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NEW YORK CITY ZONING — 1961-1991: TURNING BACK THE CLOCK — BUT WITH AN UP-TO-THE-MINUTE SOCIAL AGENDA

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I. Introduction

Zoning regulates land-use to implement a city plan. It is therefore responsible for the way a city looks and functions. In New York City, the first zoning regulation in the United States was enacted in 1916 and called the New York City Zoning Resolution (the "1916 Zoning Resolution"). Over time, the 1916 Zoning Resolution was continuously amended to adapt to changing times, and by 1960, it resembled a torn "patchwork," reflecting forty-four tumultuous years of technological, social and physical change. To clarify the confusion and establish a plan, in 1961, a Comprehensive Amendment to the New York City Zoning Resolution was passed (the "1961 Zoning Resolution"). This 1961 Zoning Resolution incorporated new standards, methodologies and techniques, and emphasized a radical vision of the future. It brought the out-dated 1916 zoning framework up to date.

Now, in 1992, it appears that history has repeated itself. Thirty years after the 1961 Zoning Resolution, there is a need for a new update. Over the years, societal concerns and priorities have fluctuated with the times and, as a result, exceptions have been made to the zoning regulations which reflect these changing social interests. The result is a Zoning Resolution which stands at 806 pages (and still counting). It is an ad-hoc, convoluted, chaotic non-plan for the City, held together by binders rather than a common vision. If the 1916

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Zoning Resolution resembled a patchwork quilt in 1960, then the 1961 Zoning Resolution today resembles a giant maze.

Zoning reflects social change, so inevitably it will fluctuate and become layered with the passage of time. Yet for zoning to be an effective instrument to guide private development and investment, it must be updated to reflect and account for the needs and interests of the day, not those of thirty or forty years ago. The time for an update is now. What is needed is a new Comprehensive Reassessment which will guide future development in accordance with the needs and values of today's society.

This essay examines the zoning history of New York City for the past thirty years in an attempt to elucidate how times can change and how the zoning framework reflects these changes. It looks at the various common themes which have guided zoning issues, as well as different approaches and exceptions which have arisen over the years to accommodate changing interests and concerns. It examines how these exceptions have contravened the fundamental principles of the 1961 Zoning Resolution and produced the current regulatory maze. It concludes with the call for a new Comprehensive Reassessment. This reevaluation would identify the City's present day needs and would therefore unify its goals by reinvigorating the potential effectiveness of zoning.

II. Increasing Respect for the "Built" And the "Unbuilt" Environment

A. Little Respect in 1961

The 1961 Zoning Resolution sought change without concern for what result this mission would have on the "built," or pre-existing environment. It was promulgated at the height of the City's urban renewal program, which was dedicated to clearing "substandard and unsanitary" areas, replacing them with sound and healthy neighborhoods. People wanted a change. Large area designations for urban renewal were in vogue. The new open space ratios, height factors and parking requirements embodied in the 1961 Zoning Resolution ensured that new development would little resemble the old city building blocks whose seemingly outmoded form was deemed responsible for the City's social ills. The Supreme Court in *Berman v. Parker*[1] dismissed conservative fears that much standard housing would be lost in the giant nationwide urban renewal clearance underwritten by the federal government, by stating:

1. 348 U.S. 26 (1954).

> It was important to redesign the whole area so as to eliminate the conditions that cause slums — the overcrowding of dwellings, the lack of parks, the lack of adequate streets and alleys, the absence of recreational areas, the lack of light and air, and the presence of outmoded street patterns. *It was believed that the piecemeal approach, the removal of individual structures that were offensive, would be only a palliative.* The entire area needed redesigning so that a balanced, integrated plan could be developed for the region, including not only new homes but also schools, churches, parks, streets, and shopping centers. In this way it was hoped that the cycle of decay of the area could be controlled and the birth of future slums prevented.[2]

These new zoning controls, enacted to parallel urban renewal, worked consistently in large scale developments which were shaped by common assumptions. On a smaller lot basis however, they either failed altogether or produced awkward dissonance within an established neighborhood. The efforts of the government to rehabilitate existing structures individually came to little in this world which preferred "thinking big."

In many ways, the 1961 Zoning Resolution and the concurrent billion dollar urban renewal program shared common assumptions and principles: large lot and large scale development were preferable. Despite this initial perception, as times changed, neither tool would survive the political storms of the next decades.

B. Landmark Preservation

The Zoning Resolution that went into effect in 1961 reflected a disdain for the existing built form. Within just a few years, however, public sentiment began to respond to an earlier and different drumbeat that sought to maintain some of the pre-existing structures and one which reflected more respect for the "built" environment.

When Pennsylvania Station was demolished in the early 1960s to make way for the 1961 Zoning office development which extended the earlier Penn Station South Urban Renewal Plan, people rallied and coalesced behind the creation in 1965 of a Landmarks Preservation Commission[3] ("LPC"). This Commission was given powers to designate and regulate individual landmarks and development within historic districts.

Landmark buildings and districts mirrored earlier times. Brooklyn

2. *Id.* at 34-35 (emphasis added).

3. NEW YORK, NY, CHARTER OF THE CITY OF NEW YORK AND ADMINISTRATIVE CODE, Local Law No. 46 (1965), currently Title 25, Chap. 3, § 25-301 to 25-999.

Heights, for example, the first historic district designated, reflected the characteristics of early 19th century technology and aesthetics. The Landmark Preservation Law was designed to preserve examples of the very building types that the 1961 Zoning Resolution disfavored. Within designated historic districts, LPC mandated that new buildings resemble their older neighbors, rather than the new zoning prototype advanced by the 1961 Zoning Resolution.

Somewhat of a shot-gun marriage was arranged between the 1961 Zoning Resolution and the Landmark Preservation Law when, in 1968[4] and 1969,[5] landmarks were permitted to transfer the development rights allowed within the 1961 Zoning Resolution, but prohibited by the landmark designation, to nearby lots, even if they were across the street. In addition, limited height zoning districts were entertained in designated historic districts. In the 1970s, developments on landmark zoning lots were able to secure use and bulk modifications of the Resolution to foster preservation and harmonious relationships between developments which included landmarks and their surroundings. While no one could thereafter accuse the Resolution of landmark-blindness, the two codes remained in a state of tension with each other. The zoning law continues to change and shift, as reflected in a current proposal now being discussed for transition districts *around* historic districts to soften the boundary shock between zoning and Landmark Preservation Commission turf.[6]

C. Lofts

Nowhere in the City has the built environment been accorded more respect in zoning than in the loft regulation section of the 1961 Zoning Resolution.[7] This provision applies to buildings south of 60th Street in Manhattan and in certain areas of Brooklyn.

In the early 1960s, SoHo's "Hell's 100 Acres" came under study

4. NEW YORK, NY, ZONING RESOLUTION, Article VII: Administration, Ch. 4: Transfer of Development Rights from Landmark Sites, § 74-79, added pursuant to City Planning Report CP-20253 (May 1, 1968). This amendment and all amendments to the Zoning Resolution cited in the following footnotes are made pursuant to § 200 of the New York City Charter, of the Zoning Resolution of the City of New York.

5. *Id.*, amended pursuant to City Planning Report CP-20938 (Nov. 5, 1969).

6. *See Zoning and Historic Districts*, commissioned by the Municipal Art Society's Planning Center, New York, NY (July 1990) (prepared by Abeles Phillips Preiss & Shapiro, Inc., New York, NY).

7. NEW YORK, NY, ZONING RESOLUTION, Art. I: General Provisions, Ch. 5: Residential Conversion of Existing Non-Residential Buildings in Certain Community Districts in the Boroughs of Manhattan, Brooklyn and Queens, §§ 15-00 to 15-58, added pursuant to City Planning Report N 800458 ZRM (Feb. 9, 1981); revised pursuant to City Planning Report N 840674 ZRY (Aug. 27, 1984).

for urban renewal clearance and new housing. The City rejected the initiative on economic rather than aesthetic grounds, since a report by soon-to-become City Planning Commissioner, Professor Chester Rapkin, noted that "[SoHo's] dingy exteriors, however, conceal the fact that the establishments operating within them are, for the most part, flourishing business enterprises of considerable economic value to the City of New York."[8]

Thereafter, however, many of the lofts were vacated by their manufacturing tenants and despite their manufacturing/commercial use-only zoning classification, they were illegally occupied for residential purposes. Artists liked these lofts for their freedom to work and live on large floors unconstrained by eight foot residential ceilings. As a result, they were legislatively deemed a species of manufacturing to legalize their occupancy.[9]

A 1977 Department of City Planning survey[10] indicated that ninety percent of residential conversions were illegal, posing a serious fire danger threat since the turn-of-the-century loft lacked built-in residential development safety features. Despite the safety concerns and the mixed reviews about their aesthetic quality,[11] the SoHo cast iron facades were sufficiently unique to warrant historic district designation by the Landmarks Preservation Commission.[12] Altogether, lofts were on their way to becoming chic and loft living *de rigueur* to a certain class of professional New Yorkers.

To maintain the lofts, the planners crafted sections 15-00 to 15-58, and thereby embraced building types originally designed for factories which, with adaptive residential reuse requirements added, ensured their retention as a built environment.[13] 1961 zoning standards were not used or involved. Sections 15-00 to 15-58 were literally a return to a built form impossible to achieve even under the 1916 Resolution.

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8. PROFESSOR CHESTER RAPKIN, REPORT ON THE SOUTH HOUSTON INDUSTRIAL AREA - ECONOMIC SIGNIFICANCE OF FIRMS, THE PHYSICAL QUALITY OF BUILDINGS AND THE REAL ESTATE MARKET IN AN OLD LOFT SECTION OF LOWER MANHATTAN (1963) (on file at the Department of City Planning, New York, NY).

9. *See* NEW YORK CITY DEPARTMENT OF CITY PLANNING, LOFTS: BALANCING THE EQUITIES (Feb. 1981).

10. REPORT OF THE DEPARTMENT OF CITY PLANNING AND MAYOR'S MIDTOWN ACTION OFFICE, RESIDENTIAL RE-USE OF NON-RESIDENTIAL BUILDINGS IN MANHATTAN (Dec. 1977) (on file at the Department of City Planning, New York, NY).

11. Professor Rapkin found them "dingy." *See* REPORT OF THE SOUTH HOUSTON INDUSTRIAL AREA, *supra* note 8.

12. LANDMARKS PRESERVATION COMMISSION, SOHO - CAST IRON HISTORIC DISTRICT DESIGNATION REPORT (August 14, 1973).

13. *See supra* note 7.

This return was achieveable by amending other laws, which made the adaptive reuse of these structures possible and safe.

D. Natural Areas and Wetlands

A respect for pre-existing environment has also emerged in the area of environmental conservation. Although by 1961 most of New York was covered with buildings, some shoreline property in all boroughs remained susceptible to development. The federal government had mandated environmental assessments in 1969 with the Federal National Environmental Policy Act (NEPA),[14] but it was not until 1976 that New York extended this environmental protection to New York State governmental actions with the State Environmental Quality Review Act (SEQRA).[15] By this time, the State already had in place Tidal[16] and Freshwater Wetland Programs,[17] so the window for development in natural areas was fast closing.

To a certain extent, landmark preservation laws, NEPA and SEQRA provided a *de jure* foundation for ending the pioneering, taming-the-wilderness chapter in the City's development which sought extensive change through urban renewal and large lot development. These laws commenced a new chapter which respected the "built" and "unbuilt" environment, called contextual zoning.

III. Growth of Contextual Zoning

A. Starting with Laissez Faire

"Context" simply means the surrounding conditions in which something occurs. "Contextual zoning" extends the definition a step further and lets the context control the development. Contextual zoning was difficult under the 1961 Zoning Resolution since it controlled height and bulk primarily through floor area ratio (FAR), rather than strict controls on the building envelope. Since FAR is a formula relating the floor size of the building to the lot size, it was the size of the zoning lot that was the crucial factor in determining the built form of the development, i.e. low-rise, mid-rise or tower. As a result, a tower or other bulky building was achievable even in a low FAR district if

14. National Environmental Policy Act of 1969, Pub. L. No. 91-190, § 2, 83 Stat. 852 (1970).

15. N.Y. ENVTL. CONSERV. LAW § 8-0101 to 8-0117 (McKinney 1984 & Supp. 1992) (effective Sept. 1, 1976).

16. N.Y. ENVTL. CONSERV. LAW § 25-0101 to 25-0601 (McKinney 1984 & Supp. 1992) (effective Sept. 1, 1973).

17. N.Y. ENVTL. CONSERV. LAW § 24-0101 to 24-1305 (McKinney 1984 & Supp. 1992) (effective Sept. 1, 1975).

the zoning lot was large enough. It therefore was difficult to ensure that the building "matched" its surroundings, making contextual development haphazard.

B. The Special District

The traditional 1961 Zoning Resolution regulated all properties within a relatively common district so that they could be developed to bulk and density levels which would not over-strain city services. It also permitted a variety of uses found compatible with the character of the area.

Often, some use choices were more profitable than others. As a result, the profitable uses would often be the ones built, while the other uses became extinct — unless the municipality could afford to subsidize development of the unprofitable use either by supplying money through urban renewal, or proposing that the area be deemed a Special District. This is what New York City tried to do in the theatre district.

In 1967, the New York City Planning Commission proposed an innovative zoning technique[18] that would preserve New York City's position as the national theatre capital without curtailing construction of the high-rise office buildings which were steadily replacing the old, uneconomic, two and three-story theatres. This plan reflected more than just sentiment and nostalgia. There were compelling findings linking New York's pre-eminence as a national corporate headquarters to its theatres around which so many related activities, such as radio and television, shopping, dining and tourism clustered. The New York City Planning Commission acknowledged this relationship and perpetuated it, to a certain extent, through the use of incentive zoning.

Rather than inhibit the building of new office space in the Times Square area which was well served by the City's mass transit network, the demarcation of the Special Theatre District in 1967 offered the developer an incentive in the form of a floor area bonus of up to forty-four percent in exchange for the promise to build a legitimate theatre as part of the project. This Special District stretched from 57th Street to 40th Street and was bounded by Eighth Avenue on the west and the Avenue of the Americas on the east, an area within which most of the City's legitimate theatres presently exist. Incentive zoning through the use of the carrot of additional density, sought to attract—and in effect subsidize—theatres and to shape development in accord-

18. Special Theatre District, *see infra* note 39.

ance with the City's Comprehensive Plan. Five legitimate theatres, which otherwise would not have come into being, were built under this innovative provision. All five are in active use today.

The incentive thrust of this Special District was directed to the stimulation of theatre construction. The 1961 Zoning Resolution bonus incentives were refashioned in 1967 to extend to individualized Special District amenities, i.e. legitimate theatres in the Theatre District, public rooms and arcades along Broadway near Lincoln Center,[19] extra retail space along Fifth Avenue[20] and a second-level pedestrian spine along Greenwich Street in Lower Manhattan.[21]

Ultimately, the enactment of forty Special Districts eroded general zoning enforcement. It proved difficult for the Department of Buildings to keep up with so many idiosyncratic provisions in different areas. If Special Districts were to be the means by which the City would contextualize its zoning in a special or unique area, the task of overlaying the 1961 Zoning Resolution would approach the cleaning of the Augean Stables.[22] The cacophony of individual Special District regulations could approach the commotion at the Tower of Babel.[23] Forty Special Districts meant forty zoning ordinances in a city where the administrative capacity was geared to one zoning ordinance.

The handwriting was on the wall: a Special District could avoid the zoning "look" that the 1961 Zoning Resolution advanced, but there had to be a better way to achieve the desired contextuality through regulation. It had become obvious that by the early 1980s, no neighborhood viewed itself as standard or typical in the sense of the 1961 Zoning Resolution, and many continued to seek contextuality.

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19. NEW YORK, NY, ZONING RESOLUTION, Art. VIII: Special Purpose Districts, Ch. 2: Special Lincoln Square District, §§ 82-00 to 82-14, added pursuant to City Planning Report CP-20365A (Mar. 19, 1969).

20. NEW YORK, NY, ZONING RESOLUTION, Art. VIII: Special Purpose Districts, Ch. 7: Special Fifth Avenue District, § 87-00, added pursuant to City Planning Report CP 21498 (Mar. 25, 1971) (replaced by Art. VIII: Special Purpose Districts, Ch. 1: Special Midtown District, §§ 81-00 to 81-90, pursuant to City Planning Report N 820253 A ZRM (Mar. 16, 1982)).

21. NEW YORK, NY, ZONING RESOLUTION, Art. VIII: Special Purpose Districts, Ch. 6: Special Greenwich Street Development District, § 86-00, added pursuant to City Planning Report CP-21418 (Jan. 6, 1971).

22. The legend of Augean is that after leaving his stable neglected for 30 years, it was finally cleaned by Hercules. *See* WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 118 (1989).

23. Babel is a biblical city where the building of a tower is held in Genesis to have been interrupted by the confusion of languages. *See Genesis* 11:1-9. *See also* WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 122 (1989).

C. Changing Attitudes Toward Open Space

One dominant value that emerged in the 1961 Zoning Resolution was the need for more open space in the City. Light and air had been one of the values of the 1916 Resolution, but other than requirements for rear yards in Manhattan, and front, side and rear yards in the other boroughs,[24] open space was limited to the City's parks. In 1958, Mies Van Der Rohe's burnished copper and glass Seagram building, with its simple reflecting pools in a plaza fronting on Park Avenue, had created a sensation in Midtown Manhattan.[25] Lever House across the street had created a similar stir a few years earlier with its provisions of a public arcade and open space, complete with a garden in a catty-cornered pedestrian route which linked Park Avenue to East 53rd Street.

Neither building exhausted its floor area potential under pre-1961 zoning; its institutional developers preferring instead to create a distinctive headquarters image. Both buildings were well-received in the '50s and have been designated as landmarks during the past decade.[26] The public made much use of the voluntary open space amenity each provided.

Planners were struck by the paucity of such amenities in Midtown and Lower Manhattan. Following the lead of the private sector, City planners sought to encourage increased private development of more public open space areas. Rather than require these in the 1961 Zoning Resolution, they were included as a development choice under the City's first incentive zoning device. Studies of pre-1961 central business district development revealed an average building FAR approaching 17. By setting basic FAR of the 1961 Zoning Resolution at 15, and allowing it to rise twenty percent to FAR 18 if the developer provided a plaza or arcade,[27] the planners hoped to replicate more Seagram and Lever House type developments with free open space amenities. While planners in 1961 were projecting future needs based on extrapolation of past data trends, and presumed the public wanted

24. NEW YORK, NY, ZONING RESOLUTION, Art. II, Ch. 3: Yard Regulations, § 23-40; Art. III, Ch. 3, Yard Regulations, § 33-20.

25. *See* Douglas Davis, *Modern Master Builder*, NEWSWEEK, Feb. 17, 1986, at 67.

26. Lever House, LP-1277 (1982); Seagram Building, lobby interior, Four Seasons Restaurant interior, LP-1664, 1665, 1666 (1989).

27. NEW YORK, NY, ZONING RESOLUTION, Art. III: Commercial District Regulations, Ch. 3: Bulk Regulations for Commercial or Community Facility Building in Commercial Districts, § 33-14 Floor Area Bonus for Urban Open Space.

NEW YORK, NY, ZONING RESOLUTION, Art. III: Commercial District Regulations, Ch. 3: Bulk Regulations for Commercial or Community Facility Building in Commercial Districts, § 33-15 Floor Area Bonus for Arcades.

more open space, one particular assumption in the data book was about to change.

Street crime statistics, calculated by decades, show unusually low levels in the '30s, '40s and '50s followed by a steady rise in the '60s, '70s and '80s.[28] Public attitudes towards the new privately-owned, public open spaces and City parks as well, began to reflect the new danger they represented.[29] Illegal grills and fences were built in an attempt to shut these open spaces to the public at off hours and lessen the incidence of crime. Spikes were introduced on ledges to prevent sleeping or sitting. Benches became suspect. The original interest in having more open public space no longer reflected the times. It seemed that the success of the Seagram's and Lever House plazas were flukes, successful in part because they served as an occasional refreshing oasis in an otherwise disciplined street wall along an avenue.

Another change stemmed from a shift in values. In the suburbs, the priority of open space often meant that contextualism was compromised. The contextualism versus open space debate in the outer boroughs was most vividly projected in a controversy over high-rise development in Glen Oaks, a community near the Queens-Nassau county line. The debate focused on whether to build up or build out. Much of the testimony at the City Planning Commission ("CPC") public hearing addressed the proposed height of the three apartment houses. Speakers argued that the proposed thirty-two-story structures would destroy the suburban character of the neighborhood. These opponents also argued that the development would be visually offensive and environmentally destructive.

Yet, the proposed development left untouched almost all of an existing golf course open space, the last remains of a glacial terminal moraine left over from the Ice Age. The ground floor area of the building covered only some two percent of the site. Moreover, the open space was further protected by a covenant contained in a declaration which prevented the owner of the property from ever building outside a certain circumscribed area regardless of what the zoning might call for in the distant future. This covenant permanently dedicated nearly one hundred acres of open space.

If the special permit for this large scale residential development were denied, the developer would still have the as-of-right option to

28. *See* Barbara Basler, *Crime Statistics: A Time Reflection*, N.Y. TIMES, Mar. 6, 1982, § 2, at 26.

29. *See* OSCAR NEWMAN, DEFENSIBLE SPACE (1973). This book responded to the new public fears and began to influence property owners as well as planners.

build more than 2500 one-family homes. This would satisfy the community's desire to retain a low level profile, but it would totally destroy the golf course and terminal moraine. In addition, ecologists who appealed to the City to reject the special permit for the high-rises overlooked the fact that one-family developments place a far greater strain on sewers than do apartment buildings in park-like settings.

The City approved the project two decades ago,[30] but the profile of the three thirty-two-story towers looming over suburbia served to fuel many a pro-contextuality political meeting over the ensuing decades as community interest began to favor contextuality over open space.

Open space has lost its standing as the City's dominant zoning value. As a candidate for incentive zoning today, it lags behind competing "amenities" on the City's social agenda and often conflicts with contextual values. The value placed on contextualism today has come to outweigh the value placed on open space.

IV. Use of Zoning as a Value Recapture Device

A. Changes of Zoning in Accordance with a Well-Considered Plan

The fact that a zoning map allows high density housing in some areas, only single family housing in others, only industrial and commercial use in designated locations, and high rise office buildings in downtown areas, creates great disparity in value among a city's many properties.

Rezoning, or upzoning into a value-increasing classification has been used as a value recapture device seeking to achieve a specific community objective for the benefit of the municipality. For example, a developer may be obligated to "give back" by providing an ice-skating rink on the site at a nominal charge to the public.[31] Such negotiated public value recapture techniques, in which the public receives something "back" from the developer, are achieved through use of restrictive declarations.

The practice of requiring restrictive declarations began in 1966 as a way of mediating conflicts and competing values in the rezoning process. The 1961 Resolution, with its limited number of districts, often permitted uses or designs which were different from those proposed by an applicant. The restrictive declaration sought to rectify this. It was signed by the property owner and other parties in interest on the lot, recorded against the property as a covenant running with the land

30. *See* New York City Planning Report CP-21651 (Aug. 11, 1971).

31. REMAPPING OF THE COCA COLA SITE, 1ST AVENUE & 34TH STREET, MANHATTAN, pursuant to City Planning Report C 7906342 ZMM (May 6, 1981).

and binding on future owners, and often renounced specific undesirable uses or designs. Occasionally the declaration would commit to an affirmative obligation, usually in the form of some design feature or amenity on the site. As a practical matter, the City's value recapture element was limited by the real estate value of the rezoning, as best as one could determine given the unpredictable nature of future values.

Not surprisingly, the City paid nothing to property owners when downzoning, or reducing the value of a given parcel to a level which did not trigger an unconstitutional "taking."[32] Presumably, assessed value would be reduced, and along with it, taxes. By this same test though, the City might have been satisfied with the increased assessed value and taxes it would derive from an upzoning.

All of these upzonings and downzonings are required to be in accordance with a well-considered plan.[33] Their private significance to the affected property owner or owners is really only an incidental by-product of the larger public interest, represented by the well-considered plan, and advanced by the particular zoning amendment. Under this rationale, a value recapture device, or "giveback," is a windfall to the community.

B. Extra Community Facility Bulk

Another type of value recapture device is used to ensure that facilities beneficial to the public are built in a community. In order to ensure the capture of this "value," the 1961 Zoning Resolution allowed a double-bulk standard[34] for these facilities, thus making their development competitive with residential single-bulk projects. The CPC rationalizes this preferential treatment by the fact that community facilities are largely public or non-profit and provide needed services. Libraries, nursing homes, colleges and schools, churches, clubs, first floor doctor's offices, hospitals, hospital staff housing and philanthropic or non-profit institutions without sleeping accommodations are all examples of these community facilities. Also included are drug rehabilitation clinics, homeless shelters and group homes for troubled children and the mentally retarded.

The City's inclusion of these uses by right within certain residential and commercial districts is not immune from controversy. A particu-

32. *See* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) (warning that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.").

33. New York City General Law § 20(24).

34. Bulk is defined as "the term used to describe the size of buildings or other structures, and their relationships to each other and to open areas and lot lines,. . . ." AMERICAN LAW OF ZONING § 12.11.

lar instance, centered in Rockaway in 1974, reflects this tension in the community over the encouragement and placement of such facilities. Due to the proximity to the ocean, the area was inundated with facilities, particularly nursing homes. The community was concerned that this nursing home "explosion" was overwhelming the surrounding neighborhoods. The residents eventually forced the City to retract the double-bulk preference from the facilities and to require a special permit for extra community facility bulk to restore some balance.

Despite this small victory, the problem still exists. This tension indicates that a major reassessment of community facility zoning and its relationship to contextualism in a city-wide framework is badly needed.

C. Plazas and Arcades

The incentives provided to developers to encourage the creation of open spaces and plazas is also a type of value recapture device. To the developer, receiving the incentive of twenty percent more floor area was generally worth more than its cost of satisfying the minimal requirement of paving an open or covered area. Soon the equality of this "exchange" tipped even more in favor of the developer. The "value" which the City received, the plaza, was increasingly perceived as a haven for drug-related and criminal activity, and the added floor space seemed to be a high price to pay for this return. It should not have come as a surprise that the low value recapture was derided by communities as a bad deal for the City.

Many of these value recapture concerns became the subject of amendments to the basic plaza text of the Zoning Resolution in the '70s.[35] By the '80s, a more fundamental questioning of the plaza's utility to the public led to a reduction in the incentive in many districts[36] and its elimination in other districts.[37] Discretionary modifications of plaza requirements for better urban design reasons became possible.[38] Safety concerns, contextual building design, and other

35. *See* New York City Planning Report CP-22784B: Establishment of Urban Open Space (amending § 12-10, Apr. 16, 1975); New York City Planning Report N 760066 ZRY: Residential Plazas (amending Art. II and III, ch. 7 and 8, Apr. 21, 1977).

36. NEW YORK, NY, ZONING RESOLUTION, Art. VIII: Special Purpose Districts, Ch. 1: Special Midtown District, § 81-23: Floor Area Bonus for Urban Plaza, added pursuant to City Planning Report N 820253 ZRM A (May 13, 1982).

37. NEW YORK, NY, ZONING RESOLUTION, Art. IX: Special Purpose Districts, Ch. 9: Special Madison Avenue Preservation District, §§ 99-00 to 99-09, added pursuant to City Planning Report CP-22350 (Nov. 7, 1973). Park Improvement District (Park and Fifth Avenues).

38. NEW YORK, NY, ZONING RESOLUTION, Art. VII: Administration, Ch. 4: Special Permits by the City Planning Commission, § 74-96: Special Urban Design Guidelines

higher priority value recapture "amenities" began to counterbalance the advantage of a public open space on private property.

D. Theatres

When the private market first looked to Times Square in the mid-'60s as an avenue for office development, it was perceived as a mixed blessing. On the one hand, bland office towers set in plazas threatened the nostalgic, raffish character of the Theatre District; on the other hand, West Midtown was the natural direction for growth of the City's prime midtown office core.

No freestanding legitimate theatre had been built there by the private sector since 1927. As described earlier, by mandating theatre development in return for increasing the space available for basic office building potential in this area from FAR 15 to FAR 21.6, the City recaptured at least five new legitimate theatres in this Special District.[39] Clearly, the City's social agenda harnessed its zoning regulation to subsidize an uneconomic use.

Special District value recapture exercises such as this one always assumed that the City prize gained would be worth more than the City "price" paid in allowing additional floor area.

E. Inclusionary Zoning

Long before the New Jersey *Mount Laurel*[40] litigation, the CPC developed a plan for Lower Third Avenue in 1970 by linking a substantial residential upzoning of the area to the nearby provision of 450 units of lower-income housing. This plan was to be implemented in a proposed special zoning district.

The new proposal permitted high density apartment development, built in accordance with certain design requirements such as widened sidewalks and arcades, only if a developer shouldered the relocation burden being created by the rezoning (i.e. loss of 450 low rent units) in one of two ways. The developer could utilize fifteen percent of her

- Residential Plaza Modifications, added pursuant to City Planning Report N760066 ZRY (Mar. 2, 1977). *See also* Art. I: General Provisions, Ch. 2: Definitions, § 12-10: Definitions - "Plaza," amended pursuant to City Planning Report N 780630 ZRM (Jan. 22, 1979).

39. NEW YORK, NY, ZONING RESOLUTION, Art. VIII: Special Purpose Districts, Ch. 1: Special Midtown District, § 81-06: Special Theatre District, added pursuant to City Planning Report CP-20000 (Nov. 1, 1967).

40. *Southern Burlington County NAACP v. Township of Mount Laurel*, 67 N.J. 151, 336 A.2d 713 (1975) (Mount Laurel I); *Southern Burlington County NAACP v. Township of Mount Laurel*, 92 N.J. 158, 456 A.2d 390 (1983) (Mount Laurel II); *Hills Dev. Co. v. Township of Bernards*, 103 N.J. 1, 510 A.2d 621 (1986) (Mount Laurel III).

residential floor area for low or moderate-income tenants; or make a payment to the City representing her pro rata share of the City's cost of acquiring public housing sites capable of producing 450 dwelling units within the district. If she resisted these blandishments, she was free to build at the underlying residual middle density zone.

The Special Lower Third Avenue District was approved by the CPC, but defeated by the Board of Estimate.[41] Various reasons have been suggested for its defeat. The adjacent community did not want high density luxury housing, did not trust the municipal promise of low-rent housing and feared the "ripple effect" of increasing zoning density on adjacent property which they saw as soaring in value so as to put it out of reach of the middle class. It may have been that the proposal was defeated because the development community which urged increasing the allowable density feared a precedent which would make the provision of proximate or on-site relocation housing a condition of zoning density increase. In that case, the high land value deterrent to class integration would have been removed.

Four special districts: Lincoln Square in 1968[42] Clinton,[43] Yorkville[44] and Manhattan Bridge,[45] over the next ten years incorporated bonus floor area allowances for a provision of low- or moderate-income housing. In the case of Manhattan Bridge, the bonus alternatively encouraged the provision of a community facility. None of these recapture schemes worked to produce any lower-income units.

It was not until 1987 that a generic zoning program to stimulate private sector provision of lower-income housing was adopted by the City.[46] This program, applicable only in areas permitting high den-

41. Proposed for the New York City Zoning Resolution as Art. VIII: Special Purpose Districts, Ch. 6: Special Lower Third Avenue Development, § 86-00, on Nov. 12, 1970, pursuant to City Planning Report CP 21179. Defeated by the Board of Estimate on Oct. 8, 1970 by a vote of 18 to 4.

42. NEW YORK, NY, ZONING RESOLUTION, Art. VIII: Special Purpose Districts, Ch. 2: Special Lincoln Square District, §§ 82-00 to 82-14 added pursuant to City Planning Report CP-20365A (Mar. 19, 1969).

43. NEW YORK, NY, ZONING RESOLUTION, Art. IX: Special Purpose Districts (continued), Ch. 6: Special Clinton District, § 96-00, added pursuant to City Planning Report CP-22758 (Oct. 21, 1974).

44. NEW YORK, NY, ZONING RESOLUTION, Art. X: Special Purpose Districts (continued), Ch. 1: Special Yorkville-East 86th Street District, § 101-00, added pursuant to City Planning Report CP-22529 (Apr. 3, 1974) (repealed Jan. 30, 1989).

45. NEW YORK, NY, ZONING RESOLUTION, Art. XI: Special Purpose Districts (continued), Ch. VI: Special Manhattan Bridge District, §§ 116-00 to 116-70, added, pursuant to City Planning Report N 801024 ZRM (June 22, 1981) (terminated Sept. 1, 1991).

46. NEW YORK, NY, ZONING RESOLUTION, Art. II: Residence District Regulations, Ch. 3: Bulk Regulations for Residential Buildings and Residence Districts, § 23-90: Inclusionary Housing, added pursuant to City Planning Report N 850487 ZRY(A) (Apr. 1, 1987).

sity housing, created a maximum twenty percent floor area bonus for providing new or preserved lower-income housing on-site, or off-site within the same community district or within a half-mile of the bonused development. This legislation provided a formula for relating the amount of bonus floor area to the floor area of the lower-income housing provided. From a public value recapture standpoint, this inclusionary benefit often competed with the plaza or arcade bonus. Where this was the case, a developer predictably chose the less costly alternative (i.e., the plaza) to secure the maximum bonus.

At no point in the process did the City pretend that it would solve its serious affordable housing crisis. Some saw the new Federal section 8 Housing Program,[47] which subsidized lower-income living, as the solution, while contrary-minded groups urged the repeal of rent regulation as the needed spur to new housing investment.[48] Inclusionary zoning did, however, help perpetuate the myth that all social problems are susceptible to a zoning solution, by adding a new, alternative entree to the City's zoning menu.

Before leaving this discussion of value recapture, it is necessary to consider the Supreme Court's opinion in *Nollan v. California Coastal Commission*[49] ("CCC"). There, the CCC had conditioned a building permit to enlarge a beach bungalow into a one-family residence on the dedication of a public pedestrian easement along the beach frontage of the lot. The CCC had made a rational basis case for the requirement which the Court however found insufficiently related to the harm prevented (ocean view corridor blockage by the house). Further, the Court found that the interest in the land to be acquired by the CCC was a taking of private property for which a payment of just compensation to the owner was required.

Reading this opinion, one comes away with an impression that a conservative Court will, in the future, look closely at the zoning value recapture exercise for evidence of opportunistic leveraging and the possible taking of private property by government. In order to maintain a value recapture device or scheme, the nexus between the harm prevented and the value recaptured will have to be close and almost beyond a second guess. The nature of the value captured by the government regulation had best not resemble the kind of interest normally obtainable in a condemnation proceeding.

47. United States Housing Act of 1937, 50 Stat. 888 (codified at 42 U.S.C. 1400-1440 (1988)).

48. Nick Ravo, *Is It Time to End Rent Regulation?*, N.Y. TIMES, Mar. 22, 1992, § 10, at 9.

49. 483 U.S. 825 (1987).

This case threatens the use of the value recapture device by a municipality seeking to reap public benefits through zoning techniques. In the future, it may be open to question whether new zoning techniques are the best avenue for advancing today's social needs.

V. Reliance on Discretion Rather Than Change by Right

A. As-of-Right Countercurrents

As Special Districts and regulation multiplied, a frequent device employed to check on their administration was the requirement of a City Planning Commission certificate. A certification was legally viewed as a ministerial act, though in practice it often hinged on exercise of judgment. Other devices were the authorization, which involved the exercise of discretion but only in relatively minor cases, and a special permit, which generated a full-scale discretionary inquiry by the City Planning Commission.

The confusion that these devices create are reflected in the regulation of parking in the City over the years. The Comprehensive Amendment of 1961, which became the 1961 Zoning Resolution, expanded the requirements for off-street parking, thus complementing the regulatory objective of building more municipal parking garages. Then in the 1970s, amendments to the Federal Clean Air Act[50] imposed ambient air quality standards on the country, including New York City, and the City was forced to implement a plan capable of achieving these standards. Suddenly, the automobile became something to be discouraged, and restricting of parking seemed a logical means to achieve that goal. A review of all parking proposals was needed. The resulting 1982 discretionary certification, authorization and special permit provisions[51] mentioned above, now co-exist awkwardly with the parking requirements originally included in the 1961 Zoning Resolution.

In the instance of parking, as well as other zoning concerns, the City's recourse to the discretionary permit mode reflects the potential for controversy caused by the proposed use or design. These discretionary approvals invite political and community participation in the decision-making process on a site-by-site basis, which can be problem-

50. Federal Clean Air Act, 42 U.S.C. §§ 1857-1858 (amended by Act of Aug. 7, 1977, P.L. No. 95-95 and now appears at 42 U.S.C. §§ 7401-7642).

51. NEW YORK, NY, ZONING RESOLUTION, Art. I: General Provisions, Ch. 3: Comprehensive Off-Street Parking Regulations in Community Districts 1-8 in the Borough of Manhattan, § 13-40: Special Permits and Authorizations, added pursuant to City Planning Report N 810276 ZRM (Mar. 16, 1982).

atic. Unbounded discretion dilutes the effectiveness of a zoning plan, while directed planning advances it.

B. Increased Obsolescence of 1961 Districting

In 1961, when the City was rezoned, teams of planners went into existing neighborhoods, measuring and classifying, and often looked to the future to create the resulting zoning map. This extensive, methodical planning technique sought to minimize the possibility of non-conformity and non-compliance with the new map.

Yet, sometimes, the future changes which the planners assumed would happen did not happen. For example, in Sunset Park in Brooklyn, the 1961 mapping bet on an industrial future for this waterfront community, despite the 1961 residential character. The Sunset Park homes were old, the Brooklyn waterfront was busy, and it was hoped that mapping the area as a manufacturing district would accelerate relocation of homeowners to new housing to be built elsewhere in the City in a neighborhood with a more assured residential future.

The City guessed wrong in this case. Not much new housing would be built under the 1961 Zoning Resolution. The Brooklyn industrial waterfront declined. Families held onto their Sunset Park homes tenaciously, despite their non-conforming status which hindered rehabilitation, enlargements and the obtaining of insurance and mortgaging. Eventually, after eleven years of classification as a manufacturing district, parts of Sunset Park were rezoned to permit residences.[52]

The City has never comprehensively re-examined its 1961 Zoning Resolution and map to determine if it is still attuned to reality in the various communities. It has, however, reacted to individual site-specific private market initiatives for remapping, insuring intimate control over the resulting development. The New York City Charter mandates this focus on private zoning requests,[53] the need for which might have been obviated by the kind of comprehensive revision advocated earlier. A comprehensively updated zoning map would release many underutilized parcels from obsolete classification, relinquish the City's site-specific hold over their future and permit them to be used in accordance with a plan.

Rather than comprehensively examine the increasingly out-of-date 1961 Zoning Resolution, the Department of City Planning has proceeded on an area-by-area basis in the '70s and '80s, and has produced

52. Remapping of Sunset Park Brooklyn, pursuant to City Planning Report CP-21812 (Jan. 9, 1972).

53. NEW YORK, N.Y., CHARTER OF THE CITY OF NEW YORK, § 192 F.

over forty Special Districts and responded to small site applications for reclassification in an attempt to ensure up-to-date regulations.

In part, the City's reluctance to initiate any comprehensive reassessments of zoning reflects not only timidity, but a concern for its fisc. For example, the State Environmental Quality Review Act ("SEQRA") requires a hard look at the environmental impacts of a project rezoning — the larger and more generic the area rezoning, the more expensive the look. An applicant for a small site-specific rezoning will agree to undertake the costs of any related Environmental Impact Statement ("EIS"), but the City has been reluctant to commit its treasury to the unknown cost of an area-wide EIS which conservative lawyers say is necessary to repel litigation.[54]

To encourage this desirable planning step, the New York State Legislature could spell out the necessary components of the environmental disclosure statement which would accompany a comprehensive reassessment of the Zoning Resolution. Such a statute would safeguard the planning initiative from destructive litigation challenges, while ensuring responsible environmental review. SEQRA would thus strengthen comprehensive planning instead of inhibiting it.

As time goes by, the relevance of the data-induced policies formed in the '50s and implemented in the 1961 regulation, lessens. Private initiation of requests for change becomes the principal, albeit, piecemeal avenue for reviewing change. Inevitably, this ad hoc determination devolves into a case-by-case exercise of discretionary planning by the City. Thus, increased regulatory obsolescence means that the incidence of exercise of discretion by government increases; more regulations are required, and as a result, the uniformity and effectiveness of the zoning map is eroded.

VI. Conclusion: The Need for a Comprehensive Reassessment

Since zoning is a tool that implements a city plan, then the 1961 Comprehensive Amendment to the Zoning Resolution implemented a plan for the City which reflected an integrated vision composed of many disparate elements, all grounded in empirical observations and data gathered in the 1950s.

However, the passage of thirty years has not aged the 1961 Zoning Resolution and its administrative apparatus gracefully. Already ten years old when adopted, the key assumptions and policies underlying

54. *Cf.* Neville v. Koch, No. 56 (N.Y. Ct. of Appeals May 5, 1992) (upholding the efficacy of generic environmental assessment of a West Midtown block rezoning). *See also* Norman Marcus, *'Neville v. Koch' Worst Case Analysis Zoning: A Farewell to 'As of Right'?*, N.Y.L.J., Mar. 6, 1991, at 1.

the 1961 plan continued to change during the subsequent thirty years. As a result, pieces of the Zoning Resolution were either jettisoned, amended or added along the way. Tinker with one part and another part's assumptions are thrown out of whack.

Now, the 1992 Zoning Resolution and Map, which evolved from the 1961 Zoning Resolution, is a collage of ad hoc, jerry-built and thoughtful inspirations, grafted onto a long-disowned armature. There is increasing local frustration over its excessive girth, complexity, obsolescence and above all, its failure to reflect a plan for the City's future. All of this suggests that the City's present system may have come about as far as it can as a credible regulatory mechanism.

At no time since 1961 has an interdisciplinary effort been undertaken to see where the City stands, or to restate the City's plan or vision for the future. Too much has changed since 1961, really 1951, and the common threads which have deformed the 1961 Zoning Resolution deserve the opportunity to stand on their own and shape the City's plan for the coming decades.

What is needed now is a new Comprehensive Reassessment to determine the needs, interests and priorities of New York City in 1992. With this updated data, the City's zoning framework can be made uniform and comprehensible. The directions and goals emerging from the data will facilitate and strengthen the zoning framework, making it an effective means of harnessing private investment, and addressing the needs of today's modern urban life and sentiment.

As history reveals, zoning plans reflect societal attitudes, and so it is natural that our zoning map now reflects the changes and inconsistencies that have occurred over the last thirty years since the last comprehensive reassessment was completed. We have also seen through history how a zoning map can evolve to a point of stagnation and ineffectiveness. It is time to update our data and our plan to meet the needs of today. Otherwise, to paraphrase George Santayana, "those who will not learn from the past may be condemned to relive it."[55]

55. GEORGE SANTAYANA, THE LIFE OF REASON 2284 (1905).