Brooklyn Law Review

Volume 78
Issue 2
SYMPOSIUM
Post Zoning: Alternative Forms of Public Land Use Controls

Article 1

2013

Introduction to the Symposium

Christopher Serkin

Gregg Macey

SYMPOSIUM

Post-Zoning: Alternative Forms of Public Land Use Controls

INTRODUCTION

Christopher Serkin & Gregg P. Macey[†]

Zoning has had a remarkable run. Municipal zoning constitutes the central thread in the fabric of regulatory limits on land. It is among the most influential regulatory tools ever deployed, largely responsible for the shape of twentieth-century land development in the United States. But zoning remains controversial, even as we take it for granted. We decry its unintended consequences[1] and exclusionary applications.[2] Traditional zoning is blamed for everything from automobile dependency, fringe development, and low-density sterility[3] to the racial dynamics of post-Katrina New Orleans.[4] Despite these

---

[†] Professor of Law, Brooklyn Law School; Associate Professor of Law, Brooklyn Law School. The authors would like to thank the participants of this symposium for their thoughtful contributions.

[1] Michael Wolf encourages us to consider the themes of "exclusion, anticompetitiveness, parochialism, and aestheticism" that make an appearance in Justice Sutherland's storied validation of zoning in *Euclid v. Ambler*, 272 U.S. 365 (1926). *See* Michael Allan Wolf, *The Prescience and Centrality of* Euclid v. Ambler, *in* ZONING AND THE AMERICAN DREAM: PROMISES STILL TO KEEP 253 (Charles M. Haar & Jerold S. Kayden eds., 1989); *see also* JONATHAN BARNETT, THE FRACTURED METROPOLIS: IMPROVING THE NEW CITY, RESTORING THE OLD CITY, RESHAPING THE REGION 47 (1995).

[2] Juliana Maantay, *Zoning Law, Health, and Environmental Justice: What's the Connection?*, 30 J.L. MED. & ETHICS 572, 579-83 (2002); Yale Rabin, *Expulsive Zoning: The Inequitable Legacy of* Euclid, *in* ZONING AND THE AMERICAN DREAM, *supra* note 1, at 101.

[3] *See, e.g.*, Edward H. Ziegler, *The Case for Megapolitan Growth Management in the 21st Century: Regional Urban Planning and Sustainable Development in the United States*, 41 URB. LAW. 147, 150-51 (2009).

[4] *See, e.g.*, Stacy E. Seicshnaydre, *Is the Road to Disparate Impact Paved with Good Intentions?: Stuck on State of Mind in Antidiscrimination Law*, 42 WAKE FOREST L. REV. 1141, 1189-91 (2007). For an account of progressive-era programs in New Orleans and their influence over the racialization of disaster vulnerability, see

and other criticisms, zoning persists and remains faithful to its original goal: separating incompatible uses of land.[5]

Zoning, of course, has not been a completely static institution.[6] Planners have introduced new tools like incentive, performance, and overlay zoning.[7] But even these innovations continue to take the separation of land by use as their point of departure. New, twenty-first-century challenges are likely to require more dramatic reconsiderations of land use controls. Issues like sea-level rise, the breakdown of the urban "transect," and novel sources of fine-grained externalities within communities are putting greater pressure on zoning. Will zoning be able to address change at new varieties of scale? In the words of Justice Sutherland, will zoning adequately "expand or contract" in response to changed circumstances as sublocal and global changes mount?[8]

In the spring of 2012, the *Brooklyn Law Review* assembled a group of the nation's leading land use experts to consider these questions in a symposium broadly titled, *Post-Zoning: Alternative Forms of Public Land Use Controls*. Their papers, assembled in this issue, provide a snapshot of cutting-edge thinking about land use policy. Several themes emerged from the symposium, including a focus on sublocal decision making and broader questions of scale, a need to generate information about land use impacts, an expansion of zoning's goals, and a reconsideration of legal limits in response to these trends. Underlying the papers is a push to grapple with zoning's ability to respond to change, particularly at different scales. Taken together, the authors in this issue call for considerably broader thinking about zoning's purpose and function in light of new pressures on land use. In this introduction, we set the stage for this collection of papers, briefly exploring zoning's origins and its traditionally limited

---

Craig E. Colten, *Basin Street Blues: Drainage and Environmental Equity in New Orleans, 1890–1930*, 28 J. HIST. GEO. 237 (2002).

[5] *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 391 (1926) ("[T]he exclusion of buildings devoted to business, trade, etc., from residential districts, bears a rational relation to the health and safety of the community.").

[6] Nestor M. Davidson, *Property's Morale*, 110 MICH. L. REV. 437, 481 (2011).

[7] *See, e.g.*, John J. Costonis, *The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks*, 85 HARV. L. REV. 574, 586 (1972); Luther L. McDougal, III, *Performance Standards: A Viable Alternative to Euclidean Zoning?*, 47 TUL. L. REV. 255, 257 (1973); Brian W. Ohm & Robert J. Sitkowski, *The Influence of New Urbanism on Local Ordinances: The Twilight of Zoning?*, 35 URB. LAW. 783, 785 (2003).

[8] *Euclid*, 272 U.S. at 387.

repertoire for anticipating needs and adjusting to change—whether within districts or across vast regions.

Zoning emerged as an alternative to common law responses to development pressures.[9] The co-location of homes and manufacturing facilities, even before the Industrial Revolution took hold, revealed the common law's limited ability to regulate incompatible land uses. Nuisance law relied on case-by-base litigation between neighbors—that is, ex post adjudication of land use conflicts. What was needed instead was a mechanism for preventing such conflicts before they occurred. Zoning offered one. Early codes separated slaughterhouses from homes, and industry from residential neighborhoods more generally.[10] These ordinances evolved into controls of use as well as height, bulk, and location of structures on parcels in Los Angeles,[11] New York City, and elsewhere, ultimately culminating in the Standard Zoning Enabling Act (SZEA).[12]

Underlying the early promulgation of comprehensive zoning was an implicit faith in planners' capacity to anticipate and shape future development needs. In part, we can trace this faith to methods of scientific inquiry that prevailed in the first half of the twentieth century. For example, ecology—a branch of biological science concerned with the interconnectedness of living systems and their environments—became an established field just as industrial activity started to pressure neighborhoods and commercial districts, threatening their quality of life.[13] Zoning followed one of ecology's early methodologies of dividing natural areas into sections, taking a representative sample of those areas, and carefully counting the organisms they contained.[14] This technique, known as the quadrat method, lent an impression of stable "life zones" and spoke to a deeply embedded belief among scientists in the "balance of nature."[15] Ecologists from this era embraced "end-

---

[9] For private law's limited ability to anticipate and remedy local environmental harms, see Edward Brunet, *Debunking Wholesale Private Enforcement of Environmental Rights*, 15 HARV. J.L. & PUB. POL'Y 311, 313-18 (1992).

[10] *See, e.g.*, 1871 Mass. Acts 534, ch. 167, *available at* http://archives.lib.state.ma.us/actsResolves/1871/1871acts0167.pdf; NEW HAVEN, CONN., ORDINANCES §§ 253-54 (1898), *available at* http://hdl.handle.net/2027/nnc1.cu56571828.

[11] *See* Hadacheck v. Sebastian, 239 U.S. 394 (1915); *Ex Parte* Quong Wo, 118 P. 714, 715 (Cal. 1911); Dobbins v. City of Los Angeles, 72 P. 970 (Cal. 1903).

[12] SEYMOUR I. TOLL, ZONED AMERICAN 147, 201-02 (1969).

[13] Fred P. Bosselman & A. Dan Tarlock, *The Influence of Ecological Science on American Law: An Introduction*, 69 CHI.-KENT L. REV. 847, 849 (1994).

[14] *Id.* at 851.

[15] *Id.* at 855-56; *see also* Jonathan Baert Wiener, *Beyond the Balance of Nature*, 7 DUKE ENVTL. L. & POL'Y F. 1, 7-8 (1996).

state" planning, arguing that "succession," the "process[] by which one plant community replaces another in successive waves[,] . . . would end in a climax state, at which point . . . the landscape [would reach] its natural condition of equilibrium."[16] When the Commerce Department promulgated the SZEA as model legislation for the states, the idea of succession had migrated to urban planning as an approach to identify the "highest and best use" of land and protect that use as it was reached.[17] Herein was zoning's implicit argument against common law land use controls: they did not ensure predictable remedies or encourage stable outcomes. In order to achieve that, one needed the equivalent of urban "quadrats" that contained building stock of various classifications.

Zoning assumed, among other things, that "similar uses in cities tend to congregate to form homogeneous units readily identifiable by the technical expert," that "urban land values in cities shift on a slow and consistent basis," and that "past trends can be extrapolated into the future."[18] These ideas were integrated into the SZEA, which most state legislatures quickly adopted.[19] The SZEA envisioned comprehensive municipal controls dividing jurisdictions into use districts of varying intensities. Single-family residential communities would be protected from noxious industry, and commercial uses would be clustered together.[20] The basic rationale for zoning extended beyond what court-made doctrine could accomplish and promised greater foresight than disparate nuisance-prevention efforts. But the early science of ecology proved to be incorrect. Ecology has since adopted a "nonequilibrium" paradigm that is more aware of the extent to which natural systems can be engineered.[21] And the aims of local governments and the forces that threaten stability today share little with the nuisance-internalization concerns of a century ago.

Zoning has not stood still in the years since it was first adopted. Its complexity increased considerably during the

---

[16] Bosselman & Tarlock, *supra* note 13, at 855 (footnotes omitted).

[17] *Id.* at 857 (internal quotation marks omitted); *see also* M. CHRISTINE BOYER, DREAMING THE RATIONAL CITY: THE MYTH OF AMERICAN CITY PLANNING 221 (1983).

[18] Charles M. Haar, *Reflections on* Euclid*: Social Contract and Private Purpose*, *in* ZONING AND THE AMERICAN DREAM, *supra* note 1, at 343.

[19] Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 CALIF. L. REV. 837, 848-49 (1983).

[20] Andrew J. Cappel, Note, *A Walk Along Willow: Patterns of Land Use Coordination in Pre-Zoning New Haven (1870–1926)*, 101 YALE L.J. 617, 617 n.1 (1991).

[21] A. Dan Tarlock, *The Nonequilibrium Paradigm in Ecology and the Partial Unraveling of Environmental Law*, 27 LOY. L.A. L. REV. 1121, 1128-30 (1994).

twentieth century, although it remained focused on separating uses in increasingly fine-grained ways rather than responding to new kinds of land use pressures. New York, for example, amended its zoning resolution over 2000 times between 1916 and 1961.[22] In some regions, urban land was at first overzoned for commercial and industrial uses, a practice that confined residential zones to limited portions of major cities.[23] Land use categories proliferated, from four in the 1916 resolution to dozens (or more) in present-day cities such as Fresno and New York.[24] The Boards of Appeals sought to keep up with change, interpreting vague criteria for whether to grant variance requests or allow nonconforming uses to reap a reasonable rate of return.[25] Density controls and other zoning improvements in the 1960s acknowledged zoning's impact on urban form but continued to ignore the unique makeup of communities where they were applied.[26] Other innovations, such as floor area bonuses and incentive zoning techniques, were as likely to yield a sterile built environment as they were to generate vibrant public spaces.[27] Much of the rift between zoning and land use challenges in these early decades was to be expected. After all, at the onset of comprehensive zoning, "supermarkets, chain stores, and shopping centers [were] unknown," industries "had not yet begun to abandon their multistory lofts for suburban

---

[22] *See* N.Y.C. CITY PLANNING COMM'N, REPORT ON THE COMPREHENSIVE AMENDMENT OF THE ZONING RESOLUTION OF THE CITY OF NEW YORK (CP-15820), at 696 (1960).

[23] William H. Wilson, *Moles and Skylarks*, *in* INTRODUCTION TO PLANNING HISTORY IN THE UNITED STATES 88, 97 (Donald A. Krueckeberg ed., 1983) ("[T]he zoning laws followed New York's famed 1916 resolution, which permitted, under full utilization, working space for some 300 million employees. . . . The other side of the overzoning coin was the underzoning of residential property.").

[24] *Compare* STANISLAW J. MAKIELSKI, JR., THE POLITICS OF ZONING: THE NEW YORK EXPERIENCE 36 (1966), *with* FRESNO, CAL., MUN. CODE § 12-201 (2012) ("Designation of Zoning Districts"), *available at* http://library.municode.com/index.aspx?clientId=14478, *and* N.Y.C. Dep't of City Planning, *Zoning Districts: Introduction to Zoning Districts*, NYC.GOV, http://www.nyc.gov/html/dcp/html/zone/zonehis2.shtml (last visited Nov. 8, 2012).

[25] ALEXANDER GARVIN, THE AMERICAN CITY: WHAT WORKS, WHAT DOESN'T 371 (1996).

[26] *Id.* at 366-67. Kevin Lynch explored what are at times the counterintuitive links among density, urban form, and quality of life in his classic text, *Good City Form*. KEVIN LYNCH, GOOD CITY FORM 261-65 (1981). Density interacts with other elements of the built environment, including whether the mixture of building types is coarse- or fine-grained, and the spatial and temporal distribution of access channels. *Id.* at 265-75.

[27] JEROLD S. KAYDEN, PRIVATELY OWNED PUBLIC SPACE: THE NEW YORK CITY EXPERIENCE 11-18 (2000).

locations," and "[c]ars, trucks, and planes had not yet become the dominant forms of transportation."[28]

In the face of so much change, zoning today has become at once overly simplistic and stultifyingly complex. Even with its many innovations, zoning has remained true to its original goals. It ignores demographic shifts and design implications while making it difficult to comply with existing ordinances through the use of overlays, conditions, and exceptions.

Criticisms of zoning's implicit pursuit of steady-state development are hardly new, raised most eloquently by Jane Jacobs in the 1960s.[29] Zoning has had time to internalize Jacobs's observations—most notably, her argument that mixed-use developments, particularly on larger parcels, generate positive externalities and contribute to more vital urban space.[30] Planned unit developments and overlay districts can be conducive to the kinds of communities that she envisioned. But these techniques are effectively add-ons—regulatory tweaks that operate within zoning's existing framework. Zoning's fundamental structure remains largely unchanged. It is what zoning is called upon to do that looks very different.

For example, modern development pressures draw much of the motivation for zoning away from planning and toward fiscal concerns.[31] Control over land use decisions gives municipalities leverage to extract valuable concessions from developers.[32] In principle, those concessions are meant as a buffer against the costs imposed by development, whether through localized environmental impacts, burdens on infrastructure, or broader congestion. But even as developers make concessions or take steps to offset costs, those offsetting benefits might not go to those most affected by new projects. Rent seeking at the local level means that the ultimate distribution of development benefits may overlook those bearing costs such as increased traffic and added stress to municipal services. This inequitable distribution is partly a problem of the scale of change ushered in by new development. Scholars have frequently pointed to interlocal externalities from municipal decisions as a reason for regional or even

---

[28] GARVIN, *supra* note 25, at 364.

[29] JANE JACOBS, THE DEATH AND LIFE OF GREAT AMERICAN CITIES 252 (1961).

[30] Jay Wickersham, *Jane Jacobs's Critique of Zoning: From* Euclid *to Portland and Beyond*, 28 B.C. ENVTL. AFF. L. REV. 547, 553-54 (2001).

[31] Daniel P. Selmi, *The Contract Transformation in Land Use Regulation*, 63 STAN. L. REV. 591, 604-06 (2011).

[32] *Cf.* Rose, *supra* note 19, at 890-91.

federal planning.[33] But the problem of concentrated sublocal harms points to a different manifestation of the scale problem. It suggests that land use decisions may sometimes occur at a higher level than necessary—at the level of the municipality, instead of the more proximate community.

Zoning has reached something of a crossroads. Issues of scale in response to change are increasingly important, while the objectives that underlie zoning are newly up for grabs. It is against this backdrop that the papers in this issue push the discussion forward in important new directions.

In this symposium, zoning's role in allocating costs and benefits to address sublocal change is most explicit in Rachel Godsil's discussion of gentrification.[34] Her contribution to this issue poses a deceptively simple question for zoning: to what degree should it privilege the interests of existing ("in-place") residents during times of dramatic demographic change? From the perspective of a municipality, opposition to gentrification may be interpreted as irrational or self-defeating. But gentrification reflects improvements in the economic conditions of an area that not everyone will embrace. Godsil looks closely at the sublocal distributional consequences of gentrification and the racial dynamics at work. Finding that gentrification can unfairly disrupt existing communities, Godsil proposes a series of responses to protect the interests of in-place residents, spanning from rent regulation or housing vouchers in gentrifying communities to active involvement by the U.S. Department of Housing and Urban Development to "[a]ffirmatively [f]urther[] [f]air [g]entrification."[35]

William Fischel shares Godsil's interest in using zoning at the sublocal level to resist broader municipal trends. Fischel identifies a gap in land use controls that falls between citywide zoning and consensual neighborhood covenants.[36] That gap persists, despite the rise of homeowner associations and related private governance tools. There are two reasons for this. First, private associations often fail to take hold in built-up areas. Second, neighborhoods that are part of larger polities have less

---

[33] *See, e.g.*, Richard Briffault, *The Local Government Boundary Problem in Metropolitan Areas*, 48 STAN. L. REV. 1115, 1118 (1996); Ashira Pelman Ostrow, *Land Law Federalism*, 61 EMORY L.J. 1397, 1404-08 (2012); Laurie Reynolds, *Intergovernmental Cooperation, Metropolitan Equity, and the New Regionalism*, 78 WASH. L. REV. 93, 109 (2003).

[34] *See* Rachel D. Godsil, *The Gentrification Trigger: Autonomy, Mobility, and Affirmatively Furthering Fair Housing*, 78 BROOK. L. REV. 319 (2013).

[35] *Id.* at 337.

[36] *See* William A. Fischel, *Neighborhood Conservation Districts: The New Belt and Suspenders of Municipal Zoning*, 78 BROOK. L. REV. 339 (2013).

influence over changed conditions than those featured in Fischel's "homevoter" model of small-town and suburban politics.[37] According to Fischel, one possible answer to the lack of "voice" for residents of such communities during times of change is the neighborhood conservation district (NCD).[38] This innovation embodies the promise of preservation without the need to wrestle with historic designation.[39] NCDs give sublocal communities the power to review proposed land use changes and enact through public law a subset of the protections against change that are available to common interest communities.[40] They offer immediate neighbors the ability to protect their interests more directly than through broader municipal decision making. Of course, adding a layer of regulatory authority increases the costs of change. And neighborhood conservation districts present a problem that Godsil identifies: how to set out the appropriate level of protection for neighborhoods within larger polities. But the framework and restrictions that NCDs introduce offer a creative expression of pressure for sublocal involvement in how a municipality manages and responds to change.

Community benefits agreements (CBAs) offer another. As Alejandro Camacho explains, they give community-based organizations—a different kind of sublocal concern—both a voice in the development process and an opportunity to protect members' interests by extracting promises from developers.[41] Camacho points out that zoning's flexibility historically derived from bilateral negotiation with regulators over variances, conditional use permits, or development agreements. These approaches often left out the interests of community groups. Equally important, the bilateral model discouraged monitoring and adjustment of zoning decisions—institutional mechanisms that are necessary to respond to changed circumstances.[42] Because CBAs include a series of promises that burden and run with the land, they set the groundwork for relationship building that can facilitate contingency planning among

---

[37] *Id.* at 345; *see also* WILLIAM A. FISCHEL, THE HOMEVOTER HYPOTHESIS 4, 14-16 (2001).

[38] *See* Adam Lovelady, Note, *Broadened Notions of Historic Preservation and the Role of Neighborhood Conservation Districts*, 40 URB. LAW. 147, 148-54 (2008).

[39] *Id.* at 154.

[40] *Compare* Hannah Wiseman, *Public Communities, Private Rules*, 98 GEO. L.J. 697, 710-14 (2010), *with* Lovelady, *supra* note 38, at 148-54.

[41] Alejandro E. Camacho, *Community Benefits Agreements: A Symptom, Not the Antidote, of Bilateral Land Use Regulation*, 78 BROOK. L. REV. 355, 361-63, 365 (2013).

[42] *Id.* at 360-61.

numerous parties.[43] The challenges of representation, coalition formation, capacity building, and enforcement posed by CBAs are legion.[44] But CBAs are an increasingly prevalent tool for responding to development-driven, sublocal change.

The proposals for sublocal control in this issue are balanced by an emphasis on more disaggregated responses to change. Lee Fennell's proposal to crowdsource information about land use preferences, intentions, and impacts is a clear example.[45] Traditional zoning relies on imperfect information. Most crucially, it inadequately addresses impacts of use-based planning experienced on adjacent land or across successive periods of ownership. Instead, zoning is informed by vague assumptions—for instance, that one type of use will have certain effects on another, or that the scale of development pursued today will remain efficient during some later time period. Planners bridge these information shortfalls with sophisticated tools like hedonic regression analysis, but they populate their models with proxies and use them to generate forecasts rather than actual impacts.[46] Fennell's project encourages the public to reveal information about land use intensity and quality of life through smartphones and other platforms.[47] This would replace—or supplement—planners' technical expertise with facts on the ground. But measuring impacts is, in a sense, an ex post treatment of sublocal externalities. New tools for gauging ambient noise and air quality can only speak to existing conditions. Such information can inform future decision making, but it is otherwise limited to the effects of decisions already made. Fennell therefore proposes another information-based approach: an options exchange that elicits data about future preferences and desires.[48] This proposal seeks to reveal consumer preference information and "execute binding property instruments" to lock in those preferences over time.[49]

Stewart Sterk provides another method to harness the power of market mechanisms. Sterk reviews existing

---

[43] *Id.* at 367.

[44] Vicki Been, *Community Benefits Agreements: A New Local Government Tool or Another Variation on the Exactions Theme?*, 77 U. CHI. L. REV. 5, 21-31 (2010).

[45] Lee Anne Fennell, *Crowdsourcing Land Use*, 78 BROOK. L. REV. 385, 387 (2013).

[46] Models in support of regulatory behavior pose a variety of limitations and concerns. *See, e.g.*, Wendy Wagner, Elizabeth Fisher & Pasky Pascual, *Misunderstanding Models in Environmental and Public Health Regulation*, 18 N.Y.U. ENVTL. L.J. 293, 308-13 (2010).

[47] Fennell, *supra* note 45, at 392-93.

[48] *See* Lee Anne Fennell, *Property and Precaution*, 4 J. TORT L. 1, 24-31 (2011).

[49] Fennell, *supra* note 45, at 402.

approaches to limiting "localized externalities" (and those that extend beyond a development's immediate environs) and hones in on the added costs of these approaches: they establish unrelated restrictions, cater to a skewed mix of organized interests, and rely on rules that are both underinclusive and overinclusive.[50] His solution is for local governments to price the effects of land uses and allow property owners to adjust accordingly. Sterk suggests that land use regulations could be augmented by taxes that are better tailored to the externalized costs of development and avoid the problems attendant to discretionary review.[51] This differs from Fennell's proposal for an options-pricing scheme because a centralized authority rather than a market would price externalities. But once prices are set, the market would give property owners what amounts to a menu of options at pre-specified prices. Supplementing zoning with development taxes expands the options available for adding fine-grained flexibility to land use controls.

A final attempt to expand zoning's flexibility can be found in the use of land transfer programs that direct, rather than respond to, development patterns. Chief among these efforts is the repurposing of transferable development rights (TDRs). TDRs are not new, but Vicki Been and John Infranca argue that New York City utilizes them to replace traditional forms of flexibility such as upzonings and zoning lot mergers.[52] In the past, developers sought exemptions from strict zoning limits by merging lots to create greater bulk limits or requesting rezoning to a more permissive designation. But these options faced structural limitations—the former requiring ownership of lots to merge, and the latter requiring affirmative regulatory action. TDRs themselves have been used primarily to relieve the rigidity of existing zoning designations. Now, New York and other cities are departing more completely from zoning constraints through subdistricting designations and TDRs built into comprehensive redevelopment efforts.[53] As many of the authors in this issue point out, land use controls fail to address change when they proceed from a limited analysis of the impacts they will encourage. The same is true of transfer programs, which were applied at times without

---

[50] Stewart E. Sterk, *Exploring Taxation as a Substitute for Overregulation in the Development Process*, 78 BROOK. L. REV. 417, 422-23 (2013).

[51] *Id.* at 431-34.

[52] Vicki Been & John Infranca, *Transferable Development Rights Programs: "Post-Zoning"?*, 78 BROOK. L. REV. 435, 438 (2013).

[53] *Id.* at 439-40.

sufficient awareness of urban design consequences or burdens on landowners. Been and Infranca chronicle how TDRs have moved beyond the strictures of lot-by-lot density controls. Often, as in Manhattan's High Line Transfer Corridor, using TDRs to direct not only the intensity but also the form of development has yielded stunning results for the character of neighborhoods where they are applied.[54]

In addition to exploring sublocal and disaggregated responses to change, contributors to this symposium identified a dramatic expansion in zoning's objectives. Courts and commentators have long recognized zoning's movement beyond the "orthodox quartet" of permissible police power regulations: "health, safety, morals, [and] general welfare" (at least as narrowly drawn).[55] With the New Deal expansion of the scope of the police power came opportunities to use zoning authority to pursue broader goals.[56] One such goal is conservation, which fits uneasily within traditional land use controls. While zoning can limit growth in an area, it is generally ill-suited to prevent growth altogether. Some local governments adopt "holding zones" by, say, designating large swaths of land for agricultural use only.[57] But this raises a host of doctrinal problems, imposes significant burdens on affected property owners without corresponding benefits, and—at least where the goal is conservation—amounts to a regulatory sleight of hand, treating agricultural use as synonymous with conservation.

Conservation easements have emerged as a tool for local governments to pursue conservation directly, as a kind of private-law alternative to zoning. Gerald Korngold points out that local governments increasingly acquire conservation easements, and he notes that this affects land's development potential as much as, if not more than, traditional zoning.[58] If at a later time municipalities adopt different conservation strategies, they can modify or release the easements they hold.

---

[54] *Id.* at 449-52.

[55] ROBERT C. ELLICKSON & VICKI L. BEEN, LAND USE CONTROLS: CASES AND MATERIALS 114-15 (3d ed. 2005).

[56] For a history of the expansion of police power regulations and its impact on land use regulation, see Bradley C. Karkkainen, *The Police Power Revisited: Phantom Incorporation and the Roots of the Takings "Muddle*,*"* 90 MINN. L. REV. 826, 838-74 (2006). A classic battleground for this expansion is in the area of aesthetic regulation. *See* ELLICKSON & BEEN, *supra* note 55, at 469-505.

[57] Gerald Korngold, *Governmental Conservation Easements: A Means to Advance Efficiency, Freedom from Coercion, Flexibility, and Democracy*, 78 BROOK. L. REV. 467, 472-76 (2013).

[58] *Id.*

By comparison, a municipality must use eminent domain to eliminate privately held conservation easements.[59] In addition, conservation easements give local governments a means to implement more fine-grained decisions. Instead of requiring a zoning ordinance to distinguish among the environmental sensitivity of various parcels—an endeavor that could require lot-level distinctions—a government can acquire conservation easements over the precise property it wants to protect.

A similar expansion of regulatory purpose, driven by the changing scale of land use impacts, is on display in the use of development controls to anticipate sea-level rise. According to John Nolon, Euclidian zoning was complicit in this country's pattern of sprawl development.[60] Separating incompatible uses encouraged segregation of homes, jobs, and commercial needs, leading—in many places—to the consumption of open space and a reliance on cars for commuting and errands. Built structures themselves are responsible for a tremendous amount of energy use in the United States, and building codes and design requirements also influence carbon emissions. Thus, local land use regulations arguably contribute to sea-level rise. A concern for sea-level rise, and for climate change more generally, encourages the deployment of municipal land use and building regulations to create transit-oriented development and more energy-efficient buildings. This, of course, reflects an expansion of the traditional purposes of zoning and land use controls. Instead of separating incompatible uses, the goal is to minimize environmental impacts on a broader scale—to limit, in essence, the global externalities of local land use decisions, as opposed to smaller-scale externalities among neighbors. Nolon explores a combination of development-control and informational mechanisms to preserve natural floodplains, protect streams and "soft" barriers against the sea, and reveal risks attendant to inundation of development in the future. The goal is to encourage developers to account for the risks of sea-level rise in siting decisions and project design.

Nicole Garnett's examination of form-based codes speaks to another expansion of regulatory purpose: focusing on

---

[59] *See* Christopher Serkin, *Entrenching Environmentalism: Private Conservation Easements over Public Land*, 77 U. CHI. L. REV. 341, 359 (2010) (identifying eminent domain's role in preserving policy flexibility for future governments).

[60] John R. Nolon, *Land Use and Climate Change: Lawyers Negotiating Above Regulation*, 78 BROOK. L. REV. 521, 526-27 (2013).

the form of built structures rather than the use of land.[61] The goal of form-based codes is to create municipalities with certain design features and more dense urban cores. Proponents of form-based codes advocate "scrap[ping] traditional zoning codes, which regulate based upon property *uses*, in favor of a regulatory system that targets building density and form."[62] As is true of each of the innovations chronicled in this issue, form-based codes present their own risks. First, they are meant to supplement zoning according to the "transect," the supposed progression of development from urban to less-intense uses of land. Form-based codes dictate the architectural elements that should proliferate along different parts of the urban transect. In practice, development does not adhere to this planning principle: it might follow more uniform density gradients, as in Los Angeles, or proceed along alternating gradients, as in Phoenix.

But with new forms and purposes of municipal land use controls come new risks. Garnett worries, for example, that the embrace of form-based codes can micromanage the details of building forms, making the codes both difficult to follow and inappropriate impositions of aesthetic preferences.[63] Crowdsourcing information also raises complicated issues of participation and voice. If data collection is more available to some people than others, their concerns may be given greater weight in land use decisions.[64] Likewise, CBAs raise difficult questions of representation, with the developer often driving the process without the benefit of procedural safeguards such as those found in New York City's Uniform Land Use Review Process.[65] Some of the approaches, including NCDs, add layers of approval or otherwise increase the cost of regulatory compliance, potentially restricting the supply of new developments.[66]

With a sense of these concerns, Richard Epstein adds a cautionary note to the project of exploring the scale of land use controls and the management of change.[67] As he quite rightly anticipates, the principal concern of the papers in this symposium is that "zoning law has proved inadequate to

---

[61] Nicole Stelle Garnett, *Redeeming Transect Zoning?*, 78 BROOK. L. REV. 571, 575-76 (2013).

[62] *Id.* at 575.

[63] *Id.* at 580-81.

[64] *See* Fennell, *supra* note 45, at 406-08.

[65] *See* Camacho, *supra* note 41, at 356-57.

[66] *See* Fischel, *supra* note 36, at 348-49, 351-52.

[67] *See* Richard A. Epstein, *The Takings Clause and Partial Interests in Land: On Sharp Boundaries and Continuous Distributions*, 78 BROOK. L. REV. 589 (2013).

grapple with all the complex issues of land use, so that additional systems are needed in order to pick up the slack."[68] For Epstein, this is troubling because the legal—and specifically, constitutional—protections for property owners are already insufficient to address traditional forms of regulatory incursion. He argues that much of the intellectual foundation for that protection is based on a misunderstanding of the relationship between states' police power and the Takings Clause.[69] Instead of the ad hoc balancing test that informs takings jurisprudence, Epstein argues for the application of more bright-line rules, designed to protect property owners from implicit expropriations under the guise of regulation. Epstein would no doubt agree that judicial oversight of the regulatory innovations described in this issue is even more up for grabs.

Stepping back from the details of this exceptional collection of papers, each shares a concern over traditional zoning's ability to respond to changing conditions and a desire to replace (or at least to augment) top-down, technocratic decision making with more responsive controls at different scales. What is most striking about the contributions, then, is their unusually bold modesty. This is not an oxymoron. The proposals are innovative, from crowdsourcing zoning preferences to implementing neighborhood conservation districts and replacing development controls with land use taxes. But they reflect a certain skepticism about zoning's ability to achieve optimal land use outcomes. Part of this comes from the broader range of externalities that land use regulations are meant to confront. The focus reflected in these papers is no longer—at least not exclusively—the kinds of municipal conflicts that zoning historically was meant to forestall. The focus is simultaneously narrower and broader, from the sublocal effects of gentrification to global concerns such as climate change. Whether or not zoning can adapt to these sources of concern, there can be little doubt that the post-zoning world is fast approaching. It heralds new, and at times unique, threats to public welfare. The legal system will have to account for them as it continues to evolve. The first step in understanding that evolution is to recognize the changes that are underway. The papers in this symposium focus our attention on those changes.

---

[68] *Id.* at 592.
[69] *Id.* at 597.