not particularly aggressive. Zoning is complicated. Understanding the effect of any given determination requires a substantial command of the specifics of local life. Even courts with the ambit to apply a more aggressive standard generally do not do so for this reason. For similar reasons, the Housing and Urban Development Department has only very sparingly used its powers under Fair Housing Act to curb local zoning excesses.<sup>63</sup>

<sup>60</sup> For an account of the political controversy, see Roderick Hills, *Saving Mount Laurel*, *Fordham Urb. L. J.* (2013)

<sup>61</sup> *Snyder v. Board of County Commissioners*, 595 So. 2d 65 (Fla. Dist. Ct. App. 1991) (finding denial of right to build when master plan would have permitted such building to be an arbitrary quasi-judicial decision) overruled by *Board of County Commissioners v. Snyder*, 627 So. 2d. 469 (1993) (overruling finding that zoning decisions are quasi-judicial but rejecting a rule that a zoning determination that limited growth but was inconsistent with the master plan should be overruled).

<sup>62</sup> See, e.g. *Leshner Communications, Inc. v. City of Walnut Creek*, 802 P.2d 317 (Cal. 1990)

<sup>63</sup> See Nicole Hannah-Jones, *Living Apart: How the Government Betrayed a Landmark Civil Rights Law*,



Zoning is the most important local power, and outsiders – from state courts to federal bureaucrats to federal courts – get involved at their peril.

### C. THE CASE AGAINST PLANS AS “IMPERMANENT CONSTITUTIONS”

While the judicial acceptance of Haar’s argument for treating plans as impermanent constitutions was limited, it retained a central place in the scholarly literature until roughly the 1980s. It then faced two major challenges -- Carol Rose’s savage takedown of its understanding of local politics, and Robert Nelson’s and Bill Fischel’s argument that piecemeal, unplanned zoning change led to an efficient market in land-use rights as long as governments could “sell” the right to develop through conditional approvals. These arguments eviscerated the case for treating plans as impermanent constitutions.

#### i. Carol Rose and the case against the politics of planning

In two classic articles, Carol Rose attacked the case for treating plans as impermanent constitutions.<sup>64</sup> At the heart of Rose’s case against the planning advocates was the internal inconsistency buried in the idea that comprehensive plans would improve local decision-making. If local legislatures were not trustworthy, why should courts give deference to city plans, which, after all, count as law only because they were ratified by local legislatures?

Planning advocates offered no evidence that legislatures performed better when drawing plans than they did when considering parcel-specific map amendments. Rose argued that opposite was more likely. Neither legislatures nor the public can be counted on to pay much attention to policies with little immediate effect; it is the specific and not the general that rouses them to informed action.<sup>65</sup> All of problems Haar saw in local legislatures were as likely to appear during the planning process. If plans mattered, majority factions or powerful developers would work to influence the planning process just as easily as they could push for parcel-specific map amendments.

---

*Pro Publica*, October 29, 2012, available at <http://www.propublica.org/article/living-apart-how-the-government-betrayed-a-landmark-civil-rights-law> (detailing low levels of use of sticks inside Fair Housing Act to limit exclusionary zoning).

<sup>64</sup> Rose, *Planning and Dealing*, *supra* note 6, at 837; Rose, *New Models*, *supra* note 6, at 1155; Sterk, *Structural Impediments*, *supra* note 21, at 246 (2011) (crediting Rose’s work with the turn away from plan jurisprudence).

<sup>65</sup> Another critic of Haar noted that making land use plans may speed up conflict, creating unnecessary acrimony in a city. Dan A. Tarlock, *Consistency with Adopted Land Use Plans as a Standard of Judicial Review: The Case Against*, 9 *URB. L. ANN.* 69, 86 (1975).

Moreover, when making plans in advance of any real dispute or proposal, local governments would be forced to speculate about what market participants or citizens will want in the future. As a result, “local governments have a good reason for keeping their land use plans rather fuzzy; they may not want a fixed plan because they cannot realistically see very far into the future. Neither can anyone else.”<sup>66</sup> Fuzzy plans, however, did not provide much of a standard against which to review subsequent decisions. Rose noted that city planners had long ago abandoned the idea of a city plan as blueprint for an ideal “end-state,” precisely because of the cognitive and political limits of local government.<sup>67</sup>

According to Rose, “plan jurisprudence” failed to grasp the basis of local governments’ legitimacy -- their close ties to local opinion.<sup>68</sup> Local tastes are likely to be idiosyncratic: two projects that look similar to an outsider expert in terms of their effects on a community may seem very different to the local insider. In order to express idiosyncratic taste preferences, local governments needed to make individualized determinations about proposed building projects, rather than *ex ante* neutral determinations. Power over land use could not be removed from politics and handed to impartial planners because land use decisions are inherently political: they involve conflicts between different types of property rights claims and different values.

Instead of thinking about zoning in terms borrowed from administrative or constitutional law, Rose argued that it was better to think about local legislatures as mediators of disputes between incumbent homeowners and developers. “If piecemeal changes are treated as mediations,” Rose contended, then “their ‘dealing’ aspects are not an undesirable aberration but natural parts of the dispute resolution dealing aspects are not an undesirable aberration but natural parts of the dispute resolution.”<sup>69</sup>

Why trust local legislatures to mediate disputes fairly, and what role should courts take in policing such parcel-specific

---

<sup>66</sup> Rose, *New Models*, *supra* note 6, at 1163, 1162-64.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 867-70, 908-11. Tarlock, *supra* note 65, at 86-87 (“Many of the conflicts that the plan seeks to resolve or minimize are disputes over fundamental values.”).

<sup>69</sup> Rose, *Planning and Dealing*, *supra* note 6, at 891.



mediations? Following Albert Hirschman, Rose suggests that local governments provide citizens with representation both through voice in decision-making, as representatives are close to voters, and exit, because people can choose to leave, putting pressure on local governments to be fair.<sup>70</sup> These pressures “legitimize” local decision-making in ways that are different from the justifications we give for the quality of national government. Thus, in land use cases, courts should examine whether the local government worked according to its own terms -- i.e whether relevant interests were involved in the process and whether the government explained its decisions in terms that the public could grasp. Courts should also ask whether the land use process was sufficiently predictable such that individuals could decide to move to a town (or not to move there) without having their investment unfairly expropriated due to regulatory surprise.

Rose’s challenge, in sum, attacked every aspect of Haar’s claim. Planning did not provide an expertly drawn end-state against which to judge politics, but rather was an on-going act of politics. Local politics was not the enemy of good land use decision-making but rather was its essence. Deal making should not be shunned but praised for serving as a form of mediation between interests. The question for courts, in short, was not whether an amendment today violated some fixed-end plan from yesterday but rather whether an amendment was reached through a predictable and open process today.

## ii. Fischel, Nelson, and the economic case against planning

Around the time that Rose was preparing her assault on planning, another attack was coming from the law and economics of zoning. In the 1960s and 1970s, law and economics scholars like Bernard Siegan and Robert Ellickson criticized zoning for reducing the supply of housing, distorting development patterns, and for failing to outperform nuisance law and contractual covenants in reducing inefficient external costs.<sup>71</sup> These economic attacks on zoning, however, did not rest on any theory that planning was responsible for the maladies of zoning. The

<sup>70</sup> *Id.* at 889-910.

<sup>71</sup> See Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 *YALE L.J.* 385, 400 (1977); Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 *U. CHI. L. REV.* 681, 682 (1973); BERNARD H. SIEGAN, *LAND USE WITHOUT ZONING* (1972); Bernard H. Siegan, *Non-Zoning in Houston*, 13 *J.L. & ECON.* 71, 91-129 (1970).

problems with zoning resulted instead from the inflexibility of zoning categories and the incentives of incumbents to discourage the construction of competing land uses.

In the late 1970s, two well-known economists, Robert Nelson and Bill Fischel, developed in favor of zoning, claiming that zoning could be broadly efficient so long as local governments could “sell” the right to develop.<sup>72</sup>

Nelson’s and Fischel’s analysis was Coasean.<sup>73</sup> Giving neighbors a “collective property right” through zoning would reduce the transaction costs of bargaining between developers and neighbors harmed by the new development. Rather than requiring nearby property owners or the local government that represents them to figure out when, what and whether a developer wanted to build, ad hoc zoning invited developers to propose new projects to the local government along with side payments to compensate for spillover burdens on neighbors. Developers would reveal the preferences of potential purchasers of proposed structures in their bid for development rights.

This method of revealing preferences through parcel-specific bids, however, requires that local governments enjoy the power to amend the zoning map parcel by parcel to accommodate the individual proposals of developers.<sup>74</sup> If zoning’s foundation is planning, then developers will not be able to buy their way out of zoning restrictions through individualized transactions that ignore the larger goals of the comprehensive plan.

Nelson argued, however, that such limits on a community’s individualized responses to developers’ parcel-specific proposals rendered zoning an inflexible straitjacket indifferent to the joint preferences of potential residents and incumbent neighbors.<sup>75</sup>

<sup>72</sup> See NELSON, *ZONING*, *supra* note 7; FISCHEL, *supra* note 7, at 75-101.

<sup>73</sup> R.H. Coase, *The Problem of Social Cost*, 3 *J.L. & ECON.* 2 (1960). *The reliance on Coase is implicit in Nelson, but explicit in Fischel. FISCHEL, THE ECONOMICS OF ZONING, supra* note 5, at 100 (“by looking at zoning as a collectively held entitlement, one can examine it in terms of the framework of the Coase Theorem.”).

<sup>74</sup> It also imagines that there are no legal impediments to “selling” permission to build. The takings clause, state law limits on developer impact fees, and direct limits on using cash as part of zoning negotiations all limit the ability of cities to sell zoning rights as imagined by Fischel and Nelson. See *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013) (requirements of cash payments for development approval subject to review under the Takings Clause); *Municipal Arts Society v. City of New York*, 522 N.Y.S.2d 800 (Sup. Ct. 1987) (“zoning benefits are not cash items”); Martin L. Leitner & Susan P. Schoettle, *A Survey of State Impact Fee Enabling Legislation*, in *EXACTIONS, IMPACT FEES, AND DEDICATIONS: SHAPING LAND-USE DEVELOPMENT AND FUNDING INFRASTRUCTURE IN THE DOLAN ERA* 60, 61-77 (Robert H. Freilich & David W. Bushek eds., 1995). These limits force localities to make less efficient deals, substituting in-kind benefits for cash or simply denying projects that would be mutually beneficial if the developer also handed over some cash.

<sup>75</sup> NELSON, *ZONING supra* note 7, at 84



Fischel developed powerful responses to the criticism that the Fischel-Nelson model failed to account for agency costs or interlocal externalities. Harvey Molotch, for instance, argued that local governments do not represent the median voter but instead a coalition of real estate brokers, developers, unions, and lenders, a “growth machine” that approves more new development than the median voter desires.<sup>76</sup> Fischel responded, however, that officials in local governments with smaller and more homogenous populations are highly responsive to the economic interests of what he called “homevoters” – owners of owner-occupied housing -- because zoning changes pose an uninsurable risk to the value of those homevoters’ most valuable asset, motivating them to monitor their representatives’ approvals of new developments.<sup>77</sup> It turns out that Fischel’s rebuttal of Molotch is applicable even in big cities, for reasons we’ll discuss below.<sup>78</sup>

Fischel also argued that, following the work of Charles Tiebout, competition between local governments alleviates inter-local externalities.<sup>79</sup> If one town does not want to have a factory or apartment complex, some other town might.<sup>80</sup> Thus, like Rose, the Fischel-Nelson “collective property right” theory of zoning relies on inter-local competition and the threat of exit to rectify the failings of zoning.

The Tieboutian and Coasean moves made by Fischel and Nelson have been widely incorporated and expanded in the legal literature on zoning, particularly in the work of Vicki Been, Lee Anne Fennell, David Dana, and Christopher Serkin.<sup>81</sup> The result was the demolition of plan jurisprudence. There remain occasional attacks on ad hoc deal-making on the ground that it leads to favoritism for insiders and violates the rule of law.<sup>82</sup> Such

<sup>76</sup> *Urban Fortunes: The Political Economy of Place* 230–32 (John R. Logan & Harvey L. Molotch eds., 1987)

<sup>77</sup> WILLIAM A. FISCHEL, *THE HOMEVOTER HYPOTHESIS* 3–8 (2001).

<sup>78</sup> For evidence of the homevoter hypothesis at work in big cities, see note 8 and accompanying text.

<sup>79</sup> FISCHEL, *THE ECONOMICS OF ZONING*, supra note 5, at 96–97. Fischel suggested other solutions for problems that would not be solved by competition, including increased regulatory takings scrutiny and home value insurance.

<sup>80</sup> This argument, however, ignores the economic benefits of colocation. Having lots local governments engaged in zoning can reduce the agglomerative efficiency of a region by disrupting the location of development in a region. See David Schleicher, *The City as a Law and Economic Subject*, 2010 U. ILL. L. REV. 1507, 1543 (2010). Fischel acknowledges this himself. FISCHEL, *THE ECONOMICS OF ZONING*, supra note 7, at 252–65.

<sup>81</sup> Vicki Been, “Exit” as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine, 91 COLUM. L. REV. 473 (1991); Lee Anne Fennell, *Hard Bargains and Real Steals: Land Use Exaction Revisited*, 86 IOWA L. REV. 1 (2000) David A. Dana, *Land Use Regulation in an Age of Heightened Scrutiny*, 75 N.C. L. REV. 1243 (1996–97). Christopher Serkin, *Local Property Law: Adjusting the Scale of Property Protection*, 107 COLUM. L. REV. 883 (2007).

<sup>82</sup> See, e.g., Daniel P. Selmi, *The Contract Transformation in Land Use Regulation*, 63 STAN. L. REV. 591 (2011) (arguing that increased reliance on contracts to define land use entitlements undermines transparency, evenhandedness, and democratic norms of public participation). Selmi devotes only a few sentences to the danger that ad hoc bargains will impede adherence to a comprehensive plan. *Id.* at 635.

objections, however, are rooted in existence of agency costs that make local politicians faithless agents of their constituents – a problem that comprehensive planning does not purport to cure. Comprehensive plans remain, both in courts and scholarship, the unwanted stepchildren of zoning, grudgingly acknowledged but rarely the focus of loving attention.

## II. A REVISED CASE FOR PLANS: PLANS AS CITYWIDE BARGAINS TO INCREASE THE MARKETABILITY OF URBAN PROPERTY

We believe that this dismissal of planning is unwarranted, but we accept the attacks on planning summarized above. Our defense of planning does not rely on planners’ alleged special ability to predict the future nor on any confidence in their -- or anyone else’s -- ability to guide development efficiently over the long- or even medium-term. Zoning’s benefits, in our discussion, exclusively come from reducing parcel-specific nuisances, not in setting forth grand visions of the city as a whole.<sup>83</sup> Further, we agree there is nothing wrong with cities waiving their onerous zoning rules in return for compensation for the costs of such deregulation (although we also wish the cities were less zealous in imposing such onerous rules in the first place).

Despite all of this agreement with the major critics of planning, we nonetheless will defend a (reformed) vision of comprehensive mapping and planning. Our argument is premised on the increasing restrictiveness of land use regulation at both the regional and big city level.<sup>84</sup> In areas where demand is high, these supply restrictions have caused major increases in prices at the regional level over the last forty years.<sup>85</sup> Edward Glaeser, Joe Gyourko and Raven Saks have shown that nearly half the price of any housing unit in the San Francisco region, for instance, is due to land use restrictions.<sup>86</sup> These dramatic increases in the cost of housing at the regional level have caused massive dislocations of people and broad economic harm. As Daniel Shoag and Peter Ganong show, for the entirety of American history prior to the 1970s, average incomes by state converged, as people from poorer

<sup>83</sup> Determining whether zoning outperforms other methods of addressing land use conflicts, from traditional nuisance to contracts to Ellickson’s nuisance boards proposal, is well beyond the scope of this paper. Zoning is not going anywhere anyway. As Richard Babcock noted about zoning persistence despite severe academic criticism “No one is enthusiastic about zoning except the people.” BABCOCK, *THE ZONING GAME*, supra note 22, at 17.

<sup>84</sup> See Schleicher, *City Unplanning*, supra note 9; Hills and Schleicher, *Zoning Budget*, supra note 9; Schleicher, *The City*, supra note 81; Roderick M. Hills, Jr. and David N. Schleicher, *The Steep Cost of Using Non-Cumulative Zoning to Preserve Land for Urban Manufacture*, 77 U. CHI. L. REV. 249 (2010).

<sup>85</sup> See William A. Fischel, *The Evolution of Homeownership*, 77 U. CHI. L. REV. 1503, 1515–16 (2010)

<sup>86</sup> See Edward Glaeser, et al, *Urban Growth and Housing Supply*, 6 J. Econ. Geo. 6 71 (2006); Edward Glaeser, et al, *Why Have Housing Prices Gone Up?*, 95 Am. Econ. Rev. Papers & Proceedings, 329 (2005). Glaeser, et al., *Why Is Manhattan*, supra note 10.



states moved to richer ones.<sup>87</sup> But since the 1970s, convergence has slowed and now stopped as a result of land use restriction in many rich states. Population no longer flows to boom areas like Silicon Valley (which lost population during the first dot com boom and only barely gained population since 2000), because land use restrictions cause prices to increase faster than incomes rise.<sup>88</sup> The national economy has suffered as workers cannot move to job-and-high-income dense areas. A new study by two of America's leading labor economists finds that land use restrictions reduce average wages in the United States by roughly \$9000, as workers cannot flow to jobs.<sup>89</sup> There may also be substantial negative effects on growth, as information spillovers in these areas go uncaptured.<sup>90</sup>

Molotch's prediction that a "growth machine" would deregulate housing supply in big cities has turned out to be false. Despite predictions of growth machine coalitions, many of the most productive and richest urban areas have seen slow housing growth.<sup>91</sup> Cities like New York City, San Francisco, Los Angeles and Boston, for instance, have seen housing growth well below the increase in national population, despite huge increases in prices. Slow population growth in the face of high wages is a result of supply constraints.<sup>92</sup>

We argue that planning can help cities resist the political pressure excessively to restrict building and expands the market for property in cities.<sup>93</sup> First, citywide planning and mapping can provide cities lacking strong political parties with mechanisms for enforcing city-wide deals on the allocation of land uses. Second, maps that make ex ante decisions about what can be

built as-of-right reduce information costs for investors. Before we proceed, we must make clear what we mean by "plans."

For our purposes, a "plan" is defined by three characteristics: It is nothing more than (1) a citywide or multi-neighborhood determination of permissible land uses (2) made simultaneously that is (3) "sticky," as a practical matter, against future piecemeal alteration.

#### A. PLANS AS A MECHANISM FOR ENFORCING CITYWIDE DEALS

One central assumption in the political critiques of plan jurisprudence is that there is nothing special distinguishing the politics of planning and piecemeal zoning. Our argument to the contrary rests on an insight of positive political theory about city legislatures that lack competing political parties.

##### i. Distributive politics in land use

As we have argued elsewhere, positive political theory about legislative process provides important lessons about land use.<sup>94</sup> As Kenneth Arrow famously showed, legislative preferences are not naturally transitive or stable: The same legislature can have cycling preferences, voting for A over B, B over C, and C over A with mere majority rule by itself unable to choose among the cycling outcomes.<sup>95</sup> Further, legislatures can face coordination problems, cases where agreements between legislators could improve outcomes for everyone but where legislators' strategic games preclude such benefits because the legislators cannot make binding commitments to each other.<sup>96</sup>

As Matt McCubbins argued, political parties in legislatures can provide a solution to the problem of choosing the best of several equally possible voting outcomes. In order to avoid cycling or coordination problems, a group of legislators, or a caucus, forms a party that gives its leadership the power to both determine the voting order (and hence determine the voting outcome in the face of cycling preferences) and to enforce deals that solve cooperation problems.<sup>97</sup> Members of a party give power to the leadership to maximize their joint electoral gains. Leaders, therefore, have the right incentives to propose generally

<sup>87</sup> Peter Ganong & Daniel Shoag, *Why Has Regional Convergence in the U.S. Stopped? 1* (Harvard Kennedy Sch., Working Paper No. RWP12-028, 2012), <http://ssrn.com/abstract=2081216>.

<sup>88</sup> See RYAN AVENT, *THE GATED CITY* 799-850 (2011)

<sup>89</sup> Chiang Tai-Hsieh and Enrico Moretti, *Growth in Cities and Countries* (Draft Paper, 2014), available at [http://conference.nber.org/confer/2014/SI2014/EJK/Hsieh\\_Moretti.pdf](http://conference.nber.org/confer/2014/SI2014/EJK/Hsieh_Moretti.pdf)

<sup>90</sup> "[I]t's a bad thing for the country that so much growth is heading to Houston and Sunbelt sister cities Dallas and Atlanta," Glaeser notes. "These places aren't as economically vibrant or as nourishing of human capital as New York or Silicon Valley. When Americans move from New York to Houston, the national economy simply becomes less productive." Edward L. Glaeser, *Houston, New York Has a Problem, CITY J.*, Summer 2008, at 62, 67

<sup>91</sup> *Think cities like New York, Los Angeles, San Francisco, San Diego, Washington, and Boston (but not Houston, Atlanta or Phoenix.) Each of these cities has high housing costs and low amounts of construction, far lower than the national average. See Stephen Smith, Housing Growth in U.S. Cities, 2000-2010, From Detroit to Miami, NEXT CITY*, March 7, 2014, available at <http://nextcity.org/daily/entry/chart-housing-growth-in-us-cities-2000-2010-from-detroit-to-miami>. For cities without problems producing housing or locating traditionally unwanted land uses, we see no reason to rely more extensively on planning. One should only take medicine when one is sick.

<sup>92</sup> See Schleicher, *City Unplanning*, supra note 9, at 1669-71.

<sup>93</sup> *Suburbs and smaller local governments are unlikely to have extensive cycling of local preferences and thus the procedural reforms discussed here are less likely to matter. However, the arguments we advance here should serve as a warning for those who believe that locating land use authority in regional or state governments will necessarily produce more liberal outcomes. If big city land use can devolve into distributive politics, giving neighborhoods similar power to exclude as rich suburbs, the same thing could happen inside a regional or state zoning authority without procedural reforms of the sort discussed here.*

<sup>94</sup> Hills and Schleicher, *Zoning Budget*, supra note 9; Schleicher, *City Unplanning*, supra note 9, at 1699-1717.

<sup>95</sup> See KENNETH J. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* 22-23 (2d ed. 1963).

<sup>96</sup> Schleicher, *City Unplanning*, supra note 9, at 1699-1704.

<sup>97</sup> See GARY W. COX & MATHEW D. MCCUBBINS, *LEGISLATIVE LEVIATHAN: PARTY GOVERNMENT IN THE HOUSE* (2007); D. RODERICK KIEWIET & MATHEW D. MCCUBBINS, *THE LOGIC OF DELEGATION: CONGRESSIONAL PARTIES AND THE APPROPRIATION PROCESS* (1991).



beneficial policies, as the gains to the caucus (and the potential caucus after the next election) must be relatively widespread across a jurisdiction if the leadership wants to build a stable majority. Party brands -- that is, Democrats and Republicans -- are a function of successive efforts by party leaders to produce policy results that are attractive to city-wide majorities.

In most American cities, however, there is no party competition to produce these beneficial results. Often, elections are formally non-partisan. Elsewhere, city elections are partisan but totally dominated by one party. Further, because of legal impediments on party rebranding and the heavy weight of national party identification in local voting patterns, one-party domination in such city legislatures is likely to continue. (In previous work, one of us has explored the reasons for party-less local democracy).<sup>98</sup> As the quality of local party performance does not matter much in one-party local elections, party leaders in city councils cannot provide the benefit of a “brand” with voters that will induce cooperation from individual members.

The absence of competitive party “brands” has two major implications for zoning politics. First, the formal procedure by which issues are considered has an outsize influence on policy outcomes. When there is party dominance, procedure is likely largely epiphenomenal: The party leadership usually chooses the procedure that best serves its ends. Absent effective party leadership, procedure determines the outcome selected by a cycling legislature. Second, weak parties cannot solve coordination problems among legislators. As Barry Weingast and John Ferejohn have shown, legislatures without strong parties can devolve into “distributive politics” if preferences take the form of a prisoner’s dilemma.<sup>99</sup> Members may collectively, say, prefer lower taxes and lower spending to higher taxes and higher spending, but each member individually prefers pork in their districts paid for by taxpayers across the entire jurisdiction. Absent a party leader who can suppress individual efforts to secure district-specific spending, legislators may adopt an informal norm approving each other’s local expenditures as an

<sup>98</sup> See David Schleicher, *Why is There No Partisan Competition in City Council Elections? The Role of Election Law*, 23 J. L. & POL. 419, 430-38 (2007); Christopher S. Elmendorf & David Schleicher, *Informing Consent: Voter Ignorance, Political Parties and Election Law*, 2013 U. ILL. L. REV. 363 (2012); David Schleicher, *I Would, but I Need the Eggs: Why Neither Exit Nor Voice Substantially Limits Big City Corruption*, 42 LOY. U. CHI. L.J. 277 (2011); David Schleicher, *What if Europe Held an Election and No One Cared?*, 52 HARV. INT’L L.J. 109, (2011).

<sup>99</sup> JOHN FERREJOHN, *PORK BARREL POLITICS: RIVERS AND HARBORS LEGISLATION, 1947-1968* (1974); Barry Weingast, *A Rational Choice Perspective on Congressional Norms*, 23 AM. J. POL. SCI. 245, 249-53 (1979).

insurance that they are not left out of the winning coalition for local benefits. The result is more spending than the legislature as a whole would prefer.

## ii. Plans as a solution to the “ironclad rule of aldermanic privilege”

As we have previously argued, the procedure of voting on piecemeal zoning changes individually can lead local legislatures to form universal log-rolling coalitions. The very term “NIMBY” suggests neighbors’ preference not for the total exclusion of a use but merely its relocation elsewhere. The literature generally assumes that neighborhoods generally oppose development, while larger constituencies (big cities, citywide officials) and individual owners (of lots or blocks) support it. The basic story – which distinguishes small cities from big ones, and neighborhood officials from citywide ones – is that property holders can use politics to form cartel-like agreements to limit competition among them and drive up their collective property values only if the political community does not get too large.<sup>100</sup> At the size of a single city electoral district, property holders and the city council members who represent them have both incentives and capacity to limit development locally even where they support growth overall.

These preferences and capacities create the type of prisoner’s dilemma familiar from models of distributive politics in budgeting. Absent party discipline, such NIMBY preferences predictably lead to excessive “pork” in the form of zoning restrictions serving neighborhoods’ local interests. Individual members of city councils end up with exclusive control over land use decisions in their districts with little incentive to consider citywide interests for an increased housing supply or the location of locally-unwanted land uses.<sup>101</sup> This dominance of the individual local legislator in land use politics has long been understood as a basic rule of local politics, known as the “ironclad principle of Aldermanic privilege.”<sup>102</sup>

The process of voting on map amendment in a piecemeal fashion retards the legislature’s collective ability to create deals

<sup>100</sup> Ellickson described land-owner cartels in his study of suburban zoning, noting that zoning can turn the “homeowner into a monopolist.” Ellickson, *Suburban Growth Controls*, supra note 72, at 400, 424-30. Fischel notes that cities of under 100,000 people will be different from bigger places, as homeowner/voters in small cities can learn what is going on in city government and force government to hew to their interest. FISCHEL, *HOMEVOTER HYPOTHESIS*, supra note 78, at 93-96.

<sup>101</sup> Schleicher, *City Unplanning*, supra note 9, at 1670.

<sup>102</sup> Gurwitt, supra note 14.



between neighborhoods and their legislative representatives across individual projects that would take into account the legislators' collective as opposed to individual interests.<sup>103</sup> Zoning map amendments are generally geographically specific, affecting only one area at a time. As a result, they are poor vehicles for spreading development across town. Moreover, the time and cost of getting a project through the amendment process means that the local legislature will not vote for a package of many projects simultaneously, thereby assuring each member that other neighborhoods will accept their fair share of new development.. In the absence of political parties to whip deals into line, it is no wonder that councilmembers don't agree to allow locally-unpopular but needed growth to occur in their districts, since they can't be sure that other members will do the same.

Both plans and comprehensive remappings are mechanisms for solving this type of breakdown. First, by their very nature, they are citywide votes, thereby reducing (if not eliminating) the pressures for NIMBY exclusion characteristic of *seriatim* decisions.<sup>104</sup> Second, the typical process of city-wide remapping can protect citywide interests against more parochial ones. Ordinarily, the Mayor's city planning department, or a newly created independent body appointed by politicians elected citywide, proposing a new plan or map to the city council after extensive hearings. The Mayor faces the broadest electorate and thus has the greatest incentive to be responsive to citywide concerns.<sup>105</sup> Putting the agenda-setting power in the Mayor's hands further promotes citywide interests. Particularly if the remapping is considered under a closed rule (i.e. no amendments are allowed), the Mayor is in a position to propose a map that goes as far to protect citywide interests as the legislature will bear.

Consider, as an example, the recent rewriting of the zoning code in Philadelphia. In 2011, Philadelphia revised the text of its zoning code, consolidating the number of zoning categories, which had not been substantially altered since 1962, redrew its zoning

<sup>103</sup> Schleicher, *City Unplanning*, supra note 9, at 1704-17.

<sup>104</sup> Imagine the fiscal impact, if instead of passing budgets, we just passed individual appropriations bills whenever someone proposed a new project!

<sup>105</sup> A neat example of this just arose in Washington D.C. The Planning Commissioner, a Mayoral appointee, asked Congress to revise the Height of Buildings Act, which sets maximum heights for buildings in D.C. The proposal was to increase the maximum height by 25% in the traditional "L'Enfant" party of the city and to eliminate it for outlying areas. The City Council voted against the proposal, even though it would have left much more power in the hands of the city (as it would have more choices about building heights.) Rep. Darrell Issa noted during a hearing that it was extremely out of the ordinary for politicians to turn down authority: "I did not expect, for the first time ever, to have people say, 'Please don't give me authority. I can't be trusted.'" Sarah Anne Hughes, *Issa Offers Hope for D.C. Autonomy on Building Heights*, D.C. CITY PAP., Dec. 2, 2013.

map.<sup>106</sup> The impetus for these revisions was the impossibility of building new projects except by piecemeal variances or map amendments that gave individual councilmembers excessive power to decide which projects would go forward. The City created a zoning code commission to propose a set of recommendations to the Council, which the Council was required to approve or reject under a closed rule. The Commission's recommendation, enacted by Council, radically simplified and relaxed the zoning code by creating more as-of-right construction and allowing both taller downtown high-rises and taller row-houses.<sup>107</sup> The revision process used an independent commission rather than the city planning department in order to overcome aldermanic privilege, inducing councilmembers to support greater density in their own neighborhoods with assurance that all parts of the city would accept some of the new construction.

In 2006, Dallas officials adopted an approach similar to Philadelphia's. Recognizing that its code had become complicated, the mayor persuaded the council to appoint a special planning commission to standardize zoning categories across the city. As the lead planning consultant noted, "zoning needs to be ready-to-wear, not custom fit ... [t]he more tailored the ordinance becomes, the harder it is to work with."<sup>108</sup> When the special commission returned its plan, the city's staff proposed an alternative that called for greater density throughout the city. The City Council adopted this more aggressive approach.<sup>109</sup> Although the plan "preserves stable neighborhoods," it also explicitly states that it "distributes new housing across the city and offers more housing choices."<sup>110</sup>

### iii. Why sorting doesn't solve the problems of excessive land use restriction

Why does not competition between cities solve the problem of excessive zoning restrictions without revision of the zoning

<sup>106</sup> See Inga Saffron, *Changing Skyline: New zoning code: Toward a more competitive, livable city*, PHIL. INQUIRER, Aug. 25, 2012; Patrick Kerkstra, *Anthropologists Should Come to Philly to Study Rare Phenomenon*, PHIL. MAG., Dec. 14, 2011 (noting that rezoning was designed to reduce control of individual councilmembers over zoning). The closed rule provisions is part of the Philadelphia City Charter. Phil. City Charter, §4-1300(d)

<sup>107</sup> See Saffron, supra note 106. The remapping process, however, which was supposed to follow the rewriting, has stalled.

<sup>108</sup> David Dillon, *Forward Dallas: Land use: The zoning code is handcuffing Dallas, which needs a smarter guide to development*, Dallas Morn. News., May 7, 2006 (quoting John Fregonese).

<sup>109</sup> David Levinthal, *Council OKs land-use plan: City staff's Forward Dallas proposal backed over panel's version*, Dallas Morn. News, June 15, 2006 at 1B.

<sup>110</sup> Forward Dallas, *Comprehensive Plan, Vision*, City of Dallas, June 14, 2006, available at <http://www.dallascityhall.com/forwardDallas/pdf/Vision.pdf>. A city councilwoman even invoked her inner-Charles Haar: "[T]he Comprehensive Plan is like our zoning and land use Constitution..." Peak's Addition Homeowner's Association, *Forward Dallas Comprehensive Plan Public Meetings*, available at [http://www.peakssaddition.org/ml/archive/2006/02/forward\\_dallas.html](http://www.peakssaddition.org/ml/archive/2006/02/forward_dallas.html), Feb. 11, 2006 (quoting Hon. Angela Hunt).



process? Relying on Charles Tiebout's famous insight that citizen-consumers can sort themselves among competing local governments based on their assessment of taxes and services,<sup>111</sup> scholars like Vicki Been and Lee Fennell have argued that local governments have incentives not to over-regulate land in ways that deter development.<sup>112</sup> There are, however, notorious limits to citizen-consumer mobility as a constraint on local regulation.<sup>113</sup> In particular, the immobility of land and the uniqueness of cities give many local governments "pricing power," meaning that the threat of exit (or non-entry) does not fully constrain them.<sup>114</sup> Many cities have no adequate substitutes, because they create agglomeration economies that rivals cannot duplicate.<sup>115</sup> Living in a big city, for instance, gives residents access to deep local labor markets, allowing them to specialize, search for employers more easily and gain insurance against the failure of any one employer.<sup>116</sup> City residents also benefit from location-specific information spillovers (for instance, contacts and information about being an internet entrepreneur simply by living in Silicon Valley).<sup>117</sup>

Therefore, while the threat of exit puts substantial pressure on suburban governments that generate fewer agglomeration benefits, exit is less of a constraint on the regulatory excesses of big cities.<sup>118</sup>

Cities' financing mechanisms also limit their incentives to de-regulate land to attract migrants. Cities' reliance on property taxes give their residents incentives to build smaller structures on smaller lots to avoid tax liability while receiving 100% of city services.<sup>119</sup> To prevent citizens from escaping average tax burdens through below-average houses, local governments restrict their residents' power to build smaller structures on smaller lots:

<sup>111</sup> Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956).

<sup>112</sup> See note 82.

<sup>113</sup> See generally Richard Schragger, *Consuming Government*, 101 MICH. L. REV. 1824, 1834 (2003) (critiquing Tiebout and Fischel).

<sup>114</sup> See Stewart E. Sterk, *Competition Among Municipalities as a Constraint on Land Use Exactions*, 45 VAND. L. REV. 831, 858-66 (1992).

<sup>115</sup> Clayton P. Gillette, *Local Redistribution and Local Democracy: Interest Groups and the Courts*, 99-100 (2011); Schleicher, *The City*, supra note 70, at 1515-29; Hills and Schleicher, *Zoning Budgets*, supra note 9.

<sup>116</sup> See Schleicher, *The City*, supra note 70, at 1535-40; Daniel B. Rodriguez and David Schleicher, *The Location Market*, 19 GEO. MASON L. REV. 637, 642 (2012).

<sup>117</sup> See Schleicher, *The City*, supra note 70, at 1525-29.

<sup>118</sup> See id.; Schleicher, *I Would*, supra note 98, at 278; Ellickson noted the broad differences between the effects of zoning in unique and non-unique places more than 40 years ago. Ellickson, *Suburban Growth Controls*, supra note 71. Our point here is simply that all places are a little unique and that big cities are particularly so.

<sup>119</sup> Bruce W. Hamilton, *Zoning and Property Taxation in a System of Local Governments*, 12 UR. STUD. 205 (1975).

Local officials have incentives not to attract residents but to drive them away.<sup>120</sup> These fiscal incentives to exclude can be socially harmful, because they undermine agglomeration economies, which depend on people being able to locate near others of their choosing.<sup>121</sup> To the extent that people sort in order to get cheaper public services, they are not locating in their first-best location. Tiebout sorting thus reduces agglomerative efficiency.

None of this is to say that exit does not put any pressure on local governments when making land use decisions. Surely it does. But many local governments have some degree of "pricing power" due to agglomeration economies and the tax system provides incentives to limit development in order to limit the number of people who can access services.

## B. PLANS AS A MEANS TO THE INCREASING THE MARKET FOR PROPERTY: THE ROLE OF PLANS IN REDUCING INFORMATION COSTS FOR BUYERS

Piecemeal zoning restricts housing not only because it prevents city-wide bargaining but also because it reduces the marketability of land through high information costs. Under such a regime, any potential developer has to figure out the preferences of local landowners and how the city's politics works before they can even consider whether buying into a city makes any sense. A comprehensive map that sets out what can be built as-of-right will produce higher property values than a system in which the government would allow the same amount of development through an ad hoc amendment process.

### i. Property law and information costs: from bundles of sticks to the greatest grid

In the most important move in modern property law theory, Tom Merrill and Henry Smith attacked the idea that "property" is best understood as a "bundle of sticks" in which each separate "stick" in the bundle – that is, each of the rights that an owner enjoyed against other individuals – could be sold, used, taken by the government, or regulated by law without affecting the other "sticks."<sup>122</sup> This "bundle-of-sticks" metaphor, dominant in law-and-economics scholarship, transforms property into a species of contract, an infinitely divisible set of claims, customizable

<sup>120</sup> Sterk, *Competition Among Municipalities*, supra note 114, at 836-40.

<sup>121</sup> See Schleicher, *The City*, supra note 80 at 1540-46.

<sup>122</sup> For discussions of the "bundle of sticks" metaphor, see Robert C. Ellickson, *Two Cheers for the Bundle-of-Sticks Metaphor, Three Cheers for Merrill and Smith*, 8 ECONO. J. WATCH. 215 (2011); Eric R. Claeys, *Property 101: Is Property a Thing or a Bundle?*, 32 SEATTLE U. L. REV. 617, 631-38 (2009).



by different users for different purposes.<sup>123</sup> Rejecting this line of thinking root and branch, Merrill and Smith argued that, because property claims run not only against some specific other individual but against the world, property rights' informational content must be simpler than, say, contract rights, which only run against people who sign a contract.<sup>124</sup> Instead, because of their in rem nature, property rights must be packaged in a limited menu of forms, allowing third parties encountering a piece of owned property to know that their responsibilities to the owner take one (or, at most, a few) potential forms.<sup>125</sup> Infinitely varied, contract-style customization of the rights and forms of ownership over a piece of property would increase information costs for third parties, whether travelers or potential purchasers. Various property law principles, such as the *numerus clausus* principle, reduces such customization for the purpose of reducing these information costs.

The same basic intuition applies not only to the rights permitted by the common law of property but also to the rules defining the physical shapes of lots. The easier it is to tell who owns how much land, the easier it is for outsiders to figure out how to behave in relation to it and to determine whether they want to buy it. A clearly demarcated piece of property with boundaries that are easily determined thus should be worth more than a similar piece of property with less clearly demarcated boundaries, as outsiders will be able figure out what it contains without first obtaining specific local knowledge. The cost of investigation is lower and thus the number of potential purchasers is higher.

Dean Lueck and Gary Libecap have confirmed empirically that the existence of easily ascertained boundaries can substantially increase property values.<sup>126</sup> Comparing “metes and bounds” lots, the boundaries of which are defined by irregular and

individualized lines often following natural boundaries like hills, trees and streams, with “rectangles and squares,” a system that originally allocated properties in standardized rectangular and square lots, Lueck and Libecap determined that “rectangles and squares” demarcation results in property values that are roughly 30% higher than “metes and bounds” – an effect persisting 200 years after the original demarcation.<sup>127</sup> Lots defined by rectangles and squares attracted more population, urbanized more quickly, and, despite the legal power of property owners to customize their lots after the initial demarcation, retained their geometrical boundaries long after they were initially demarcated.<sup>128</sup>

Manhattan's street grid suggests a similar effect of simple, uniform, and rectangular lot lines. In 1811, when New York was a city of just under 100,000 people residing almost entirely south of Houston Street, the state legislature authorized three street commissioners to create a uniform street grid covering almost all of Manhattan Island, thereby creating enough lots to accommodate a city with a “greater population than is collected at any spot this side of China.”<sup>129</sup> Avoiding the model set by Pierre L'Enfant's city plan for Washington D.C., which used many diagonal avenues to create “circles, ovals and stars” for monuments and civic buildings, the 1811 street plan also completely ignored Manhattan Island's streams and hills (“Manhatta” was the Lenape word for Island of Many Hills), many of which were later flattened as part of the laying out of the street plan.<sup>130</sup> They also ignored all existing property lines north of Houston, using eminent domain to take property necessary for the streets from land owners.<sup>131</sup>

With few deviations,<sup>132</sup> the result was a uniform grid of numbered streets and avenues that, according to the Commissioners, would lower the cost of construction, as “strait-sided and right-angled houses” were cheap and easy

123 Merrill and Smith, *What Happened*, supra note 17, at 365-70. On the importance of the “bundle-of-sticks” idea to Ronald Coase's analysis of property, see See Smith and Merrill, *More Coasean*, supra note 117, at 80.

124 Apologies for extending the arboreal metaphor. It was almost unavoidable. See, e.g., Merrill & Smith, *More Coasean*, supra note 117, at 81-77 (2012); Merrill & Smith, *What Happened*, supra note 117, at 115; Merrill and Smith, *Numerus Clausus*, supra note 16; Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 COLUM. L. REV. 773 (2001). See also Henry E. Smith, *Property as the Law of Things*, 125 Harv. L. Rev. 1691 (2012); Henry E. Smith, *On the Economy of Concepts in Property*, U. PENN L. REV. (2012); Henry E. Smith, *Property and Property Rules*, 79 N.Y.U. L. REV. (2005); Henry E. Smith, *Exclusion and Property Rules in the Law of Nuisance*, 90 Vir. L. Rev. 965 (2004); Henry E. Smith, *Exclusion v. Governance: Two Strategies for Delineating Property Rights*, 31 J. L. STUD. 453 (2002).

125 *Id.* at 93-99; Merrill & Smith, *Numerus Clausus*, supra note 17, at 8-20; Merrill & Smith, *What Happened*, supra note 16, at 365; Merrill & Smith, *More Coasean*, supra note 17, at 89-93; Merrill & Smith, *Numerus Clausus*, supra note 17, at 8.

126 Gary D. Libecap & Dean Lueck, *Land Demarcation Systems* in RESEARCH HANDBOOK ON THE ECONOMICS OF PROPERTY 257 (Kenneth Ayotte and Henry E. Smith ed. 2012); Gary D. Libecap and Dean Lueck, *The Demarcation of Land and the Role of Coordinating Property Institutions*, 119 J. POL. ECON. 426 (2011); Gary D. Libecap, Dean Lueck & Trevor O'Grady, *Large Scale Institutional Changes: Land Demarcation Within the British Empire*, NBER Working Paper No. 15820 (2010).

127 Libecap & Lueck, *The Demarcation of Land*, supra note 126, at 432-50. Libecap and Lueck relied on a natural experiment in Ohio, part of which was governed by Virginia's system of “metes and bounds” and part, by the standardized squares created by the Northwest Ordinance of 1785. They note that, for extremely rough topography, the data suggest that metes and bounds may outperform rectangles and squares. *Id.* at 450. See also Gary D. Libecap, Adrian Lopes & Dean Lueck, *Land Demarcation and Agriculture in 19th Century California*, available at [http://www.econ.ucsb.edu/~neira/11calworkshop\\_files/Lopes.pdf](http://www.econ.ucsb.edu/~neira/11calworkshop_files/Lopes.pdf)

128 See Libecap, Lueck and O'Grady, supra note 126, at 7.

129 THE GREATEST GRID: THE MASTER PLAN OF MANHATTAN 1811-2011 27, 41 (Ed. Hilary Balon, 2011).

130 *Id.*

131 GREATEST GRID, supra note 129, at 16-18, 37-40. They used assessments on properties that went up in value to pay for cost of compensation.

132 Most of today's deviations from a perfect grid – e.g. Central Park, Broadway north of 23rd street, Madison Square, superblocks for developments like Lincoln Center – were not part of the original map. There were a few exceptions – a military parade, a market place, and some accommodations for existing roads. See *id.* at 35-36.



to build.<sup>133</sup> The grid had another “unstated advantage”: It promoted “an easy format for subdivision and development of land,” because the rectangular blocks virtually assured rectangular lots.<sup>134</sup> Rectangular lots made property rights easy to ascertain, reducing property disputes between neighbors.<sup>135</sup> And it made it easier, as grid surveyor John Randel noted, for outsiders to engage in the “buying, selling and improving of real estate.”<sup>136</sup> By creating many lots of relatively uniform size and shape that could be traded as commodities by a large number of investors and developers, the grid fostered a boom in the real estate market.<sup>137</sup> Standardized lots allowed these buyers and sellers to rely on easily obtained information in the deeds and maps, surveys, and records held by the Real Estate Exchange.<sup>138</sup> Studying border areas in Manhattan – that is, areas that were on the grid and neighboring areas that were not – Trevor O’Grady confirmed that properties on gridded blocks are both more valuable and more densely developed.<sup>139</sup>

In sum, standardized forms of property increase property’s value in part because they are more easily sold to a larger market of people. This basic insight suggests how ex ante comprehensive planning expands the market for development in cities.

## ii. The case for plans as a method of reducing information costs and increasing the marketability of land

Rectangular boxes in the air above each lot that are defined by local zoning laws should have the same benefits as rectangular lots. Where local zoning laws define plain as-of-right entitlements to build, it is easier for outsiders to determine the value of lots. Simplicity and predictability in zoning enlarge the market for urban land. In contrast, seriatim and parcel-specific zoning amendments that custom-tailor the uses and bulk for each lot shrink the market.

<sup>133</sup> Remarks of the Commissioners (1811), in *supra* THE GREATEST GRID, *supra* note 129, at 40.

<sup>134</sup> GREATEST GRID, *supra* note 129, at 87.

<sup>135</sup> Robert C. Ellickson, *The Law and Economics of Street Layouts: How a Grid Pattern Benefits a Downtown*, 64 *Ala. L. R.* 463, 479 (2013). See also Libecap and Lueck, *Coordinating Property Institutions*, *supra* note 120, at 446.

<sup>136</sup> As quoted in JOHN WILLIAM REPS, *THE MAKING OF URBAN AMERICA: A HISTORY OF CITY PLANNING IN THE UNITED STATES* 299 (1965).

<sup>137</sup> GREATEST GRID, *supra* note 129, at 87.

<sup>138</sup> *Id.* at 88-90.

<sup>139</sup> Trevor O’Grady, *Spatial Institutions in Urban Economies: How City Grids Affect Public Goods, Density and Development*, (draft paper 2013, on file with author).

Custom-tailored, parcel-specific zones defended by Bill Fischel and Robert Nelson impose very high informational costs on buyers and developers. Imagine a municipality that followed a pure-Nelson/Fischel style zoning process. There would be no as-of-right building at all. If a developer wants to build, she has to negotiate with the local government by proposing a specific use for that lot, paying the city off for any negative effect on incumbent neighbors.<sup>140</sup> Nelson and Fischel argue that the developers’ proposals and local governments’ demands would efficiently reveal the relative preferences of neighbors and non-resident buyers or renters.

But they ignore the market-shrinking effect of such custom-tailored zoning. The market for development would be limited to developers and investors with inside knowledge of what the local government and neighbors would likely charge for the proposed development. This requires developers to determine residents’ idiosyncratic tastes for light, air, aesthetics, subjective value for the status quo. Developers also need expertise in local politics and bureaucracy. Just as bazaars where all prices are negotiated are intimidating to tourists, cities where all building rights are negotiated parcel by parcel are costly for developers. Nelson’s and Fischel’s parcel-specific amendments create information costs that reduce the value of property because these costs decrease real estate’s being traded as a commodity in an impersonal market.

Fischel’s and Nelson’s proposal, in other words, can be attacked on the same grounds that Smith and Merrill invoke against the “bundle of sticks.”<sup>141</sup> Property law balances the private desire for customization against the information costs that customization imposes on outsiders. Zoning law must likewise balance these benefits and costs of customization. Negotiations between a landowner/developer and neighboring land owners (represented by the local government) may lead to an optimal amount of development in that particular case, as the cost

<sup>140</sup> Lest you think this ridiculous, remember that cities have increasingly devoted land to “holding zones,” or areas with no right to build, so that they can create conditions on all building. BEEN & EL-LICKSON, *supra* note 24, at 90. Even in big cities, we see officials acting as if all building needs their approval. Julia Vitullo-Martin described the reign of former New York City Planning Department Director Amanda Burden thusly: “Development has become a game of second-guessing... What will Amanda think of my project? What will I need to compromise on?” ... There really doesn’t seem to be any true as-of-right development anymore.” Julie Satow, *Amanda Burden Wants to Remake New York. She Has 19 Months Left*, N.Y. TIMES, May 18, 2012, at MB1. In Washington, a city council member has proposed that even as-of-right building of certain densities be subject to community review. Mark Lee, *Doing to development what broke down booze*, WASH. BLADE, Apr. 13, 2013 (discussing a proposal by “queen of the NIMBYs” Council Member Mary Cheh).

<sup>141</sup> Merrill and Smith, *More Coasean*, *supra* note 17, at 588-90. Put another way, Fischel and Nelson’s ideas are explicitly derived from Coase and they are thus subject to the same critique that Merrill and Smith make of Coasean thinking about property.



of negotiating is low. But the general practice of such ad hoc bargaining increases the costs borne by third parties who might otherwise have invested in the jurisdiction but are deterred by the information costs imposed by the zoning system as a whole. By shrinking the market of buyers as well as preventing scale economies in construction,<sup>142</sup> these information costs reduce overall property prices within any local government governed by Fischel's and Nelson's bargaining regime. The implication is that lots with as-of-right building rights based on only a few simple zoning categories should have higher property values and more development than lots on which the city allows the exactly identical amount of building through a seriatim amendment process.<sup>143</sup>

There is no systematic study akin to Libecap's and Lueck's for lot boundaries that measures the gains from the standardization of use rights. Anecdotal evidence, however, suggests that the gains from reducing zoning uncertainty are sizeable. As the Mayor of Lakewood, Colorado noted,

"[r]ezonings are deadly. ... If we're going to track investment, there's one thing that's more important than anything else right now and that's certainty. What level of certainty does the investment have once it enters your community?... The important message here is that the entitlements are in place. So if an investor wants to come in, they don't have to go through an expensive and unpredictable zoning process, whose outcome is always less than certain."<sup>144</sup>

There is undoubtedly a tradeoff between the gains from reducing third party's information costs and the gains from

<sup>142</sup> This effect is not only on investors in property, but applies to building contractors. Barry LePatner has shown that the construction industry largely consists of small operators and has not seen the corporatization we have seen in other industries. BARRY B. LEPATNER, *BROKEN BUILDINGS, BUSTED BUDGETS: HOW TO FIX AMERICAN'S TRILLION-DOLLAR CONSTRUCTION INDUSTRY* 49-56 (2007). One reason for this are wildly varying zoning and building code regulations. The information cost of learning local rules, interpretations of local rules, and workarounds are sufficiently high as to make working across jurisdictions costly for construction firms. The result is less efficient scale and higher costs. *Id.* at 123-131.

<sup>143</sup> One other implication is that having a few, regular categories is better than having lots of specific-to-location rules. Zoning rules have gotten far more complicated over time. The zoning map in Euclid had only 6 categories. See Toll, *supra* note 22, at 216. By contrast, New York City has hundreds of different designations to deal with different zoning categories, special purpose districts, commercial overlay districts and their interactions. *Zoning Districts: Introduction to Zoning Districts*, NYC Planning, available at <http://www.nyc.gov/html/dcp/html/zone/zonehis2.shtml>.

<sup>144</sup> Bob Murphy, Lakewood Mayor Bob Murphy talks about the city's plans, *DEN. BUS. J.* Feb 18, 2011, <http://www.bizjournals.com/denver/print-edition/2011/02/18/lakewood-mayor-bob-murphy-talks-about.html?page=all>.

the fine-grained lot-specific information acquired through custom-tailored zoning. Having a few types of zoning (e.g. just residential, commercial and manufacturing with common rules about uses and heights for each) will reduce third-party investor information costs. But such parsimony has a cost with respect to tailoring lot regulation to conditions peculiar to a neighborhood or block.

The problem with a zoning process that lacks binding comprehensive plans, however, is that the city cannot practically make such a tradeoff in favor of lower information costs and less custom-tailoring. To reduce information costs through comprehensive planning, such plans have to be difficult to change even when there could be gains from tweaking the plan to improve regulation of a specific lot. None of the parties immediately involved in an effort to custom-tailor a lot's zoning, however, have any incentive to safeguard the general value of transparent zoning. Neither the immediate neighbors resisting a development that the comprehensive plan allows nor the developer seeking a special waiver of a restriction that the plan imposes will internalize the general value of zoning transparency for third parties not involved in the transaction.<sup>145</sup> Thus, absent some legal mechanism by which the city can tie its hands, there is always a hydraulic pressure by parties with the most immediate interests to deviate from plans.

Philadelphia's revision of its zoning code illustrates the dilemma. The revision made the city's zoning regime easier to navigate by reducing the number of use categories and making zoning rules easier to understand.<sup>146</sup> The City Council, however, almost immediately began undermining these advantages through changes allowing lot-specific alterations, as has the Board of Zoning Appeals by continuing to grant variances at a high rate.<sup>147</sup> Parcel-specific map amendments and variances would certainly allow fine-tuning that might improve the

<sup>145</sup> Opponents of building projects therefore oppose efforts to remove discretion from zoning policy. For instance, Madison, Wisconsin's zoning map was redrawn last year to "streamline...the approval process" so that infill development could proceed with public review. A few months later, an opponent of a small apartment development was shocked: "The developer could do basically whatever he or she wanted as long as it fit the letter of the law in the zoning code." Mike Ivy, *Neighbors of building projects find influence diminished by new zoning code*, *CAP. TIMES*, May 8, 2013, [http://host.madison.com/news/local/writers/mike\\_ivey/neighbors-of-building-projects-find-influence-diminished-by-new-zoning/article\\_1202a018-ed6e-522c-96fb-e9cfc52b1a53.html#ixzz2wCDoVjBU](http://host.madison.com/news/local/writers/mike_ivey/neighbors-of-building-projects-find-influence-diminished-by-new-zoning/article_1202a018-ed6e-522c-96fb-e9cfc52b1a53.html#ixzz2wCDoVjBU).

<sup>146</sup> Alan Greenberger et al. *One-Year Zoning Code Review: A Report to the City Council, Office of the Mayor of Philadelphia* (2013).

<sup>147</sup> See *id.* (noting continued stream of variances); Holly Otterbein, *Philadelphia City Council already tinkering with massive zoning overhaul*, *NEWSWORKS*, Nov. 8, 2012, <http://www.newsworks.org/index.php/local/philadelphia/46732-philadelphia-city-council-already-tinkering-with-massive-zoning-overhaul> (noting immediate efforts by City Council to change zoning code.).



regulation of a specific lot, but the advantages of that fine-tuning could be outweighed by the overall losses from a more opaque land-use process.

In this sense, plans are city-wide contracts creating commitments across time. Cities can face time inconsistency in their preferences about development. Setting out development possibilities *ex ante* creates a benefit for all lots in the city by promoting the marketability of city land to third parties, but any given individual *ad hoc* deviation from that commitment could increase value for the city with respect to that specific lot. A binding plan or map allows a local government to limit its power to approving amendments, even those amendments that make sense when they are proposed, in the service of reducing information costs borne by investors-developers overall.

While this logic does not tell us exactly when to rely on parcel-specific amendments or comprehensive plans, it should be clear that Fischel and Nelson are wrong to think that there are never non-distributional differences between allocating the right to build to a city and allocating the right to build to a developer. There are differences, and the differences lie in the cost of acquiring information about the value of a piece of property. The decreased commodification of property caused by a system of holding zones and amendments means there is a smaller market of buyers and developers of property.

### III. Mechanisms for citywide deals and greater certainty in land use

The revised defense of planning offered here does not rest on planners' superior information or Olympian impartiality about how an ideal city ought to grow. Instead, we offer a defense based on local governments' needs to make binding commitments across neighborhoods and time that the ordinary legislative process does not provide. Implementing plans, therefore, means creating legal mechanisms for making such commitments. Plans must be "sticky" in the sense that they must resist the individual legislators' constant temptations to defect from the commitment when pressured by neighborhood activists. They also must resist pressures to fine-tune the plan from developers or neighbors whose *ad hoc* proposals threaten to make the entire process for future and potential buyers and developers more opaque.

The scope, force, and beneficiaries of the planning mandate, therefore, ought to be tailored the need to overcome such temptations to defect from planning commitments. Suggested below are some examples of plans that address the weaknesses of the local legislature's bargaining capacity. The suggestions are neither exhaustive nor exclusive, but merely illustrative examples of how a plan can provide an inter-neighborhood structure and trans-jurisdictional transparency to land-use politics that an unaided legislature might not be capable of providing.

#### A. THE PLAN AS CITY WIDE DEAL: BUDGETING PRINCIPLES FOR PLANNERS

Recall that local legislatures typically lack party leadership capable of forcing individual members to accept local costs for the common good. This is especially so when those costs are inflicted over a lengthy period of time during which each member is uncertain that their sacrifice will later be repaid. The problem is acute with maintaining an adequate housing supply insofar as no member has a reason to welcome new housing into their district absent assurance that their colleagues will do the same.

One benefit of plans can be to facilitate cross-neighborhood bargains by giving the parties confidence that costs will be equitably distributed and city-wide benefits will ultimately be achieved. It is helpful to think of such a plan as a "zoning budget," in which regulatory restrictions are the costly item being allocated among neighborhoods. The purpose of such a "zoning budget" is to make cross-neighborhood commitments to limit such restrictions that, in the absence of partisan leadership, are difficult to supply.

Such a budget would specify an overall goal of locally undesirable land uses, or simply quantity goals for different types of housing, for the entire jurisdiction. It would also allocate those land uses across neighborhoods, seeking to allay concerns from councilmembers about being dumping grounds for new construction and to capture the benefits of cross-neighborhood trades. Finally, the budget would include an enforcement mechanism, creating some sort of presumptive entitlement for developers to build the budgeted use until the city-wide goal is met.



None of these elements requires special apolitical expertise on the part of planners. The point is not that the plan represents some higher wisdom about the best uses of land in a city. Instead, the budget's goal simply solves a collective action problem from which local legislators otherwise suffer, because the goal is not focused on any particular neighborhood. The mayor's ordinary political incentives to make accurate demographic predictions should insure that the housing goal will be superior to a bargaining free-for-all in which goods are excluded everywhere. The advantage of the planners is simply that have a citywide constituency and, therefore, can be trusted to be impartial among neighborhoods.

The critical challenge is designing an enforcement mechanism that can resist the centrifugal tendencies of aldermanic privilege. Once developers propose any specific new structures for particular neighborhoods, the neighbors so targeted have an incentive to enlist a universal coalition against the proposal. Can any enforcement mechanism resist these pressures?

As we have explained elsewhere, "issue bundling" has been a successful method for making generally beneficial policies that have district-specific costs.<sup>148</sup> The legislature can overcome its own centrifugal tendencies by delegating to an extra-legislative actor the job of bundling together locally controversial district-specific decisions with general policies that the legislature as a whole endorses. The bundle can overcome NIMBY pressures to the extent that the entire scheme relieves individual legislators of political pressure to unbundle the package and force a vote on the site-specific decision. Congress' Base Closure and Realignment Act (BCRA) is an example of such a successful bundle: By delegating the closing of obsolete military bases to the executive branch in the form of a Base Realignment and Closure Commission, Congress gave political cover to individual congresspersons who might otherwise have felt pressured to unravel the base closing plan on behalf of constituents wanting to preserve jobs resulting from wasteful military bases.<sup>149</sup>

A similar system of issue bundling might prevent NIMBY-minded neighbors from overturning a comprehensive housing plan. Planners can act as an extra-legislative body, charged

with bundling together many site-specific up-zoning decisions into some more general scheme. In theory, an individual legislator could reverse the former by proposing the repeal of the latter. In practice, however, the general scheme would likely provide sufficient political cover to reduce the incentives of other legislators to go along with the proposal or even induce a legislator affected by the specific upzoning to forbear from making the proposal at all.

As an example, of such a successful zoning issue bundle, consider New York City's creation of a Special Theater Subdistrict in 1982. Adopted in the wake of the demolition of the historic Morosco and the Helen Hayes Theaters, the Subdistrict initially subjected thirty-six theaters to a special administrative process before they could demolish their structures, while simultaneously compensating them with transferable development rights ("TDRs") that could be sold to lots contiguous to or across a street from the theater.<sup>150</sup> The City eventually land-marked 28 theaters within the Subdistrict, but the theater owners argued that, absent some compensation, they still would not produce plays in the preserved buildings. Enlisting the Broadway Initiative, Actors Equity, and other theater-workers' unions, these owners pressed for expansion of the use of TDRs to create incentives for staging dramatic productions. As approved by the City Council in 1997, the Subdistrict's TDR system allowed theater owners to transfer their unusable air rights to any lot within the Subdistrict. Unlike the TDRs provided under the City's ordinary land-marking law, the Subdistrict's TDRs could be transferred "by certification" rather than through a special permit process, meaning that the Planning Commission would have no discretion to turn down the transfer so long as the transfer increased the Floor-Area Ratio ("FAR") of the receiving site by no more than twenty percent of the site's "baseline" FAR limit. In return for the right to sell air rights to other lots in the Subdistrict, the theater owners would have to continue the use of the property as a legitimate theater and contribute ten dollars per square foot of transferred floor area to a Theater Subdistrict Fund.<sup>151</sup>

In effect, the theater owners received the unilateral power to sell substantial new building rights within prime commercial real estate on the West Side of Manhattan. Eventually, theaters

<sup>148</sup> Hills & Schleicher, *Zoning Budget*, *supra* note 9.

<sup>149</sup> *Id.* at 108-113.

<sup>150</sup> Michael Kruse, *The Special Theater Subdistrict: Culture, Politics and Economics in the Creation of Transferable Development Rights*, 40 *URB. LAW.* 95, 11-112 (2008).

<sup>151</sup> *Id.* at 115-117.



transferred the right to build 450,000 square feet through the Subdistrict.<sup>152</sup> Unsurprisingly, the neighbors of this new construction and their elected representatives launched bitter legal and political attacks on the transfers of air rights, arguing that such extra construction reduced their property values and the quality of their neighborhood. But the non-discretionary character of the system set up by the Subdistrict law -- transfer by certification -- insured that the legal challenges could succeed only if the law itself were deemed an unconstitutional deprivation of property.

The courts' rejection of such constitutional challenges left only political avenues available to the aggrieved neighbors. But their efforts to modify or repeal the Subdistrict law were stymied by the law's clever use of issue-bundling. By tying together the issues of expanding the supply of commercial space with protection of New York City's theater industry, the law insulated the former from political attack. Mayor Ed Koch seemed to care little about preserving legitimate theater, but he supported the Subdistrict law as a convenient mechanism for enlisting allies in the theatrical community for expanding commercial real estate. "Broadway's devoted constituency" provided "political capital" with which city council could resist pressures to repeal the law.<sup>153</sup> Political leaders like Manhattan Borough President Virginia Fields railed against the effects of the transferred air rights on abutting land, but neither she nor anyone else placed repeal of the entire program on the City Council's agenda. Manhattan Community Board 5, representing the Hell's Kitchen/Clinton area where the extra construction was transferred, ruefully acknowledged how the tying of commercial real estate to the cause of theaters immunized the former from effective political attack.

Could cities engineer a similar bundling of issues to protect housing construction from NIMBY pressures? The Special Theater Subdistrict suggests some generalizable lessons for the design of an effective enforcement mechanism. First, the Subdistrict law provided general benefits -- continued operation of structures for legitimate theatrical productions and theater owners' \$10-per-square foot contribution to the theater trust fund -- that could provide political cover for politicians from

accusations that they were developers' stooges. Second, the siting decision was inextricably linked to this general benefit. Nothing in the system provided any venue for neighbors to focus exclusively on the siting decision, because the Subdistrict law did not permit any administrative second-guessing of the general policy of transferring air rights. The neighbors, therefore, were placed in the awkward position of having to support repeal or modification of the entire scheme rather than simply rejection of the scheme's application to their neighborhood. Third, although the ratio of benefits was ratified by the City Council, it was rooted in formulae devised by planning staff and voted on as a bright-line rule not subject to theater-by-theater administrative adjustment. Finally, political opposition was minimized through the careful drawing of the Subdistrict's boundaries, carving out the most potentially powerful opponents like unionized workers in the Garment District.

We do not pretend to have the political expertise to devise a foolproof bundle appropriate for all cities or even any particular city. Leaving that task for the pros, we offer instead the following rough outline of how the problem of housing could be addressed with an effective enforcement mechanism in the spirit of the Theater Subdistrict Law.

As with the Theater Subdistrict, the basic enforcement mechanism should bundle some generally popular city-wide benefits with locally unpopular site-specific up-zonings. With housing the traditional benefit is affordable housing, promoted through some sort of system of inclusionary zoning, although it could just as easily be transportation benefits or tax breaks. Inclusionary zoning systems differ importantly in their details, but their essential characteristic is that, in return for some sort of right to construct market-rate units, developers provide units sold or rented below market rate to persons who otherwise could not afford the housing.<sup>154</sup>

The familiar problem with inclusionary programs is that their mandates on developers act as a tax on new housing construction, deterring developers from constructing new market-rate units. The absence of such market-rate units prevents current occupants from leaving their existing market-rate housing,

<sup>152</sup> Vicki Been & John Infranca, *Transferable Development Rights Programs: "Post-Zoning"?* 78 BROOKLYN L. REV. 435, 448 (2013).

<sup>153</sup> *Id.* at 117-28.

<sup>154</sup> Jenny Schuetz, Rachel Meltzer, & Vicki Been, *31 Flavors of Inclusionary Zoning: Comparing policies from San Francisco, Washington, D.C., and Suburban Boston* (Furman Center for Real Estate, Working Paper 08-02).



thereby preventing aspiring renters and owners from moving into these existing units as they “filter” downwards with the expansion of the housing supply.<sup>155</sup> Indeed, as Robert Ellickson noted more than thirty years ago, inclusionary requirements can be a covert way of excluding genuinely affordable housing, if the neighbors impose them for the purpose of driving away most new development while camouflaging their purpose with a few trophy units of affordable housing to show their lack of animus towards the poor or racial minorities.<sup>156</sup> Courts in New Jersey have expressly endorsed Ellickson’s suspicion about inclusionary zoning as an exclusionary tool, noting that inclusionary zoning that does not provide developers with sufficient up-zoning benefits “provides municipalities with an effective tool to exclude the poor by combining an affordable housing requirement with large-lot zoning.”<sup>157</sup>

Determining the ratio of inclusionary to market-rate units, however, presents the legislature with a dilemma. On one hand, inclusionary units provide the political cover necessary to bring along the votes of the entire legislature for greater density, the same way pork-barrel spending can grease passage of important laws. On the other hand, legislators might be pressured into demanding an unrealistic ratio by neighborhood activists seeking to stop “incompatible” (read, any substantially denser) residential development. Even though the legislature as a whole might agree to increase the housing supply, with affordable housing providing political cover, they also are at risk of being waylaid by NIMBY neighbors intent on simply stopping new development, using affordable housing requirements instrumentally to drive up the cost of development.

Planners provide an escape from this dilemma. Rather than attempt to devise the ratio themselves, the local legislature could delegate the task to an expert planning staff led by the mayor. Like a military base-closing commission, the staff would provide additional political cover for legislators in sensitive districts, allowing them to endorse the general idea of inclusionary zoning while feeling free to rail against the formula that the planning staff ultimately presents. These areas where the plan proposes new development can be spread around the

<sup>155</sup> See, e.g., Richard Green, *Metropolitan-Specific Estimates of the Price Elasticity of Supply of Housing, and Their Sources*, 95 AM. ECON. REV. 336 (2005) (describing the economics of filtering).

<sup>156</sup> Robert C. Ellickson, *The Irony of “Inclusionary” Zoning*, 54 S. CAL. L. REV. 1167 (1981).

<sup>157</sup> *In re Adoption of N.J.A.C. 5:96 & 5:97, by the N.J. Council On Affordable Hous.*, 6 A.3d 445, 461 (N.J. Super. Ct. App. Div. 2010).

city to avoid suspicions of dumping. Further, planners can help break up an anti-development coalition by designating general criteria for growth areas where developers would presumptively be entitled to build upon proffering the staff-determined amount of affordable housing. This would make opposition take the form of opposing the goodies as well as the development. Finally, to ensure that the legislative attacks go no further than railing, the legislature could agree to debate the planning staff’s proposal under a closed rule barring amendments: The price of opposition would thus be scuttling the entire deal.<sup>158</sup>

Affordable housing is far from the only goodie that could be tied in fixed packages for zoning approvals. We particularly like the idea of tying packages of transportation upgrades to increases in the zoning envelope along the path of the upgrade. For instance, a Mayor could propose to the city council the development of an express train or simply greater frequency on a subway line (or the development of a rapid bus transit line) but state that the upgrades are contingent on a zoning amendment allowing increased development along the entire line. The Council could, of course, order the Mayor to engage in the transportation upgrade even if it does not approve the set package of zoning changes, but the Mayor’s ability to control the operation of the transportation system (and the threat that she would not let the project work without the full package) may be enough to hold together a whole set of zoning changes against opposition in individual neighborhoods. Further, if some form of value capture is used, such that revenue from new construction is being used to fund the transportation upgrades, the desire among residents to get the transportation upgrade may be enough to make the council approve the entire package of zoning changes.<sup>159</sup>

Planners, in short, can advance the zoning budget by relieving the legislature of the politically sensitive task of designing the zoning budget tradeoffs, presenting the legislature with “take-it-or-leave-it” packages that are designed to be taken rather than left.

<sup>158</sup> *Planners’ impartiality among neighborhoods plays a critical role in making this work, but not in the way that planning advocates have suggested. The planners’ impartiality is important not because the plan embodies the disinterested ideals of the community. Instead, impartiality is important because the legislature needs an honest broker to insure that the mayor does not use the plan to retaliate against his or her political enemies. This may require insulating the planning staff from political removal, so the legislature can receive this assurance.*

<sup>159</sup> “Value capture” involves funding infrastructure improvements through taxes or special assessments on properties near the improvement, “capturing” the increased value created by the improvement. See Jeffrey Baltrusak, *The Core Plan or How I Learned to Stop Worrying and Love the Central City: Shifting Control of Regional Mass Transit to the Central City*, 5 Pierce L. Rev. 271, 284 (2007)



## B. STANDARD “PRICE SHEET” FOR DENSITY INCREASES

A second proposal comes from the insight of recent property theory that customization of property rights imposes costs on third parties. The idea that custom-tailored zoning erodes value by generally impeding the smooth functioning of land markets suggests that a comprehensive plan might be designed to serve the same function as New York City’s 1811 grid. The grid standardized the packages in which real estate are purchased to rectangular city blocks of roughly 200 by 780 feet,<sup>160</sup> typically sold off in smaller rectangles divisible by 25 feet in width. Such standardization of use rights is impractical, because the ideal use of land varies more widely than the ideal parcel size did in the nineteenth century.<sup>161</sup> The ideal intensity of uses for different neighborhoods varies radically, ranging from the quiet residential brownstone to the noisy and smelly factory.

Nevertheless, even though zoning should distribute use rights with less uniformity than parcel size and assign different packages of use rights for lots in different neighborhoods, the rights for each neighborhood could still be defined transparently, without customizing the rights for each lot within each neighborhood based on the owner’s bargains with the City. Such uniform definitions of use rights would allow buyers to have a clearer idea of the uses accompanying title, thereby facilitating a cheap and quick market for real estate. By requiring that “[a]ll [zoning] regulations shall be uniform for each class or kind of buildings throughout each district,” Section 2 of the Standard Zoning Enabling Act could be understood as serving the same end as the *numerus clausus* principle, facilitating the marketability of land by constraining the multiplicity of customized rules.

A comprehensive plan should serve the function of such a customization-limiting constraint on zoning. One could imagine such a plan as a standard price sheet for use rights,

<sup>160</sup> The north-south sides of the blocks under the 1811 plan varied between 181 and 206 feet but the average was almost exactly 200 feet. The east-west sides averaged 780 feet varied much more, ranging from as short as 610 feet to as long as 920 feet. According to Richard Howe, the only blocks that could be perfectly divided into rectangles evenly divisible by 25-foot wide lots are the 650-foot blocks between First and Second Avenues and 800-foot blocks between Sixth and Twelfth Avenues. See Richard Howe, Notes on 19th Century Lot Sizes, Gotham Center for New York City History, available at <http://www.gothamcenter.org/blotter/?p=811>.

<sup>161</sup> Until building technology made it economically feasible to construct a tower using a substantial portion of a city block, there was little need to face the excruciating holdout problems accompanying the re-assembly of many 25 x 100-foot rectangles into a super-sized lot. Under modern building conditions, when the ideal lot size might vary much more radically, some sort re-aggregation device other than voluntary transactions or eminent domain might make sense. See Michael Heller & Roderick M. Hills, Jr., Land Assembly Districts, 121 HARV. L. REV. 1465 (2008).

defining with minute detail the conditions entitling a parcel’s owner to a particular land use just as a menu specifies the price of an entrée.<sup>162</sup> Current uses and uses “as of right” would have a price of zero, as they could be unconditionally undertaken. Uses that were conditional on the fulfillment of some condition – building a plaza, donating money to a mass transit trust fund, widening a road, installing sewage lines, and so forth – would specify with precision the exact sort of amenity to install or the precise sum of money to pay for the right to build. Such a plan might also contain a timetable, specifying a schedule for enlarging uses or changing prices upon the occurrence of certain contingencies. The plan, for instance, might specify that if the vacancy rate for rental housing declines to a particular level, the permissible floor-area ratio for residential apartments shall automatically increase by a particular percentage. The critical characteristic of such an idealized plan-as-uniform-price sheet is transparency: Anyone could see the uses accompanying title to land without haggling or making an ad hoc offer to enlarge the uses in exchange for an unlisted amenity.

While obviously an impractical fiction, such an idealized price sheet is nevertheless a useful heuristic to exhibit the costs of customization. The advantage of transparency is that it allows land use markets to dispense with the costly machinery of negotiation – the lawyers, consultants, fixers, lobbyists, and accompanying hearings and negotiations – that clog the process by which land is bought and sold.<sup>163</sup> Further, it allows purchasers to make comparisons between investment opportunities in different cities. Like the expensive and time-consuming title searches obviated by a simple grid, the expenses of the zoning negotiation game are a deadweight loss that serves neither the local government nor the real estate owner in a world in which the plan revealed the local government’s ideal allocation of uses. The complaints of local government officials and landowners alike suggest that haggling at the zoning bazaar comes at a considerable cost. As William Stern, a former Chairman and Chief Executive of the New York State Urban Development Corporation noted:

<sup>162</sup> Lee Anne Fennell proposes something similar to this, although less tied to political process and with more sophisticated pricing mechanisms. LEE ANNE FENNEL, THE UNBOUNDED HOME (2009) (proposing “entitlements subject to self-made options” as methods of pricing externalities).

<sup>163</sup> For an account of the magnitude of these expenses in New York City, see Eric Lipton, Lobbyists Putting Muscle Behind Real Estate, N.Y. TIMES, Jul. 11, 2000.



“complying with New York’s Kafkaesque zoning code and its banana-republic process for approving building projects requires first and foremost a Herculean exercise in politics. It is hugely time-consuming and very expensive, not only because time is money, but because a developer has to schmear people, both publicly and sometimes not so publicly, every step of the way. One high-powered city developer put it bluntly: ‘You have to be a conniver to get things done.’”<sup>164</sup>

Note that gist of Stern’s and other’s complaint is not simply or even primarily that the process of individualized zoning negotiations is corrupt. Even honest negotiations are, per Stern, “time-consuming and very expensive.” This cost does not merely or primarily consist of fees for fixers and delay in breaking ground. Like the costs of an opaque title system, in which the expense of hearing a title search might be small potatoes compared to the burden of transactions foregone because of legal uncertainty, the main costs of an opaque zoning system may well be the unseen and difficult-to-measure loss of bidders, as buyers drop out of the market, discouraged by their capacity to determine what land is really worth. The dominance of a few insiders who can bear the scale economies required for defining use rights leaves projects that are too small to bear the freight of land-use negotiating process unbuilt.

Why not dispense with this cost by plainly stating up front what can be built? There are three potential objections, one rooted in politics, another in the cost of determining best uses, and a final one from constitutional law.

First, complete transparency might trigger the collective action problem described in Part II(A)(2) above. Neighbors are better organized than prospective users of proposed uses, such that plain rules clearly describing land-use entitlements would trigger activism by the former but not the latter. A plain statement that some existing structure could, for a price, be replaced by a bulkier

or noisier structure upon fulfillment of specific conditions might cause the neighbors to shut down any such opportunities for additional development even though the benefits of the change in the status quo exceed the costs.

Second, in a world without such plan transparency, developers’ custom-tailored proposals to change the land-use status quo might reveal potentially useful information that the local government might otherwise forgo. Local governments typically do not know the developer’s bottom line, because developers do not open up their books to the public. The value of a change in the status quo, therefore, is unknown to local officials. Such ignorance might have both undesirable distributive and allocatively inefficient consequences. If the uniform price sheet sets the price “too low” such that the developer pays less than the value of a new land use, then the money left on the table might be regarded as a distributively unjust (at least if one presumes that the community is entitled to new value created by a change in the land-use status quo). If the price sheet sets the price too high, then developers might be deterred from building even when the benefits of going forward with a new structure exceed the costs imposed on the local government’s constituents.

Neither of these objections, however, is fatal to the idea of increasing the transparency of zoning through a comprehensive plan. The need to keep land’s development potential opaque to mute neighborhood protests, for instance, assumes that there is no “zoning budget” enforcement mechanism to keep NIMBY pressures in check. The plan itself can serve as such a measure, as described above in Part III(A). Moreover, even if one worried that complete transparency would add to the political advantages of neighbors, one could modify the “price sheet” concept without wholly abandoning the advantages of a transparent market for land uses. The price sheet, for instance, could specify the land-use intensity not for particular parcels but rather for a neighborhood, thereby diluting opposition that might mobilize against a particular level of intensity on a particular block. Such a diffuse specification of a neighborhood’s average residential density would provide less information to potential buyers, but it would provide more than a zoning system that left the question entirely up for grabs. If the plan specified that proposals would be presumptively

<sup>164</sup> William J. Stern, *Why Gotham’s Developers Don’t Develop*, CITY JOURNAL, Autumn 2000, available at [http://www.city-journal.org/html/10\\_4\\_why\\_gothams.html](http://www.city-journal.org/html/10_4_why_gothams.html). For similar complaints, see Roger Starr, *How To Fix New York’s Heavy-Handed Zoning Laws*, MANHATTAN INSTITUTE Civic Bulletin No. 12 April 1998, available at [http://www.manhattan-institute.org/html/cb\\_12.htm](http://www.manhattan-institute.org/html/cb_12.htm); Peter D. Salins, *Simple Rules for a Complex Society: Redesigning New York’s Zoning* (Winter 1993), available at <http://www.city-journal.org/article01.php?aid=1149>.



approved if they moved the neighborhood closer to the level of intensity described in the price sheet, then the plan would give buyers a reason to bid more for lots in the neighborhood. Such a price sheet might also open up conflicts of interest among neighbors, given that construction in one part of the neighborhood would bring the rest of the neighborhood closer to achieving the land-use intensity described for the neighborhood in the price sheet, giving neighbors further from the proposed construction and incentive to support it and thereby avoid construction nearer to their neck of the woods.

As for information revealed through the bargaining process, its value must be discounted by not only the loss of transactions caused by the opacity of bargaining but also by local officials' inability to bargain effectively to acquire such information. If one sets up a bazaar and no one comes because they are deterred by the hassle of bargaining, then one has not gotten any useful information about consumer demand.<sup>165</sup> Uniform prices undoubtedly risk leaving money on the table, as no single price can perfectly capture the distinctive values associated with a land use at a unique site.<sup>166</sup> It is not, however, obvious that local officials have the expertise to induce developers to reveal their bottom line. As William Whyte noted with respect to "incentive zoning" schemes, the rents that developers derived from FAR bonuses under a vague discretionary conditional use procedure routinely exceeded the aesthetic and social value of the infrastructure that they proffered in return. Whyte's prescription was specification in minute detail of precisely the sort of plazas that developers should supply in exchange for extra FAR -- i.e., a uniform price sheet.<sup>167</sup>

Finally, the Supreme Court's recent decision in *Koontz v. St. Johns River Water Mgmt. Dist.* might be understood to require such clear conditions to be subject to review under the Takings Clause, which would undermine the benefits of clarity.<sup>168</sup> It is hard to say exactly what *Koontz* means and how important it will turn out to be, but if it ends up meaning that transparency in land use deals

<sup>165</sup> For an example of a bazaar that was defeated by such transaction costs, see Hiten Samtani, *Developers, wary of cost and delay, spurn city's landmark transfers program for air rights, the Real Deal*, January 29, 2013 (noting that the City's system granting developers TDRs in exchange for landmarked buildings is rarely used because of the costs of the discretionary system of TDR approval).

<sup>166</sup> See *Buying Sky: The Market for Transferable Development Rights in New York City*, Furman Center for Real Estate and Urban Policy, available at [http://furmancenter.org/files/BuyingSky\\_PolicyBrief\\_21OCT2013.pdf](http://furmancenter.org/files/BuyingSky_PolicyBrief_21OCT2013.pdf) (October 2013).

<sup>167</sup> WILLIAM H. WHYTE, *CITY: REDISCOVERING THE CENTER* 230-55 (1987). We are not endorsing the specifics of Whyte's proposal, but rather the clarity of the demand.

<sup>168</sup> 133 S. Ct. at 2586.

is impossible, it will have the ironic effect of being a decision that sounds protective of the interests of developers but turns out to harm them as a class.

#### IV. CONCLUSION: WHAT HAPPENED TO REAL PROPERTY IN MODERN PROPERTY LAW THEORY?

In addition to offering a theory of when and how planning is a useful tool for cities constrained by a politics that leads to excessive zoning restrictions, we hope this paper provides an example of a different way to think about land use and property law questions. Most property law theory focuses on explaining why the content of legal rules adopted by common-law courts or state legislatures are, or are not, efficient or otherwise good. But the common law has fallen into the background as a method of regulating real property ownership and use. Today's real property law contains far more specific regulation of permitted uses than the existed under the common law, allows for more customization by contract, and is made by a variety of institutions at different governmental levels, ranging from local legislatures to federal administrative bodies to quasi-public institutions. Efforts to understand contemporary disputes about real property law must address how these institutions work and how they interact, something that is missing from much work in modern property theory. As a result, while much modern property theory is intellectually fascinating, it is frequently beside the practical point.<sup>169</sup> Likewise, the most important tools for real estate regulation – zoning, particularly – are not subject to the conceptual analysis and unique normative view of contemporary property law theory.

The analysis in this article suggests a different course for property scholarship. The central policy questions in contemporary property law are about the powers of property regulators and their institutional incentives, and not simply landowners' ideal entitlements. Property, in other words, should be regarded as a field of public law and studied using the tools of political science, as much as it is a matter of common private law and studied using tools derived from microeconomics.

<sup>169</sup> At least with respect to real property. We do not assess here how well this argument applies to personal or intellectual property, fields where some of the concerns discussed here may be less relevant. This sections focus on the work of Merrill and Smith here, and not their main critics "progressive property" theorists. See, e.g., Gregory Alexander, Eduardo Peñalver, Joseph Singer, & Laura Underkuffler, *A Statement of Progressive Property*, 94 Cornell L. Rev. 743 (2012) (arguing that selecting between the plural values at stake in property law should rely on a form of a "deliberation" that is "both principled and contextual, and should draw upon critical judgment, tradition, experience, and discernment.") But "progressive property" theory scholarship similarly pays little attention to questions of institutional design and is subject to the same type of critique.



Compare the approach here with the most important work in modern property theory, Merrill and Smith's information cost approach discussed above.<sup>170</sup> While they employ sophisticated economic tools and have usefully and insightfully analyzed a large number of traditional property doctrines, there is something very odd about their deploying state-of-the-art property theory to explain medieval and early modern common-law doctrines. With a few minor exceptions, Merrill and Smith's work contains no discussion of zoning, planning, subdivision requirements, exactions, building codes, environmental law, civil rights law, changes in financial regulation, or federal, state or local tax. They only rarely acknowledge or consider how property law might need to change in response to changes in information technology, the electronic availability of property information, transportation, the securitization of mortgages, agglomeration economies, construction methods, changed public services, or the rise of residential community associations. Their work simply does not recognize any of the major recent (and not so recent) changes in how real property is used.

The problem with this omission of modern public law is evident from Merrill and Smith's optimism about legislative customization of property rights in their *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*. In arguing that the numerus clausus principle efficiently limits the customization of in rem property to reduce information costs on third parties, Merrill and Smith suggest that any customization of property forms ought to fall to the legislature.<sup>171</sup> According to Merrill and Smith, legislative determinations are, relative to judicial decisions, clear, universal, comprehensive, stable, prospective, and implicitly compensatory to losers.<sup>172</sup>

Merrill and Smith's optimism about legislatures, however, is accompanied by no analysis whatsoever of how legislatures actually operate. As explained above, zoning by legislatures unstructured by competing political parties has led to vague

<sup>170</sup> "Merrill and Smith's writings have permanently altered legal academic thinking about the nature of private property." Robert C. Ellickson, *Two Cheers for the Bundle-of-Sticks Metaphor, Three Cheers for Merrill and Smith*, 8 *Econ. J. Watch* 215, 220 (2011).

<sup>171</sup> Henry Hansmann and Renier Kraakman critiqued Merrill and Smith's interpretation of the numerus clausus doctrine, arguing that it is the fact that property rights run with the land that requires limits on customization. Henry Hansmann and Renier Kraakman, *Property, Contract, and Verification: The Numerus Clausus Problem and the Divisibility of Rights*, 31 *J. LEG. STUD.* 373 (2002). Numerus clausus, they convincingly argue, is a doctrine designed to make verification of ownership easier, putting greater notice requirements on those who want to develop unique forms of ownership. However, given that government actors still must set rules about what types of notice are required for what forms, their argument is subject to the same problems discussed here. We need to know who is making the rules, what their incentives and capacities are, the process by which such rules are made in order to predict whether updating of the notice requirements are going to be beneficial or harmful.

<sup>172</sup> Merrill and Smith, *Optimal Standardization*, *supra* note 17, at 8.

"holding zones" that are anything but transparent or stable. The dizzying array of legislatures that have delved into the fine-tuning of property rights include the non-partisan city council of Longmont, CO,<sup>173</sup> as well as the polarized-by-party Texas state legislature,<sup>174</sup> the city council of Richmond, California which is elected at-large<sup>175</sup> as well as the districted legislature of Westchester County, NY,<sup>176</sup> the unicameral Nebraska state legislature<sup>177</sup> as well as our bicameral Congress.<sup>178</sup> These entities have been custom-tailoring property law in ways analogous to the customized rules prohibited by the numerus clausus principle.<sup>179</sup> If one throws in administrative bodies that Merrill and Smith count as "legislative," such as the Environmental Protection Agency, state attorneys general,<sup>180</sup> county recorders of deeds,<sup>181</sup> voters themselves in referenda, and quasi-public institutions like Fannie Mae,<sup>182</sup> the diversity of "legislatures" becomes even greater. One cannot usefully generalize about whether this

<sup>173</sup> Longmont, like many other jurisdictions, passed local limitations of the use of fracking technology, that may be preempted by state law. Rachel A. Kitzze, Note: *Moving Past Preemption: Enhancing the Power of Local Governments over Hydraulic Fracturing*, 98 *MINN. L. REV.* 385, 408-09 (2013).

<sup>174</sup> The Texas state legislature in 2012 passed controversial legislation barring individuals from using drones to take pictures of privately-owned real property. Texas Privacy Act, 2013 Tex. HB 912 (enacted June 14, 2013). For evidence that the Texas legislature is polarized, see Boris Shor, *New Preliminary 2013 Data on Polarization*, available at <http://research.bshor.com/category/polarization/> (January 14, 2014).

<sup>175</sup> Shaila Dawan, *A Long Shot Against Blight*, *N.Y. TIMES*, Jan. 14 (2014) (describing Richmond's efforts to use eminent domain to condemn mortgages for properties in town that are going to be foreclosed upon).

<sup>176</sup> Nicole Hannah-Jones, *Soft on Segregation: How the Feds Failed to Integrate Westchester County*, *PRO PUBLICA*, Nov. 2, 2012 (describing opposition to Fair Housing Act case in Westchester legislature), available at <http://www.propublica.org/article/soft-on-segregation-how-the-feds-failed-to-integrate-westchester-county>

<sup>177</sup> See Andrew Harris and Tom Witowsky, *Keystone Pipeline Eminent-Domain Foes Fight Nebraska Law*. *BUS. WEEK ONLINE* (Sep. 27, 2013), <http://www.businessweek.com/news/2013-09-27/keystone-pipeline-eminant-domain-foes-seek-nebraska-court-order> (describing Nebraska law delegating power to Governor to use eminent domain to take land to turn over to the Keystone XL pipeline).

<sup>178</sup> See David A. Dana, *A Simple Approach to Preventing the Next Housing Crisis – Why We Need One, What One Would Look Like and Why Dodd-Frank Isn't It*, 38 *FORDHAM URB. L.J.* 721 (2011) (arguing Dodd-Frank did not do enough to change housing finance).

<sup>179</sup> And many have actually been customizing the forms of property that are subject to numerus clausus. For instance, cities around the country have been creating hybrid ownership forms either to improve affordability for first-time buyers of low-to-moderate incomes. See *Down Payment Assistance Loan Program*, San Francisco City and County, Mayor's Office of Community and Housing Development, <http://www.sf-moh.org/index.aspx?page=737> (describing shared-appreciation ownership scheme to help low and middle income residents put up downpayments); City of Oakland, *Shared Appreciation Mortgage*, <http://www2.oaklandnet.com/Government/ohcd/s/HousingResources/OAK042059> (same) Austin Texas, *Downpayment Assistance*, <http://austintexas.gov/department/down-payment-assistance> (describing shared-appreciation loans); San Diego Housing Commission, *Shared Appreciation Loan Guidelines*, <http://www.homesthatlast.org/san-diego-shared-appreciation-loan-program/>. See also Lee Fennell, *Lumpy Property*, 160 *U. Pa. L. Rev.* 1955 (2013) (describing shared appreciation mortgages as new form of ownership.) The two newer forms of ownership discussed in Merrill and Smith's paper, the timeshare and the condominium, are now subject to weird webs of regulation by state and local legislature and administrative agencies, with disputes arising between levels. See Mary Lou Savage, Colin M. Lancaster and Nicholas C. Bougopoulos, *Time Share Regulation: The Wisconsin Model*, 77 *MARQ. L. REV.* 719, 727-29 (1994) (state and local conflict over time share regulation); Leighton J. Hyde, Note: *Rethinking Roth: Why the Florida Legislature Should Empower Local Governments to Regulate Condominium Conversions*, 42 *STETSON L. REV.* 751 (2013) (discussing different regimes of state and local condominium regulation nationwide).

<sup>180</sup> See Margaret H. Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 *HARV. L. REV.* 486 (2013) (discussing role of AGs in suits against the Mortgage Electronic Registry System)

<sup>181</sup> As the character Nick Smith says in Whit Stillman's brilliant film *Metropolitan* (1990), "I am not entirely joking." County recorders of deeds have recently been involved in some important recent policy disputes, particularly with respect whether and how to make deed registries electronically available. See Sam Stonefield, *The Use and Recording of Electronic Real Estate Instruments and Electronic Real Estate Documents: Context, Unresolved Cost-Benefit Issues and a Recommended Decisional Process*, 24 *W. NEW ENG. L. REV.* 205, 222-23 (2002) (discussing resistance among county officials to making registries and filing electronic.)

<sup>182</sup> See Note: *The Perils of Fragmentation and Reckless Innovation*, 125 *HARV. L. REV.* 1799, 1803 (discussing Fannie Mae and other government-sponsored enterprises role in developing securitization market for mortgages).



vast array of decision-making bodies outperforms courts in minimizing the sum of information costs and losses from excessive standardization – especially since “courts” include bodies ranging from the U.S. Supreme Court to elected state trial courts<sup>183</sup> to local surrogate and family courts<sup>184</sup> to quasi-judicial bodies like Boards of Zoning Appeals. Further, the analyzing whether “courts” or “legislatures” are better at customizing property elides the far more important question of which type of “legislative” institutions is best suited for making the tradeoff between customization and standardization.<sup>185</sup> The one-size-fits-all nature of Merrill and Smith’s generalizations about “legislatures” and “courts” reduces rather than enhances understanding of the political dynamics between institutions.

Likewise, Merrill and Smith’s substantial focus on changes in nuisance law reveals how distant their analysis is from the center of today’s property law disputes. As part of a long discussion about why nuisance law includes rule-like “exclusion” principles in their *cri di coeur* *What Happened to Property in Law and Economics?*, they argue that the benefits of the customization of use rights increase with greater urban density and industrial intensity and that this led to changes in the Restatement (Second) of Torts.<sup>186</sup> In passing, they also note that social changes not only created an incentive to change in nuisance law but also to other tools for customization, like “the rise of zoning and environmental regulation.”<sup>187</sup>

<sup>183</sup> For instance, the Supreme Court of Tompkins County, NY decided what was one of the most important property law cases in years in *Anschutz Exploration Corp. v. Town of Dryden*, 35 Misc.3d 450, 451 (N.Y. Sup. Ct. 2012), holding that state laws did not preempt local zoning ordinance barring oil and gas exploration.

<sup>184</sup> See e.g., *In Re McDowell*, 345 NYS.2d 828 (Sur Ct 1973) (ordering that two squabbling siblings trade off possession of their deceased father’s beloved rocking chair every six months).

<sup>185</sup> Smith provides a bit more grist about his thoughts on the role of non-court property law making institutions in a later piece on nuisance law, but his analysis continues to reflect similar problems. *Smith, Exclusion and Property*, supra note 134, at 1027-36. Analyzing the much-derided formalism of *Hammonds v. Cent. Ky. Natural Gas Co.*, 75 S.W.2d 204, 205 (Ky. 1934), and other early cases about property rights in sub-surface oil and gas, Smith argues that courts are not always wrong to maintain strong exclusion rules in new situations, even when such doctrines produce waste or bad results. Relying on traditional and formal exclusion doctrines may not solve a particular use conflict – in the case of natural gas, the traditional rule of treating gas like natural animals that could not be owned until they were captured led to excessive drilling – and a governance regime specifying particular use rights may be better. But a court should not necessarily create that regime because “it is more important in case of the discovery of a new dimension to a resource to use the exclusion regime in a way that does not preclude or delay legislative and administrative efforts to devise governance regimes.” *Id.* at 1036. Smith argues that it is hard to say whether the courts that adhering to the traditional rule about subsurface rights did the right thing, calling it a “tough question” and dropping a footnote to say that the answer depends in part on “how subject to capture legislatures and courts are and how to define capture in the first place.” *Id.* at 1036, n. 225. While this begins to look at relevant features of non-court property law-making institutions – their resistance to interest group capture – it does so at strange level of remove given that the relevant rules were generated almost 100 years ago. States making law in this area have very different legislatures, administrative agencies of a variety of levels of institutional competence and court systems with differing levels of judicial capacity and knowledge. Smith ceases dealing with the property law question – the relative value of governance rules specifying uses and the information-cost reducing value of exclusion rules – as soon as the issue moves from being common law to being the product of legislation and administrative law. That is, as soon as it enters the realm of modern property regulation.

<sup>186</sup> Merrill and Smith, *What Happened*, supra note 17, at 397.

<sup>187</sup> *Id.*

But both the change in urbanization and the rise of zoning and environmental regulation happened many decades ago.<sup>188</sup> And nuisance law is a bit player in land-use regulation when compared to zoning, and local zoning itself is now overlain by huge numbers of state statutes<sup>189</sup> as well as federal laws like the Endangered Species Act, the Clean Water Act’s section 404 dredge-and-fill permit system, and the Religious Land Use and Institutionalized Persons Act. Private covenants and communities that create extremely complex use regimes have been a part of American housing development for decades now, further pushing nuisance law into the background of property regulation.<sup>190</sup> Traditional common law nuisance exists in the background of these public and contractual systems of land use regulation, but very much in the background.<sup>191</sup> Merrill and Smith’s focus on common-law rules to the exclusion of more important second-order questions about the design of, and interaction between, different types and levels of property-regulating institutions.

The result is that, although Merrill and Smith have produced a modern property theory, it is not used to analyze modern property law.<sup>192</sup> The informational burdens involved in navigating modern property – what the law says about where you can and can’t go,<sup>193</sup> from whom you can buy property or renegotiate encumbrances,<sup>194</sup> what use rights you have as a holder of property – are ever larger as a result of the increasing scope and varying approaches of

<sup>188</sup> In 1800, the urban population of the United States was only 6% and by 1850 it was still only 15%. But by 1920, more than half of the country lived in urbanized areas and by 1970 it was nearly 75%. See UNITED STATES CENSUS BUREAU, SELECTED HISTORICAL DECENNIAL CENSUS POPULATION AND HOUSING COUNTS, available at <http://www.census.gov/population/www/censusdata/hiscendata.html>.

<sup>189</sup> Fred Bosselman & David Callies, *The Quiet Revolution in Land Use Control* 3 (President’s Council on Environmental Quality, 1971)

<sup>190</sup> See ROBERT H. NELSON, *PRIVATE NEIGHBORHOODS AND THE TRANSFORMATION OF LOCAL GOVERNMENT* (2005).

<sup>191</sup> The reasons for this are multiple. First, by separating uses, zoning reduces the incidence of nuisances. Nuisance suits are brought against property owners that fail to comply with zoning rules, but this is merely a private enforcement of zoning’s governance use regime by those suffering special damages. Second, although compliance with zoning is not a complete defense against private nuisance claims, it is evidence of reasonableness of use. See, e.g., *Little Joseph Realty, Inc. v. Babylon*, 363 N.E.2d 1163 (N.Y. 1977) (“a use which fully complies with a zoning ordinance may still be enjoined as a nuisance . . . albeit the plaintiff assumes a heavy burden of proof”). Courts rarely find land uses that comply with zoning regulations to be public nuisances. *Restat 2d of Torts*, § 821B (1978). As a result, the leading land use casebook devotes less than half a chapter to nuisance law. *Been and Ellickson*, supra note 22.

<sup>192</sup> A fun example if a bit of a cheap shot: Smith’s 2004 article on nuisance quotes as many cases from the 1900 and 10s as it does from the 1990s and 2000s (which is particularly notable because most of the cases from after 1990 are not nuisance cases, but are takings and possession cases used to establish general propositions). *Smith, Exclusion and Property Rules*, supra note 115 (citing 11 cases after 1990 and 11 from 1900-20, and 11 from 1860 to 1890).

<sup>193</sup> For instance, consider questions about who can use New York City’s “privately owned public spaces,” plazas that developers of office towers build in return for density bonuses. JEROLD S. KAYDEN, *PRIVATIZING CREATION OF THE PUBLIC REALM: THE FRUITS OF NEW YORK CITY’S INCENTIVE ZONING ORDINANCE: PRIVATELY OWNED PUBLIC SPACE: THE NEW YORK CITY EXPERIENCE* (2000). The information costs for owners – 50% of whom are not in compliance with the law – and the public created by this complex legal regime became national news, as one of these spaces, Zuccotti Park, was the location of the Occupy Wall Street protest. Lisa A. Foderaro, *Privately Owned Park, Open to the Public, May Make Its Own Rules*, N.Y. TIMES, October 13, 2011.

<sup>194</sup> Joseph William Singer, *Subprime: Why a Free and Democratic Society Needs Law*, 47 HARV. C.R.-C.L. L. REV. 141, 165 (2012) (underwater homeowners face difficulty renegotiating mortgages due to securitization).



property regulators. But property law theory, as it exists now, does not help us understand how these costs might be mitigated, or whether the benefits of customized regulation justify the increase in information costs.

Other areas of law have faced similar problems generating clear understandings or normative recommendations due the existence of multiple lawmakers of overlapping authority, interpreters of varying capacities, and complex procedural rules and politics.<sup>195</sup> Their reaction was an “institutional turn,” taking second-order questions about the design of and interaction between law-making and interpreting bodies and bringing them to the forefront, leaving questions about optimal rules to the side. Something similar is necessary in modern property law. There is, to be fair, a substantial literature on which level (federal, state or local) should make different property law determinations, both generally and particularly with respect to land use.<sup>196</sup> But there is too little contemporary work on how differing institutional forms affect the quality and shape of contemporary property law.<sup>197</sup> There is also little work that shows how methods of regulation can themselves raise information costs for third parties.

Focusing on common law doctrines while ignoring the web of legislative and administrative regulation results not only in an incomplete discussion of property law, but a flawed discussion of the common law as well. For instance, in previous work, we discussed the rise of “non-cumulative zoning,” or zones that permit manufacturing uses but not less intense uses like housing.<sup>198</sup> One reason cities create these zones is because

<sup>195</sup> See, e.g., Sunstein and Vermule, *supra* note 19 at 889-95 (advocating for an “institutional turn” in constitutional law); William N. Eskridge Jr., *No Frills Textualism*, 119 HARV. L. REV. 2041 (2006) (discussing no fewer than three separate institutional turns in statutory interpretation); Heather K. Gerken & Michael S. Kang, *The Institutional Turn in Election Law Scholarship*, in RACE, REFORM, AND REGULATION OF THE ELECTORAL PROCESS: RECURRING PUZZLES IN AMERICAN DEMOCRACY 86, 89 (Guy-Uriel E. Charles, Heather K. Gerken & Michael S. Kang eds., 2011) (advocating an institutional turn in election law scholarship).

<sup>196</sup> See, e.g., Ilya Somin, *Federalism and Property Rights*, 2011 U. CHI. L. FORUM 53 (2011); Robert C. Ellickson, *Federalism and Kelo: A Question for Richard Epstein*, 44 TULSA L. REV. 751 (2009); Roderick Hills, Jr., *The Individual Right to Federalism in the Rehnquist Court*, 74 GEO. WASH. L. REV. 888, 891-92 (2006); Stewart E. Sterk, *The Federalist Dimension of Regulatory Takings Jurisprudence*, 114 YALE L. J. 203 (2004); Abraham Bell & Gideon Parchamovsky, *Of Property and Federalism*, 115 YALE L. J. 72 (2005); Serkin, *Local Property Law*, *supra*.

<sup>197</sup> There are, of course, exceptions. See, e.g., Nestor M. Davidson & Rashmi Dyal-Chand, *Property in Crisis*, 78 FORDHAM L. REV. 1607 (2010); Fennell, *Lumpy Property*, *supra* note 186, at 2000 (discussing use of different instruments – tax, legal exclusions, etc. – to achieve standardization); Abraham Bell and Gideon Parchamovsky, *Registries*, forthcoming *Yale Law Journal*; Abraham Bell and Gideon Parchamovsky, *Governing Communities By Auction*, 81 U. CHI. L. REV. 1 (2014)

<sup>198</sup> Hills and Schleicher, *Non-Cumulative Zoning*, *supra* note 75, at 55-65.

nuisance laws created to deal with emissions generally result in a huge number of lawsuits when factories are located in densely populated areas. While state common law rules of this form might make sense if cities did not have the power to create these non-cumulative zones (but not to modify the private law), they are quite costly given such a regime.<sup>199</sup> If nuisance law was laxer in designated urban manufacturing zones, people could choose whether to move to these areas despite their higher degree of pollution, allowing for greater housing supply and improving residential choice. Determining whether a laxer nuisance law in some specific areas would be worth it requires thinking about property law holistically in an age of extensive and systematic administrative land use regulation.

In short, property theory needs to move away from a focus on the substance of increasingly marginal common-law rules and instead focus on law-making institutions. This paper focuses on planners, non-partisan or uni-party local legislatures, and mayors, but these are only a handful of the law-making institutions that are part of the mix. By moving away from the common law’s rules and instead examining decision-making bodies, property theory will finally be able to focus on the rules that define how rights in land are really customized, standardized, restricted and enlarged.

<sup>199</sup> Smith’s discussion of the famous case, *Boomer v. Atl. Cement Co.*, 257 N.E.2d 870 (N.Y. 1970), reveals this problem acutely. Smith, *Exclusion and Property Rules*, *supra* note 115, at 1037-45. The Court in *Boomer* allowed a nuisance-generating cement plant to continue operating if it paid damages to nearby residents – that is, it gave residents near the plant the protections of a liability rule and not full property rule protection against the cement plant’s emissions. It did so because giving each harmed resident the power to press for an injunction would ensure that the plant shut down because high transaction costs and holdout problems would make negotiations practically impossible. Smith critiques the court for failing to acknowledge that the plant’s owners had options *ex ante*, like acquiring easements over nearby land or buying the land outright. But he also argues that the court should not have designed a governance regime itself, rather than leaving the job to more expert legislatures and administrative agencies, which can issue rules *ex ante* rather than *ex post* decisions that “destabilize expectations.” *Id.* at 1044. “When greater precision of use rights is valuable, we may expect some tendency to shift along the spectrum from exclusion to governance but this may take the form of movement from courts to some other institution or to private parties.” *Id.* at 1045. But one need not guess about what institutions are available to deal with this situation. The plant in *Boomer* was originally built in an unzoned area, and later (before the case), a zoning code was passed classifying the area as “heavy industrial.” Joel C. Dobris, *Boomer Twenty Years Later: An Introduction, with Some Footnotes about “Theory,”* 54 ALB. L. REV. 171, 171 (1990). But zoning boards and local governments generally do not have the power to change nuisance law. The state legislature could have changed nuisance law to deal with this type of situation, but the cost of making such rules for the huge variety of local situations is very high and it is hard to say that state legislators facing competing demands are necessarily “institutionally superior” to courts in making these determinations. Perhaps state legislatures should delegate to cities and counties the power to change nuisance law in specific zones – in fact, we’ve argued they should! – but there are costs associated with deviating from the general rule against local-made private law, information costs created by having an inconsistent nuisance law, and costs associated with using the state’s legislative agenda. Hills and Schleicher, *Non-Cumulative Zoning*, *supra* note 75, at 55-65. But such an argument requires an analysis of the methods by which local governments make law, their susceptibility to interest group pressure, their degree of expertise and so on. Smith treats property law making institutions other than courts as a black box, a costless source of clear, prospective rules. But such institutions are knowable, and the difficulties they face in devising rules can be analyzed.

