

## Zoning Reformed

Michael Allan Wolf\*

*It has been roughly a century since early advocates of zoning took notice of how crowded and congested housing conditions contributed to the spread of disease (including the then-recent H1N1 pandemic). The U.S. Supreme Court had just rejected on property rights grounds a city ordinance that expressly segregated neighborhoods by race. One hundred years later, the exposure of the weaknesses embedded in our system of public land use regulation during the crises of 2020 presents a unique and timely opportunity for serious consideration of major and minor adjustments to state statutes, local ordinances, and judicial decisions. This Article calls for a comprehensive reform of zoning, eschewing pie-in-the-sky or revolutionary changes. It presents for the first time to state legislators, local officials, judges, academic commentators, and law and planning professionals a comprehensive set of achievable steps to take now in anticipation of future pandemics, in response to current and anticipated public health emergencies caused by climate change, and in addressing (at long last) social justice issues directly tied to undeniable elements of systemic racism caused and exacerbated by the paucity of safe, affordable housing. History will determine whether American public officials and private-sector participants will have attended to the painful lessons from the current crises in order to fine-tune zoning and land use regulation, or whether the U.S. will go back to our old and harmful habits once again.*

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\* Richard E. Nelson Eminent Scholar Chair in Local Government, University of Florida Levin College of Law. The author thanks Sara Bronin, Dan Mandelker, Stephen Miller, John Nolon, and Frank Schnidman for valuable feedback on early drafts, and the following talented colleagues who offered very helpful suggestions and guidance during a Zoom-facilitated workshop at the Levin College of Law: Mark Fenster, Andrew Hammond, Berta Hernández-Truyol, Blake Hudson, Merritt McAlister, Jason Nance, Bill Page, Danny Sokol, and Andy Winden. Matthew Ossorio provided excellent research and technical assistance.

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[E]pidemics have repeatedly offered a vantage from which to see deep into basic structures of inequality and injustice in the American legal order. . . . [C]alamity can be an occasion for making intolerable social conditions visible—and for reforming them.

John Fabian Witt<sup>1</sup>

We reversed an Obama-Biden regulation that would have empowered the Department of Housing and Urban Development to abolish single-family zoning, compel the construction of high-density “stack and pack” apartment buildings in residential neighborhoods, and forcibly transform neighborhoods across America so they look and feel the way far-left ideologues and technocratic bureaucrats think they should.

Donald J. Trump and Ben Carson<sup>2</sup>

The very machinery upon which many white Americans had the chance to build their lives and assets was forbidden to African-Americans who were still just a generation or two out of enslavement and the apartheid of Jim Crow, burdens so heavy and borne for so long that if they were to rise, they would have to work and save that much harder than their fellow Americans.

Isabel Wilkerson<sup>3</sup>

## INTRODUCTION

The year 2020 in the United States—which will long be associated with the COVID-19 pandemic,<sup>4</sup> a reinvigorated racial and social justice

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1. JOHN FABIAN WITT, *AMERICAN CONTAGIONS: EPIDEMICS AND THE LAW FROM SMALLPOX TO COVID-19*, at 140 (2020).

2. Donald J. Trump & Ben Carson, *We'll Protect America's Suburbs*, WALL ST. J. (Aug. 16, 2020, 4:02 PM), <https://www.wsj.com/articles/well-protect-americas-suburbs-11597608133> [<https://perma.cc/M7EM-7ZNX>].

3. ISABEL WILKERSON, *CASTE: THE ORIGINS OF OUR DISCONTENTS* 185 (2020).

4. See *Coronavirus Disease (COVID-19)*, WORLD HEALTH ORG., [https://www.who.int/health-topics/coronavirus#tab=tab\\_1](https://www.who.int/health-topics/coronavirus#tab=tab_1) [<https://perma.cc/8PA4-XB4C>] (last visited Sept. 30, 2021).

movement,<sup>5</sup> and the ravages of climate change<sup>6</sup>—presented a unique and timely opportunity to consider seriously several major and minor modifications of zoning, the predominant American public land use regulatory system comprising statutes, ordinances, and judicial decisions that has begun its second century of existence and authority.<sup>7</sup> The achievable<sup>8</sup> changes outlined in this Article are not just responses to one

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5. John Eligon, *Black Lives Matter Grows as Movement While Facing New Challenges*, N.Y. TIMES (Sept. 3, 2020), <https://www.nytimes.com/2020/08/28/us/black-lives-matter-protest.html?searchResultPosition=5> [<https://perma.cc/K73T-3849>] (“In the two weeks after Mr. [George] Floyd was killed in May, more than 2,000 protests were held across all 50 states. The demonstrations were diverse, reaching both big cities and communities that were rural and overwhelmingly white. On June 6 alone there were at least 531 protests nationwide, according to Count Love, a database of protests since 2017.”).

6. See, e.g., Richard Fausset, Rick Rojas & Henry Fountain, *Hurricane Sally Is a Slow-Moving Threat. Climate Change Might Be Why.*, N.Y. TIMES (Oct. 9, 2020), <https://www.nytimes.com/2020/09/15/us/hurricane-sally.html?searchResultPosition=1> [<https://perma.cc/DZR2-5LSZ>] (“Scientists saw [Hurricane] Sally’s stall over the warm waters of the Gulf as yet another effect of climate change in the United States, coming as wildfires along the West Coast have incinerated millions of acres and sent foul air into the atmosphere as far away as Washington, D.C.”); Rick Rojas, *After 2 Hurricanes, Lake Charles Fears its Cries for Help Have Gone Unheard*, N.Y. TIMES (Oct. 20, 2020), <https://www.nytimes.com/2020/10/20/us/lake-charles-hurricane-laura-delta.html?searchResultPosition=1> [<https://perma.cc/PDM4-LR75>] (“Lake Charles, a working-class city of roughly 78,000 people, has been eviscerated by a direct assault from this season’s hurricanes—Laura, one of the most powerful storms to hit Louisiana, followed six weeks later by Delta. Thousands of residents remain displaced. But as many see it, the city was also the victim of an extraordinary year of misfortune, one that has subjected the nation to a carousel of calamity—record storm and wildfire seasons on top of a pandemic.”).

7. See, e.g., ONE HUNDRED YEARS OF ZONING AND THE FUTURE OF CITIES ix (Amnon Lehavei ed., 2018) (“The 1916 New York City zoning ordinance serves as an essential milestone in the development of zoning and other forms of contemporary land-use regulation.”); Lisa Chamberlain, *Zoning at 100*, AM. PLAN. ASS’N (Jan. 2017), <https://www.planning.org/planning/2017/jan/zoningat100/> [<https://perma.cc/BWN6-77L8>] (“2016 marked the hundredth anniversary of New York City’s comprehensive zoning law, considered by most academics and urban planners to be the first of its kind. There were, of course, precursors to zoning that go as far back as the first walled city. The wall created a zone determining who was allowed in and who was not, as opposed to determining what is permitted to happen where, as planners generally think of zoning today.”).

8. For a perceptive recent set of arguments in defense of American zoning, see Christopher Serkin, *A Case for Zoning*, 96 NOTRE DAME L. REV. 749 (2020). In opposition to the consensus that is “building, at least among academics and elite activists, that zoning is a problem to be overcome,” Professor Serkin asserts:

Zoning, and density limits in particular, continue to serve important functions that go beyond its conventional justification of controlling externalities by separating incompatible uses. Today, zoning is primarily concerned with regulating the pace and costs of community change. It does this primarily by maintaining community character, enhancing property values, and allocating the costs of development between insiders and outsiders. Zoning remains an important tool in municipal toolkits, but more for these modern purposes than for the traditional ones.

*Id.* at 751–52 (footnotes omitted).

crisis-filled year; they are also responsible steps to take in anticipation of future pandemics and other unprecedented public health emergencies such as extreme weather events caused by climate change, and to address in a comprehensive and effective way social justice issues related to systemic racism in the crucial realm of adequate, safe, and affordable housing.

We can dream that politicians of all stripes would stop demonizing those Americans who are seeking a better life in the suburbs, just like we can imagine that they will begin to listen to public health experts and climate scientists, but it would not be wise to bet on that occurring. As the second quotation above illustrates, the Trump Administration was more interested in taking credit for slaying a mythical dragon<sup>9</sup> than in

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The current critics of zoning, see, for example, *id.* at 750–52 & nn.5–14, follow in a long tradition. See, e.g., BERNARD H. SIEGAN, *LAND USE WITHOUT ZONING* (1972); Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681 (1973). This Article, which offers a comprehensive set of corrections and improvements, is situated between the remaining defenders and the many opponents of traditional zoning.

For the difficulties in enacting a “comprehensive revision” of a traditional zoning ordinance, see Sara C. Bronin, *Comprehensive Rezoning*, 2019 BYU L. REV. 725 (2019). Professor Bronin has astutely noted that “[a] comprehensive rezoning offers a city the opportunity to re-think its regulation of land use. . . . Yet, . . . very few communities have undertaken the comprehensive rezoning process.” *Id.* at 735–36. Because the author does not foresee a paradigm shift nationally (as occurred in Hartford, Connecticut, as described by Professor Bronin), this Article instead offers a set of modifications for the predominant zoning model.

This Article is not a Trojan Horse, a camouflaged plea to get rid of zoning altogether. What Charles Haar observed nearly thirty years ago remains as true today:

In short, over an extended period of practice and of criticism, land-use law in the different states and municipalities proceeds on even course, between contending, but certainly not overwhelming, waves of “too far” or “not far enough.” Sometimes emotions run high over amendments and variances or the foray of a NIMBY (not in my back yard). Essentially, though, the stability of land-use controls is the striking factor—the system’s ability to adapt to startlingly new transportation technologies, changes in financing and the flow of capital, even transformations of family values. Land-use controls continue to provide the setting in which cities and suburbs exist today.

Charles M. Haar, *The Twilight of Land-Use Controls: A Paradigm Shift?*, 30 U. RICH. L. REV. 1011, 1014–15 (1996). Similarly, Professor Serkin asserts:

Zoning is better seen as a tool for moderating the pace of community change and, in so doing, allocating costs between insiders and outsiders. These are more complex goals that require a more nuanced assessment of the competing pressures of stability and dynamism in our communities.

Serkin, *supra*, at 798. The current Article is based on the belief that the adaptability of zoning continues to be one of its essential attributes.

9. Preserving Community and Neighborhood Choice, 85 Fed. Reg. 47899-01 (proposed Aug. 7, 2020) (to be codified at 24 C.F.R. pts. 5, 91, 92, 570, 574, 576, 903) (“Over time however, HUD began to use this AFFH [affirmatively further fair housing] certification as a vehicle to force states

confronting the challenges posed by the pandemic and structural racism on the land use front, as in so many other settings. Instead of playing these rhetorical games, we should take steps now to anticipate the worst, much in the way that building codes have been updated so that structures can withstand winds associated with hurricanes and tropical storms.<sup>10</sup> We can still hope that the current pandemic has no sequels, that the real property ownership and wealth gap between whites and African Americans will disappear, and that nature will on its own reverse climate change. Nevertheless, to do nothing to adapt zoning and other forms of land use regulation to the stark current and anticipated realities would be an abdication of responsibility, much like waiting for COVID-19 suddenly to disappear.

During the early decades of the Cold War, the U.S. government designated parts of existing structures as fallout shelters, designed to protect and sustain large segments of the population in the event of nuclear strikes that, thankfully, were never launched.<sup>11</sup> Today, the once-ubiquitous placards featuring three yellow triangles within a black circle are a quaint symbol of the times when, as during the Cuban Missile Crisis in the fall of 1962, tensions and concerns were sky-high.<sup>12</sup> It is the author's fervent wish that several of the changes suggested by this Article, such as ensuring that private sports and entertainment structures designed to hold large numbers of people can easily be adapted to use as public spaces for emergency hospital care,<sup>13</sup> will one day be viewed with the same nostalgia

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and localities to change zoning and other land use laws. . . . In the new rule, HUD repeals the 2015 AFFH rule and its related accretions.”); Danielle Kurtzleben, *Seeking Suburban Votes, Trump to Repeal Rule Combating Racial Bias In Housing*, NPR (July 23, 2020, 5:05 PM), <https://www.npr.org/2020/07/21/893471887/seeking-suburban-votes-trump-targets-rule-to-combat-racial-bias-in-housing> [https://perma.cc/2983-W76L].

10. Robin Kundis Craig, *Cleaning Up Our Toxic Coasts: A Precautionary and Human Health-Based Approach to Coastal Adaptation*, 36 PACE ENV'T L. REV. 1, 47 (2018) (“Improved building codes in Florida (the most stringent in the nation) after 1992’s Hurricane Andrew required installing impact windows, using stronger ties between roofs and walls, and securing roof shingles with nails instead of staples, according to the *Wall Street Journal*. And indeed, newer buildings built to code fared better during Hurricane Irma.”).

11. Tanya Mortensen, *An Unattainable Wedge: Four Limiting Effects on the Expansion of Nuclear Power*, 5 ENV'T & ENERGY L. & POL'Y J. 60, 80 (2010) (footnote omitted) (“Responding to the growing concerns of the Cold War era, Congress enacted the Federal Civil Defense Act of 1950 [Pub. L. No. 81-920, 64 Stat. 1245 (1951)] to fund projects for the protection of the public from atomic attacks. Although building fallout shelters for the entire public proved uneconomical, the Civil Defense Administration invested in civil education programs that printed pamphlets teaching people how to build their own fallout shelters, instituted warning systems, and taught children how to respond to atomic attacks.”).

12. See *Community Fallout Shelter Tours*, CIV. DEF. MUSEUM, <http://www.civildefensemuseum.com/cdmuseum2/commun.html> [https://perma.cc/4YVY-9LKX] (last visited Oct. 1, 2021).

13. See *infra* Part III.H.

as those placards. For now, however, government officials charged with land use regulatory authority are obliged to act as if the triple threat of pandemics, climate change-related natural disasters, and the legacies of structural racism will be with us for the foreseeable future.

This Article, a comprehensive blueprint for reforming zoning, is divided into five sections. Part I reveals how pandemic, contagion, and racial and ethnic bias formed essential parts of the historical context of, and rationales for, the development of American zoning. Part II revisits and presents recommendations for updating some golden oldies—the height, area, and use classifications that form the skeleton of Euclidean Zoning—in order to reflect the realities of the early 2020s. Part III presents a second set of modifications for the law governing zoning changes—rezonings (that is, zoning amendments), special use permits, variances, and nonconforming uses and structures. Part IV proposes the incorporation of pandemic resiliency and social justice in comprehensive plans, to supplement the sustainability elements found in a number of modern planning documents. Part V considers the new reality of emergency-driven government authority and procedures in the realm of land use regulation, in a world without traditional in-person public hearings, meetings of public officials, and court proceedings. The Conclusion offers a comprehensive checklist of changes and adaptations for zoning’s second century and considers the intricate interconnection between public land use regulations and other private and public development-related programs. Government officials should implement the proffered changes not just in anticipation of future pandemics and of natural disasters attributable to climate change, but also, and of equal importance, to enhance the efficacy and social justice aspects of zoning as it enters its second century.

This is but the beginning of a crucial conversation. History alone will determine whether American public officials and private-sector participants will have attended to the painful lessons of the current crisis in order to fine-tune zoning and other forms of land use regulation, or whether we will go back to our old habits once the current crisis finally passes, it is hoped with minimal additional harm and heartbreak.

## I. THE PANDEMIC AND RACIST PAST AS PROLOGUE

While a range of factors contributed to the development and popularity of zoning, the prevention of the spread of disease and the protection of the residents in (and values of) single-family housing from less desirable neighbors were prominent. The U.S. Department of Commerce, the



agency responsible for gathering the real estate experts who crafted the highly influential Standard State Zoning Enabling Act,<sup>14</sup> explained in *A Zoning Primer* how “ZONING PROTECTS PROPERTY AND HEALTH”:

Suppose you have just bought some land in a neighborhood of homes and built a cozy little house. There are two vacant lots south of you. If your town is zoned, no one can put up a large apartment house on those lots, overshadowing your home, stealing your sunshine and spoiling the investment of 20 years’ saving. Nor is anyone at liberty to erect a noisy, malodorous public garage to keep you awake nights or to drive you to sell out for half of what you put into your home. . . .

A zoning law, if enacted in time, prevents an apartment house from becoming a giant airless hive, housing human beings like crowded bees. It provides that buildings may not be so high and so close that men and women must work in rooms never freshened by sunshine or lighted from the open sky.<sup>15</sup>

These bureaucratic cheerleaders also pointed out that zoning reduces living costs by preventing blight in residential neighborhoods caused by the intrusion of “various uses threatening rapid destruction of its value for residences—such . . . as sporadic stores, or factories, or junk yards.”<sup>16</sup> The popularity of zoning seems also to have been enhanced by two events—a public health emergency and a decision of the U.S. Supreme Court.

#### *A. From Pandemic to Pandemic*

The COVID-19 pandemic is, of course, the second major pandemic that the nation has experienced, the first taking place roughly a century ago. It would be an overstatement to assert that 2020 was simply a replay of 1918. Still, the development and early growth of zoning in the 1920s occurred in a milieu in which there were serious and widespread concerns about public health, the devastation wrought by natural disasters,<sup>17</sup> and the

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14. See, e.g., Michael Allan Wolf, *A Common Law of Zoning*, 61 ARIZ. L. REV. 771, 785–88 (2019) [hereinafter Wolf, *Common Law of Zoning*].

15. DEP’T OF COM. ADVISORY COMM. ON ZONING, *A ZONING PRIMER* 2 (1922), <https://www.govinfo.gov/content/pkg/GOVPUB-C13cf208d8ed0dda43ed677acd6cad8be81/pdf/GOVPUB-C13-cf208d8ed0dda43ed677acd6cad8be81.pdf> [<https://perma.cc/BP3K-GGLD>].

16. *Id.*

17. Two of the most devastating disasters in U.S. history occurred within a couple of decades of the birth of zoning—the Galveston hurricane of 1900 and the 1906 San Francisco earthquake and fire. See Dave Roos, *The Deadliest Natural Disasters in U.S. History*, HIST. (Sept. 18, 2020), <https://www.history.com/news/deadliest-natural-disasters-us-storm-flood-hurricane-fire>

perceived threats posed by racial and ethnic minorities to “white” neighborhoods. These concerns in turn influenced the origin story of American zoning.

What role did the inaccurately labeled “Spanish Flu” of 1918–1919 play in the formative years of American zoning? There are connections between the impacts of this devastating H1N1 virus, responsible for several hundred thousand American deaths during and after World War I,<sup>18</sup> and efforts to enact and implement the system of comprehensive height, area, and use classifications known as American zoning.

In 1919, an Ohio Court of Common Pleas upheld the city of East Cleveland’s early “building zone” ordinance in the face of a constitutional challenge.<sup>19</sup> The court observed:

The congestion of population is conducive to the spread of epidemics. Epidemics are spread by social intercourse, and the more dense this intercourse the more devastating is the epidemic, or the plague. When epidemics are sweeping over the land the cities suffer most, and those portions of the city which are most densely populated suffer most of all. . . . *The influenza epidemic through which this country passed within the last year is fresh in the minds of all.* Churches, schools, theaters, public halls and public meetings were closed, but apartment homes, containing from 100 to 200 or 300 families, or from 500 to 1000 persons, remained open. It is no wonder that the influenza could not be checked and that its victims were numbered by the thousand.

The claim is frequently made that modern sanitation, and the advance in medical science and scientific ventilation will practically nullify the effect of epidemics, but *the experience of American cities with the influenza last winter flatly contradicts this claim.*<sup>20</sup>

This connection between congestion and disease was also noted by planning expert Robert H. Whitten, who in 1921 was serving as an advisor to the Cleveland City Plan Commission. Whitten wrote:

To secure concentration and specialization without congestion is the

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[<https://perma.cc/MQT4-E3AG>]. The Great Mississippi Flood of 1927 occurred in the year following the Supreme Court’s approval of zoning in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). For the role humans play in what are popularly known as “natural” disasters, see CHRISTINE A. KLEIN & SANDRA B. ZELLMER, *MISSISSIPPI RIVER TRAGEDIES: A CENTURY OF UNNATURAL DISASTERS* (2014).

18. *1918 Pandemic*, CTNS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/flu/pandemic-resources/1918-pandemic-h1n1.html> [<https://perma.cc/PQG9-W5EJ>] (last visited Oct. 1, 2021).

19. *State ex rel. Morris v. City of E. Cleveland*, 31 Ohio Dec. 98, 119 (1919).

20. *Id.* at 112–13 (emphasis added).

recurring problem. Congestion is the disease that here in this form and there in that form assails the comfort, the strength and the very life of the city—congestion of the work shop, of the terminals, of the transit facilities, of the roadways, of the sidewalks and of the habitations of the people. Concentration is usually good but congestion is always bad. The city problem is that of securing concentration and specialization without congestion.<sup>21</sup>

Echoes of these and other defenses of zoning would appear in the U.S. Supreme Court's 1926 landmark<sup>22</sup> opinion in *Village of Euclid v. Ambler Realty Company*,<sup>23</sup> involving another Cleveland suburb, and particularly in Justice George Sutherland's consideration of state court opinions considering the validity of the new land use regulatory scheme:

The decisions . . . agree that the exclusion of buildings devoted to business, trade, etc., from residential districts, bears a rational relation to the health and safety of the community. Some of the grounds for this conclusion are promotion of the health and security from injury of children and others by separating dwelling houses from territory devoted to trade and industry; suppression and prevention of disorder; facilitating the extinguishment of fires, and the enforcement of street traffic regulations and other general welfare ordinances; *aiding the health and safety of the community*, by excluding from residential areas the confusion and danger of fire, *contagion*, and disorder, which in greater or less degree attach to the location of stores, shops, and factories.<sup>24</sup>

This is not to suggest that the *raison d'être* of zoning was to prevent contagion. Rather, proponents of zoning, well aware that the protection of health and safety was a central focus of the police power, considered the reduction of congestion one of many advantages that this form of public land use regulation had over private law analogues such as real covenants and private and public nuisances.<sup>25</sup> Nevertheless, hindsight allows us to appreciate the original links between zoning and the elimination of congestion to prevent the spread of contagious disease.

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21. Robert H. Whitten, *Zoning and Living Conditions*, in PROCEEDINGS OF THE THIRTEENTH NATIONAL CITY CONFERENCE ON CITY PLANNING 28 (1921) (emphasis added).

22. See generally MICHAEL ALLAN WOLF, *THE ZONING OF AMERICA: EUCLID V. AMBLER* (2008) [hereinafter WOLF, *ZONING OF AMERICA*].

23. 272 U.S. 365 (1926).

24. *Id.* at 391 (emphasis added).

25. See WOLF, *ZONING OF AMERICA*, *supra* note 22, at 17–18; Raphael Fischler, *The Metropolitan Dimension of Early Zoning: Revisiting the 1916 New York City Ordinance*, 64 J. AM. PLAN. ASS'N 170, 173 (2007). The other advantages included socioeconomic, racial, and ethnic exclusion, promotion of aesthetics, and the preservation of economic value of land, among others. See *id.* at 138–55.

*B. Seeking Alternatives after Buchanan v. Warley*

The early link between zoning and structural racism is even more evident. Only one year after New York City enacted its highly influential, comprehensive zoning ordinance, the United States Supreme Court, in *Buchanan v. Warley*,<sup>26</sup> had struck down Louisville, Kentucky's racial zoning scheme.<sup>27</sup> The Court, in the separate-but-equal period between *Plessy v. Ferguson* and *Brown v. Board of Education*, did not base its ruling on a violation of the Equal Protection Clause; instead, the Justices found that overtly racial zoning "is in direct violation of the fundamental law enacted in the Fourteenth Amendment of the Constitution preventing state interference with property rights except by due process of law."<sup>28</sup>

Two recent studies of the way in which structural racism against African Americans shaped the private and public law of property show a direct link between Louisville's Supreme Court setback and the adoption of height, area, and use classifications that comprise the American version of zoning. Professor Paige Glotzer has noted that when *Buchanan* cast a shadow over "the country's first comprehensive municipal residential segregation ordinance"<sup>29</sup> in Baltimore, Mayor James Preston "remained committed to finding additional ways for the municipal government to limit black mobility."<sup>30</sup> Having been advised against "setting aside sections of the city for black people on the grounds they 'constituted a permanent menace to the health of the white population,'" the mayor

also proposed land-use zoning, which would regulate the construction and use of every property in the newly enlarged city. Zoning was a process in which municipal officials carved the city into areas or "zones" and then designated permitted uses and construction guidelines for property in each type of zone. Various scholars have concluded that what seemed an ostensibly color-blind use of zoning had explicitly racial

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26. 245 U.S. 60 (1917).

27. *See id.* at 70 ("The title of the ordinance is: 'An ordinance to prevent conflict and ill-feeling between the white and colored races in the City of Louisville, and to preserve the public peace and promote the general welfare[] by making reasonable provisions requiring, as far as practicable, the use of separate blocks[] for residences, places of abode, and places of assembly by white and colored people respectively.'").

28. *Id.* at 82.

29. PAIGE GLOTZER, HOW THE SUBURBS WERE SEGREGATED: DEVELOPERS AND THE BUSINESS OF EXCLUSIONARY HOUSING, 1890-1960, at 83 (2020); *see also* Christopher Silver, *The Racial Origins of Zoning in American Cities*, in URBAN PLANNING AND THE AFRICAN AMERICAN COMMUNITY: IN THE SHADOWS (June Manning Thomas & Marsha Ritzdorf eds., 1997).

30. GLOTZER, *supra* note 29, at 110.

intent.<sup>31</sup>

Baltimore's first zoning ordinance, as implemented during the administration of Preston's successor, had decidedly ethnic and racial elements:

The south and southeastern sections of Baltimore, with large populations of blacks and immigrants, were zoned industrial. Even neighborhoods composed primarily of homes were zoned industrial if they were majority-black, depriving them of the height, use, and construction restrictions neighborhoods of similar appearance received. The values of residential property in industrial districts would suffer, as would the residents, because all noxious businesses would be concentrated near their homes. This move sapped value from black-owned property and made it more difficult for the African Americans who could afford to own property in Baltimore to buy a new home outside the new industrial areas. For black renters, who already faced a housing shortage that had them paying much higher rents than whites for comparable units, zoning exacerbated the shortage of potential locations for new multifamily dwellings.<sup>32</sup>

The zoning law, unlike the Baltimore and Louisville racial segregation ordinances, was technically, though not actually, color-blind.

*The Color of Law*,<sup>33</sup> Richard Rothstein's compelling indictment of comprehensive *de jure* racial segregation of residential property, reveals the efforts of renowned city planner Harland Bartholomew to craft the first zoning ordinance for St. Louis, which was enacted in 1919:

According to Bartholomew, an important goal of St. Louis zoning was to prevent movement into "finer residential districts . . . by colored people." He noted that without a previous zoning law, such neighborhoods have become run-down, "where values have depreciated, homes are either vacant or occupied by colored people." The survey Bartholomew supervised before drafting the zoning ordinance listed the race of each building's occupants. Bartholomew attempted to estimate where African Americans might encroach so the commission could respond with restrictions to control their spread.<sup>34</sup>

Thus, because technically it contained "no reference to race," St. Louis's "ordinance pretended to be in compliance" with *Buchanan*.<sup>35</sup>

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31. *Id.*

32. *Id.* at 112–13.

33. RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* (2017).

34. *Id.* at 49.

35. *Id.*

While it may seem commonplace to some, the following truth bears repeating: from its origins in Manhattan, through the post-World War II explosion of suburbs, and to its current alignment with sustainability, zoning has been inextricably linked to distinctions based on caste, race, ethnicity, and social status. From the beginning, skeptics and critics alleged that the overriding purpose of zoning was for those on the inside to use devices such as minimum residential lot sizes and mobile and manufactured housing bans to exclude, to keep the other—immigrants, racial and religious minorities, the working class, students, the elderly—on the outside. In the 1950s, Charles Haar, Norman Williams, and other keen observers issued warnings about the troubling underside of post-war suburban development.<sup>36</sup>

Once the proliferation of private schools and the pace of white flight to outlying suburbs went into overdrive, the resegregation of public schools by race and income was not surprising.<sup>37</sup> The stakes of housing segregation became even higher, as minority parents were financially unable to match the significant contributions made by parents in wealthier (and whiter) suburbs to augment public school budgets. In the 1970s and 1980s, as several state courts, led by the Supreme Court of New Jersey in the *Jarndyce*-like *Mount Laurel* saga,<sup>38</sup> began to expose the evils of exclusionary zoning, one significant response of legislatures and courts in some states was the development of inclusionary zoning devices such as density bonuses and set-asides designed to incentivize the development of affordable housing by residential and commercial developers.<sup>39</sup> Critics

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36. See Wolf, *Common Law of Zoning*, *supra* note 14, at 808–09 & n.224.

37. See, e.g., *Bd. of Educ. v. Dowell*, 498 U.S. 237, 251 (1991) (Marshall, J., dissenting) (“The practical question now before us is whether, 13 years after that injunction was imposed, the same [School] Board should have been allowed to return many of its elementary schools to their former one-race status. The majority today suggests that 13 years of desegregation was enough.”).

38. See generally CHARLES M. HAAR, *SUBURBS UNDER SIEGE: RACE, SPACE, AND AUDACIOUS JUDGES* (1996); *In re Declaratory Judgment Actions*, 152 A.3d 915, 917 (N.J. 2017) (footnote omitted) (“For the last sixteen years, while the Council on Affordable Housing (COAH) failed to promulgate viable rules creating a realistic opportunity for the construction of low- and moderate-income housing in municipalities, the *Mount Laurel* constitutional affordable housing obligation did not go away.”); *S. Burlington Cnty. NAACP v. Mt. Laurel (Mt. Laurel II)*, 456 A.2d 390 (N.J. 1983); *S. Burlington Cnty. NAACP v. Mt. Laurel (Mt. Laurel I)*, 336 A.2d 713 (N.J. 1975).

39. See, e.g., *Mt. Laurel II*, 456 A.2d at 445 (“The most commonly used inclusionary zoning techniques are incentive zoning and mandatory set-asides. The former involves offering economic incentives to a developer through the relaxation of various restrictions of an ordinance (typically density limits) in exchange for the construction of certain amounts of low and moderate income units. The latter, a mandatory set-aside, is basically a requirement that developers include a minimum amount of lower income housing in their projects.”).

have launched salvos at these initiatives based on economic theories,<sup>40</sup> and in response state legislators have flexed their preemption muscles to stifle local experimentation.<sup>41</sup> However, the lessons taught by Isabel Wilkerson in her recent exposure of America's special brand of caste<sup>42</sup> and the links between crowded housing units and COVID-19 infections,<sup>43</sup> should prompt a reconsideration, reinvigoration, and reshaping of this tool and other aspects of zoning on a national scale.

Today, we would characterize the strategies pursued by St. Louis and Baltimore zoning officials (and their counterparts in many other American cities)—to exclude African Americans from “better” neighborhoods and to expose them to environmental hazards—as environmental racism. Indeed, current concerns about racial and social exclusion effected through single-family residential zoning and other land use controls show that the past truly is prologue.<sup>44</sup> In the 2020s, as a century before, there appear to be dangerous links between congested living and work spaces and the rapid spread of disease, with hot spots in nursing homes and other senior living facilities, prisons, and poultry- and meat-processing plants.

The year 2020 provided a stress test for American zoning, exposing some of this enduring legal institution's weakest elements. We should take this opportunity seriously to consider a number of modifications to zoning and planning enabling statutes, ordinances, and judge-made concepts (what the author elsewhere has identified as the essential common law of zoning<sup>45</sup>) to make American zoning a serviceable and responsive regulatory regime for the remainder of the twenty-first century.

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40. The classic assault is Robert C. Ellickson, *The Irony of “Inclusionary” Zoning*, 54 S. CAL. L. REV. 1167 (1981).

41. See, e.g., TEX. LOC. GOV'T CODE ANN. § 214.905(a) (West 2007) (“A municipality may not adopt a requirement in any form, including through an ordinance or regulation or as a condition for granting a building permit, that establishes a maximum sales price for a privately produced housing unit or residential building lot.”).

42. See WILKERSON, *supra* note 3, at 185.

43. See, e.g., Ian Bogost, *Revenge of the Suburbs*, ATL., (June 19, 2020), <https://www.theatlantic.com/technology/archive/2020/06/pandemic-suburbs-are-best/613300/> [<https://perma.cc/S3Z8-5XET>] (“That doesn't mean suburbanites want the density of urban life, however. Some fear it, blaming the spread of the virus on tightly packed, metropolitan masses. Those fears mistake crowding for density. Some of the worst coronavirus hot spots have erupted not in dense cities, but in crowded communities such as nursing homes, Hasidic households, and manufacturing plants.”).

44. See, e.g., Erin Baldassari & Molly Solomon, *The Racist History of Single-Family Home Zoning*, KQED (Oct. 5, 2020), <https://www.kqed.org/news/11840548/the-racist-history-of-single-family-home-zoning> [<https://perma.cc/VV2X-PXF2>].

45. See Wolf, *Common Law of Zoning*, *supra* note 14, at 772.

## II. ADAPTING EUCLIDEAN BASICS TO NEW REALITIES: HEIGHT, AREA, AND USE REGULATION

The exploration of weak links in the zoning chain begins with the basics of zoning, as they were fashioned by planners and lawyers and state and local lawmakers and approved by the nation's highest courts in the first three decades of the twentieth century. It is somewhat remarkable that these elements continue to form the foundation of zoning in localities throughout the U.S., even with an impressive array of post-Euclidean modifications, adaptations, and improvements such as overlays, transferable development rights, planned unit development, form-based codes, and so many more.<sup>46</sup>

There are many lessons we can learn about the most vulnerable aspects of zoning's basic elements by looking through the 2020 lens. The dramatic transition of Americans to remote work and education challenges preconceptions regarding zoning's traditional separation of residential and nonresidential uses.

### *A. The Inefficacy of Defining or Limiting Home Occupations or Professions Allowable in Residential Zones*

All one has to do is to watch video clips from the mid-pandemic version of Saturday Night Live<sup>47</sup> or of any of the late-night comedy hosts to understand that the range of work that was from home in 2020 and 2021 was unprecedented; there are indications that this pattern will continue even after the pandemic abates.<sup>48</sup> One of the early and lingering features of zones reserved for residential uses has been the classification and protection of certain home occupations while banning those commercial and professional pursuits that do not fit within the traditional mode.<sup>49</sup> The

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46. See, e.g., CHARLES M. HAAR & MICHAEL ALLAN WOLF, LAND USE PLANNING AND THE ENVIRONMENT: A CASEBOOK 222 (2010) ("New York City's use of landmark designation and transferable development rights (TDRs) are two of the many examples of post-Euclidean devices that local and state land use regulators have devised over the past few decades to add flexibility and responsiveness.").

47. See, e.g., Saturday Night Live, *Zoom Catch-up—SNL*, YOUTUBE (May 9, 2020), <https://www.youtube.com/watch?v=vdqsMY5Z8E8> [<https://perma.cc/JNC3-HGMC>].

48. Katherine Guyot & Isabel V. Sawhill, *Telecommuting Will Likely Continue Long after the Pandemic*, BROOKINGS INST. (Apr. 6, 2020), <https://www.brookings.edu/blog/up-front/2020/04/06/telecommuting-will-likely-continue-long-after-the-pandemic/> [<https://perma.cc/4JBF-JPJV>].

49. 2 SARA C. BRONIN & DWIGHT H. MERRIAM, RATHKOPF'S THE LAW OF ZONING AND



home computing technology that mushroomed beginning in the 1980s and the ubiquity of the internet by the end of the century have rendered this aspect of Euclidean zoning badly outmoded.

Although many localities have updated their zoning ordinances to reflect the new possibilities of tele-work, this has by no means been a universal trend. Consider the facts and resolution in *Rosen v. Underkoffler*,<sup>50</sup> a 2016 decision of the Maryland Court of Special Appeals upholding the pre-internet status quo. Fred Rosen, who wanted to operate his business from home, faced a zoning ordinance that distinguished allowable “professions” from disallowed trades and businesses.<sup>51</sup> He lost in the trial and intermediate appellate court, the latter tribunal explaining:

Section 158.071(E) of the Carroll County Zoning Ordinance (the “Ordinance”) permits offices for certain types of professions as accessory uses in residences located within the County’s Conservation District. Fred R. Rosen’s residence is located in the Conservation District and he wishes to continue to operate his business, Diversified Technologies, Inc., from his home. Mr. Rosen filed an application with the Carroll County Zoning Administrator seeking a ruling that his business is a professional office and thus permitted as an accessory use pursuant to § 158.071(E).<sup>52</sup>

After consulting the essential tool of the textualist jurist—the dictionary—the court concluded that

“profession” means an occupation that requires specialized knowledge which is derived through long and intensive academic education and training. A “professional” is an individual who is engaged in such an occupation. A “professional office” is the office in which the professional engages in his or her profession. We agree with the circuit court that the term “profession” in § 158.071(E)(11) refers to a category of occupations that are distinct “from those more commonly viewed as

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PLANNING § 33:32 (2021); DANIEL R. MANDELKER & MICHAEL ALLAN WOLF, *LAND USE LAW* § 5.06 (6th ed. 2020); PATRICIA E. SALKIN, *AMERICAN LAW OF ZONING* §§ 19:4–19:39 (5th ed. 2021).

50. No. 1310, 2016 Md. App. LEXIS 631 (Md. Ct. Spec. App. July 11, 2016).

51. *Id.* at \*3–4 (“Within a dwelling, the professional office of a physician, insurance agent, realtor, or other profession determined by the Zoning Administrator to be similar in use and characteristics, subject to Zoning Administrator approval after a public hearing . . .”) (quoting CARROLL CNTY., MD., CODE OF ORDINANCES § 158.071(E)(11) (2019)). The ordinance also permitted certain home occupations in the Conservation District, defined in part as “[a]ny use of a dwelling, conducted solely by a resident, or use of any accessory building which is incidental or subordinate to the main use of the principal building for dwelling purposes,” and subject to size, parking, signage, and other restrictions. *Id.* at \*3 n.1 (quoting CARROLL CNTY., MD CODE OF ORDINANCES § 158.002 (2021)).

52. *Id.* at \*1.

trades or businesses.”<sup>53</sup>

One of the lessons that the COVID-19 crisis has taught us is that these kinds of distinctions no longer make sense. University and secondary school instructors teaching from home are just the tip of a very large iceberg. One study based on surveys conducted in April and May, 2020, found that “[t]he fraction of workers who switched to working from home is about 35.2%,” which, when added to the 15.0% who were already working at home, brought the total to more than half.<sup>54</sup> Residential use classifications in a zoning ordinance should make sense from a bird’s-eye or Google Earth-view of the property. What is going on inside residential property is not nearly as relevant as what is going on outside. A doctor who is currently seeing patients over the phone or computer screen in her house is not generating any more negative land use externalities than when she sees patients in her office miles away in the commercial or office district. As long as those patients are not affecting traffic and parking in the neighborhood, why is it the concern of the zoning officials and nosey neighbors?

In fact, if those neighbors are so concerned about the thought of someone in the subdivision creating software, practicing accounting, or dispatching delivery trucks from the central facility across town (or on the other side of the country, for that matter), they can always (unless the state legislature takes away this option) resort to the private law tool of choice—restrictive covenants enforced at law or in equity.<sup>55</sup> The COVID-19 pandemic has only reiterated what we already knew: home occupation and professional limitation provisions in zoning codes no longer make sense or serve a useful function for an internet-based society and economy.

*B. Redefining and Expanding Accessory Uses and Allowing a Meaningful Range of Accessory Dwelling Units*

For decades, zoning ordinances typically designated specific accessory uses, that is, uses of land that complement or often accompany the predominant residential (or sometimes commercial) use designated by

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53. *Id.* at \*19–20.

54. Eric Brynjolfsson, John J. Horton, Adam Ozimek, Daniel Rock, Garima Sharma & Hong-Yi TuYe, *COVID-19 and Remote Work: An Early Look at US Data 4* (Nat’l Bureau of Econ. Rsch., Working Paper No. 27344, 2020), <https://www.nber.org/papers/w27344.pdf> [<https://perma.cc/P952-A7K8>].

55. MICHAEL ALLAN WOLF, POWELL ON REAL PROPERTY § 60.07 (2021) [hereinafter WOLF, POWELL ON REAL PROPERTY].

the relevant zoning classification. In many communities, one vestige of traditional Euclidean zoning that was already on the way out before our current crises was the exclusion of accessory dwelling units (ADUs) from single-family residential zones.<sup>56</sup> Known by different names—mother-in-law suites, granny flats, casitas, tiny houses—these smaller units are the modern versions of carriage houses, bungalow courts, and Fonzie’s room above the Cunninghams’ garage.<sup>57</sup> In their quest to create fairly uniform suburban paradises, those early ordinance framers who sought to protect the single-family detached dwelling (which Professor Sonia Hirt instructs us is the most distinctive feature of American zoning when compared with its counterparts around the globe<sup>58</sup>) outlawed the co-location of more than one housing unit per lot.<sup>59</sup>

The movement to welcome ADUs, like the more ambitious (and controversial) stabs at eliminating the single-family residential zone itself (discussed in Part I.C. below), was already afoot prior to 2020 because of affordable housing and sustainability concerns, as best illustrated by California’s ambitious ADU initiatives. A review of the changes that went into effect in California in early 2020 notes:

Among a list of innovative [new policies], the legislation eliminates owner occupancy requirements, impact fees on certain ADUs, replacement parking requirements, and minimum and maximum sizes. The permit review period and required setbacks were also reduced, and a requirement for state and local jurisdictions to provide grants and incentives to facilitate enhanced ADU development by the end of 2020 was created.<sup>60</sup>

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56. MANDELKER & WOLF, *supra* note 49, § 5.05; SALKIN, *supra* note 49, § 9.28.

57. See Linda Silmalis, *Sydney Homeowners Rejoice as ‘Happy Days Fonzie Flats’ Above Garages Now Approved*, DAILY TEL. (July 12, 2014, 10:00 PM) <https://www.dailytelegraph.com.au/news/nsw/sydney-homeowners-rejoice-as-happy-days-fonzie-flats-above-garages-now-approved/news-story/ef203c37b34c3e77715c7792337ec477> [<https://perma.cc/FQV6-J6EB>] (“It was made famous in the classic US TV show Happy Days—Fonzie living in an apartment over the Cunninghams’ garage.”).

58. SONIA A. HIRT, *ZONED IN THE USA* 7 (2014).

59. See MUN. RSCH. & SERVS. CTR. OF WASH., *ACCESSORY DWELLING UNITS* iii (1995).

60. Anne Wyatt, *ADUs to the Rescue?*, PLAN. MAG., Feb. 2020, at 9. For statutory language and a summary of the 2019 legislation, see CAL. DEP’T OF HOUS. & CMTY. DEV., DIV. OF HOUS. POL’Y DEV., *MEMORANDUM TO PLANNING DIRECTORS AND INTERESTED PARTIES 1* (Jan. 10, 2020), [https://www.hcd.ca.gov/community-development/housing-element/docs/ADU\\_TA\\_Memo\\_Final\\_01-10-20.pdf](https://www.hcd.ca.gov/community-development/housing-element/docs/ADU_TA_Memo_Final_01-10-20.pdf) [<https://perma.cc/996A-H9S6>] (“This memorandum is to inform you of the amendments to California law, effective January 1, 2020, regarding the creation of accessory dwelling units (ADU) and junior accessory dwelling units (JADU). Chapter 653, Statutes of 2019 (Senate Bill 13, Section 3), Chapter 655, Statutes of 2019 (Assembly Bill 68, Section 2) and Chapter 659 (Assembly Bill 881, Section 1.5 and 2.5) build upon recent changes to ADU and JADU law (Government Code Section

These measures are built on an impressive foundation, as the state legislature had already “limited off-street parking requirements; eliminated separate utility meter requirements; prevented homeowner associations from banning ADUs in covenants, conditions, and restrictions; and permitted junior ADUs.”<sup>61</sup> Other states have taken similar steps in the same direction.<sup>62</sup> A word of caution is in order, however: no community should use ADUs as a way of checking the affordable housing box to indicate a mission accomplished, especially those localities in California and other highly desirable locations in which real estate values have climbed to levels affordable to a very small percentage of the population.

Over the last several decades, courts have struggled to make sense of the often-puzzling definitions of accessory uses found in zoning ordinances that attempt to describe the structures permitted in residential zones. This phenomenon is illustrated by a Tennessee appellate case excluding an illegal children’s playhouse that was not “diminutive” enough<sup>63</sup> and a Massachusetts Land Court case allowing a cabana because it fit a traditional, though eminently unworkable and distracting, definition of an accessory use.<sup>64</sup>

Here is how the Tennessee Court of Appeals explained its anti-playhouse ruling:

The structures which are included as “accessory uses” and which are not required to be attached to the principal residence are “arbors, pergolas

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65852.2, 65852.22 and Health & Safety Code Section 17980.12) and further address barriers to the development of ADUs and JADUs.”).

61. Wyatt, *supra* note 60, at 9. A Junior Accessory Unit (junior ADU) is defined as “a unit that is no more than 500 square feet in size and contained entirely within a single-family residence.” CAL. GOV’T CODE § 65852.22(h)(1) (Deering 2020).

62. See, e.g., MASS. ANN. LAWS ch. 40R, § 2 (LexisNexis 2021) (“[N]othing herein shall preclude a city or town from adopting a starter home zoning district that would permit construction on a single lot in a starter home zoning district of an accessory dwelling unit of 600 square feet or less on the same lot as a starter home.”); OR. REV. STAT. § 197.312(5)(a) (2021) (“A city with a population greater than 2,500 or a county with a population greater than 15,000 shall allow in areas within the urban growth boundary that are zoned for detached single-family dwellings the development of at least one accessory dwelling unit for each detached single-family dwelling, subject to reasonable local regulations relating to siting and design.”); WASH. REV. CODE ANN. § 36.70A.600(1)(n) (LexisNexis 2019) (“A city planning . . . is encouraged to take the following actions in order to increase its residential building capacity: . . . (n) Authorize accessory dwelling units in one or more zoning districts in which they are currently prohibited.”).

63. Blevins v. City of Belle Meade, No. M2013-00268-COA-R3-CV, 2013 Tenn. App. LEXIS 772, at \*7 (Tenn. Ct. App. Nov. 25, 2013).

64. Hauer v. Casper, No. 07 MISC 338201, 2012 Mass. LCR LEXIS 24, at \*44 (Mass. Land Ct. Mar. 16, 2012) (quoting ANDOVER, MASS., BYLAWS, Art. VIII (Zoning By-Law), § 10.1 (2001)).

and gazebos,” dog houses, and children’s playhouses . . . . There is a minimum set back from the rear and side lot lines and a maximum square footage for each such structure. As used in the Zoning Code, the term “diminutive in scale and design” has a unique and specific meaning when applied to a children’s playhouse; other language in the section that the provision applies to “similar children’s recreational facilities” sets out a standard with which to judge the structure. This is sufficient guidance in the interpretation of the ordinance and it is not necessary that specific criteria for the height, roof pitch, or exterior material be contained in the Code, as contended by Mr. Blevins.<sup>65</sup>

Such detailed provisions take the whimsy out of the very idea of a playhouse and subject local officials to justifiable accusations of over-regulation.

The Massachusetts court considered another, and equally objectionable, way of defining an accessory use, situated on the other end of the regulatory spectrum: a use that “is subordinate to, clearly incidental to, customary in connection with, and located on the same lot as, the principal use.”<sup>66</sup> The Gibsons’ neighbors on an Andover cul-de-sac balked at their construction of a cabana behind their new pool.<sup>67</sup> The court rejected challenges based on the location and height of the structure, so the issue boiled down to the meanings of three nebulous adjectives—“subordinate,” “incidental,” and “customary.”<sup>68</sup> This section of the court’s opinion, taking up more than 1,600 words, included dictionary definitions, quotations from several cases that ruminate on the meaning of these adjectives, and excerpts from cross-examination of the plaintiffs’ (neighbors’) expert and testimony of one of the defendants.<sup>69</sup> In addition, to counter the plaintiffs’ alternative argument “that the cabana is not an accessory building at all, but tantamount to a second dwelling,”<sup>70</sup> the court examined the record below to establish that the cabana, though capacious,<sup>71</sup> contained neither sleeping nor cooking facilities.<sup>72</sup>

These standards and rules, difficult enough to justify under normal conditions, are actually a barrier to the many extended families that

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65. *Blevins*, 2013 Tenn. App. LEXIS 772, at \*10–11 (quoting BELLE MEADE, TENN., ZONING CODE § 14-202(1)(b)).

66. *Hauer*, 2012 Mass. LCR LEXIS 24, at \*44 (quoting ANDOVER, MASS., BYLAWS, Art. VIII (Zoning By-Law), § 10.1 (2001)).

67. *Id.* at \*1.

68. *Id.* at \*44.

69. *Id.* at \*43–52.

70. *Id.* at \*51.

71. *Id.* at \*5 (“The pool house . . . is 47’ wide and 18’ deep.”).

72. *Id.* at \*51.

attempt to quarantine together during a pandemic, or to family and friends in need because they have been dislocated for months at a time by natural disasters such as a supercharged hurricane, blazing wildfire, or unprecedented flood event.<sup>73</sup> Legislation mandating the availability of ADUs in single-family residential zones and modifications of zoning ordinances to broaden the definition of accessory buildings and uses will make it easier for elderly parents (with or without live-in caregivers) to be several steps away from their children; for friends and family to get back on their feet after losing their homes to fire, water, or wind; for children and young adults (all in the same family or in pods<sup>74</sup>) to have a quiet space for effective remote learning; and for tele-working adults to hold video conferences without disturbing or being distracted by the sounds and activities of “normal” family life.

Emergency orders implemented during the early months of the pandemic typically limited or eliminated commercial and industrial activities taking place indoors, with exceptions for a limited number of essential services.<sup>75</sup> Many restaurants, which were especially hard-hit by these restrictions, shifted to curb service, take-out, and delivery, and added additional outdoor dining space in order to stay afloat. Other commercial businesses made similar modifications in order to allow a growing number of customers to drive up, receive the items they purchased, and get back home safely and efficiently. These business-saving changes often constituted technical violations of the zoning ordinance. Once local governments return to some semblance of normalcy following the pandemic, officials should amend the zoning ordinance to allow commercial users to submit plans ahead of time for alternate configurations to allow for contact-free or reduced customer contact.<sup>76</sup>

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73. See, e.g., Arian Campo-Flores & Erin Ailworth, *Harvey Delivers Another Blow to Katrina Survivors*, WALL ST. J. (Aug. 30, 2017, 7:10 PM), <https://www.wsj.com/articles/harvey-delivers-another-blow-to-katrina-survivors-1504134412> [<https://perma.cc/9VEE-KKS8>] (“For many Katrina evacuees who ended up settling permanently in Houston, going through Harvey and its aftermath has been like reliving a nightmare . . . Katrina uprooted residents to cities across the U.S., but Houston received the largest share outside Louisiana. Of the 150,000 to 200,000 evacuees who initially arrived in Houston, as many as 40,000 remain.”).

74. See, e.g., Dani Blum & Farah Miller, *What Parents Need to Know About Learning Pods*, N.Y. TIMES (Aug. 18, 2020), <https://www.nytimes.com/article/learning-pods-coronavirus.html> [<https://perma.cc/CGQ9-SNAA>].

75. See Jiachuan Wu, Savannah Smith, Mansee Khurana, Corky Siemaszko & Brianna DeJesus-Banos, *Stay-at-Home Orders across the Country*, NBC NEWS (Apr. 29, 2020), <https://www.nbcnews.com/health/health-news/here-are-stay-home-orders-across-country-n1168736> [<https://perma.cc/6J3L-ZA3Y>].

76. This is one of several ways in which the adaptation of zoning and planning regulations to the grim social and economic realities of a pandemic or other health emergency can run contrary to

*C. Allowing “Missing Middle” and Other Forms of Affordable Housing in Erstwhile Single-Family Zones*

The exclusive single-family, detached-dwelling, residential classification at the same time is the synecdoche of American zoning<sup>77</sup> and its most problematic feature. State and local lawmakers over the last few years have taken aim at “single-family zoning,” most notably in the states of Oregon and California, and in the city of Minneapolis.<sup>78</sup> The 2019 Oregon act, applicable to the state’s largest municipalities, reads in pertinent part:

Except as provided in subsection (4) of this section, each city with a population of 25,000 or more and each county or city within a metropolitan service district shall allow the development of:

- (a) All middle housing<sup>79</sup> types in areas zoned for residential use that allow for the development of detached single-family dwellings; and
- (b) A duplex on each lot or parcel zoned for residential use that allows for the development of detached single-family dwellings.<sup>80</sup>

Minneapolis officials, also during 2019, designated all residential districts

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sustainability goals. *See, e.g.*, Daniel Chapple & Bradley Adams, *Drive-Through Services*, SUSTAINABLE DEV. CODE, <https://sustainablecitycode.org/brief/prohibit-or-limit-the-use-of-drive-through-services-5/> [<https://perma.cc/7MWD-3CEQ>] (last visited Oct. 3, 2021) (“Studies centered around drive-throughs show that idling vehicles waiting in queue lines waste fuel, lessen the quality of air, and contribute to greenhouse emissions. Idling vehicles produce carbon dioxide at rates higher than those in motion. Volatile organic compounds (VOCs) and nitrogen oxides (NOx) are another byproduct of still vehicles, both of which are toxic to humans. VOCs and NOx combine with heat and sunlight to form ground-level ozone, a byproduct of the burning of fossil fuels which can lead to respiratory disorders. The National Weather Service recommends that individuals should avoid using drive-throughs to reduce the effects of ground-level ozone.” (footnotes omitted)). One challenge for the future will be to find ways to make pandemic response and resiliency regulations *as sustainable as possible*, while allowing a life-line for businesses that normally depend on in person contact with customers.

77. HIRT, *supra* note 588, at 15 (referring to “[t]he peculiarities of the current U.S. zoning system, with its focus on strict order, land-use segregation, and exclusive private spaces limited to particular family types and particular physical configurations”).

78. *See* OR. REV. STAT. § 197.758 (2021); MINNEAPOLIS, MINN., CODE OF ORDINANCES No. 2019-048 (2020); *see also* Arnab Chakraborty, *Calls to End All Single-Family Zoning Need More Scrutiny*, 86 J. AM. PLAN. ASS’N 123 (2020); Jake Wegmann, *Death to Single-Family Zoning . . . and New Life to the Missing Middle*, 86 J. AM. PLAN. ASS’N 113 (2019).

79. The term “middle housing” includes duplexes, triplexes, quadplexes, cottage clusters, and townhouses. OR. REV. STAT. § 197.758(1)(b) (2020).

80. *Id.* § 197.758(2). *See also* 2021 Cal. Legis. Serv. 162 (West) (directing local governments to permit urban duplexes and lot splits in single-family zones, subject to several exceptions, to be codified in new CAL. GOV’T CODE §§ 65852.21 and 66411.7).

as “Multiple-family,” thereby reclassifying the two “Single-family” and “Two-family” residence districts.<sup>81</sup>

Time will tell whether these anti-single-family-zone initiatives were the beginning of a trend<sup>82</sup> or an early 2000s aberration. Allowing “missing middle housing,”<sup>83</sup> that is, multi-family homes, into neighborhoods previously zoned exclusively for single-family homes, could be one part of an overall strategy for creating socioeconomically, and even racially and ethnically, integrated neighborhoods. That is reason enough for more local and state governments to replicate this experiment.

However, there are four reasons why this may well prove to be much more of a band-aid than a cure. First, many subdivisions, especially older ones, are already built out, meaning that, unless current buildings are razed, Minneapolis-style ordinances will be irrelevant. Second, homeowners association (HOA) fees run on average from a few to several hundred dollars a month.<sup>84</sup> Third, there is a high likelihood that the neighborhoods in single-family residential zones are covered by restrictive covenants that prohibit more than one building per lot, duplexes, townhouses, and other more intensive uses of undeveloped lots.<sup>85</sup> Fourth, because the missing middle housing must still meet the area (for example setbacks) and height requirements for the most restrictive zoning classification, the impact of these measures will be limited. In order to overcome the last two barriers, state lawmakers who are serious about

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81. MINNEAPOLIS, MINN., CODE OF ORDINANCES No. 2019-048 § 2 (amending *Id.* § 521.10(1)).

82. See CAMBRIDGE CITY, MASS., POLICY ORDER, POR 2020 #129 (Oct. 5, 2020), [http://cambridgema.iqm2.com/Citizens/Detail\\_LegiFile.aspx?Frame=&MeetingID=2688&MediaPosition=&ID=11956&CssClass](http://cambridgema.iqm2.com/Citizens/Detail_LegiFile.aspx?Frame=&MeetingID=2688&MediaPosition=&ID=11956&CssClass) [<https://perma.cc/Y3CP-ZUJT>] (creating § 11.207.4(a), which provides that “[i]n all zoning districts, an AHO [affordable housing overlay] Project may contain single-family, two-family, townhouse, or multifamily dwellings as-of-right. Townhouse and Multifamily Special Permit procedures shall not apply.”). But see Max Masuda-Farkas, *Alameda Casts Its Vote for Single-Family Homes*, REGUL. REV. (Jan. 5, 2021), <https://www.theregreview.org/2021/01/05/masuda-farkas-alameda-casts-vote-single-family-homes/> [<https://perma.cc/7MDS-BJW9>] (“On Election Day [November 3, 2020], approximately 60 percent of Alameda residents voted ‘no’ on Measure Z, a ballot measure that would have effectively eliminated single-family zoning across the city.”).

83. See, e.g., Wegmann, *supra* note 788.

84. See Mark Uh, *Attack of the Killer HOA Fees*, TRULIA (Mar. 15, 2017), <https://www.trulia.com/research/hoa-fees/> [<https://perma.cc/5XNW-C6WE>] (noting that, based on census figures, national average monthly HOA fee was \$331).

85. See, e.g., John Infranca, *The New State Zoning: Land Use Preemption Amid a Housing Crisis*, 60 B.C. L. REV. 823 (2019). Professor Infranca notes, “Some authorities assume that a state ADU law would apply only to local governments and not override private agreements such as a homeowner’s associations’ covenants. However, it is possible that—in light of a strong state interest in encouraging housing development in the form of ADUs—a court might strike a covenant for public policy reasons or a legislature might pass a statute prohibiting covenants that restrict ADUs.” *Id.* at 874–75 (footnote omitted).



creating a blend of single- and multi-family housing in new neighborhoods (and in those with available lots) should introduce legislation preempting covenants and height and area restrictions that frustrate good-faith efforts to address segregation by class and race and to augment the supply of affordable housing in desirable communities.

*D. Returning to Cumulative Zoning = Mixed Use: Walking to Work, Growing Food*

Mixed-use zoning was all the rage during the closing decades of the twentieth century, as developers mingled residences, offices, and stores in planned unit developments, New Urbanists designed new towns that offered the chance to live above a storefront, and architects and planners located condos on top of theatres, atriums, and shopping malls.<sup>86</sup> More recently, critics of zoning have bemoaned the fact that urban agriculture is not permitted in many residential zones.<sup>87</sup>

In reality, mixed-use zoning was anything but an innovation, because the original zoning ordinances promulgated in the 1920s and approved by the U.S. Supreme Court in *Euclid v. Ambler* were *cumulative*.<sup>88</sup> That is, industrial could include residential and commercial, commercial could include residential, and multi-family residential could include single-family detached dwellings or agricultural uses. If you wanted to live above a restaurant, as in *Bob's Burgers*,<sup>89</sup> or above a candy store, like the two little boys in *Lost in Yonkers*,<sup>90</sup> you could, although the playwright Neil Simon would tell you that it's no heaven. Should you desire to raise

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86. See, e.g., *Town of Rhine v. Bizzell*, 751 N.W.2d 780, 787 n.6 (Wis. 2008) (“[M]ixed use zoning’ mixes a number of different uses in respective zones rather than limiting mixed uses. Many urbanists believe that mixed use districts are the key to restoring vibrancy to American cities.”) (citing Sonia Hirt, *The Devil is in the Definitions*, 73 J. AM. PLAN. ASS’N 436, 436 (2007)).

87. See, e.g., Sarah B. Schindler, *Of Backyard Chickens and Front Yard Gardens: The Conflict Between Local Governments and Locavores*, 87 TUL. L. REV. 231, 233 (2012) (“Throughout the country, antiquated land use ordinances restrict homeowners and renters from undertaking practices such as raising chickens for eggs, planting gardens in front of their homes, or selling produce they have grown.”).

88. *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 381 (1926) (“Class U-1 is the only district in which buildings are restricted to those enumerated. In the other classes the uses are cumulative; that is to say, uses in class U-2 include those enumerated in the preceding class, U-1; class U-3 includes uses enumerated in the preceding classes, U-2 and U-1; and so on.”).

89. See Trey Garrison, *Bob from Bob's Burgers Is Sitting on an \$800K Golden Egg*, HOUSINGWIRE (June 20, 2014, 1:00 PM), <https://www.housingwire.com/articles/30389-bob-from-bobs-burgers-is-sitting-on-an-800k-golden-egg/> [https://perma.cc/7C4F-GQVV].

90. ErawanClips, *Lost in Yonkers—Movie—Part 1 of 10*, YOUTUBE (Mar. 2, 2009), <https://www.youtube.com/watch?v=e1J0WAhS6ik> [https://perma.cc/5ATD-UYTA].

chickens in a backyard coop, like television's Conner family (minus Roseanne),<sup>91</sup> the zoning inspector would not stop you.

Then gradually, by the second half of the twentieth century, the American zoning paradigm shifted from cumulative to noncumulative, as more and more local ordinances featured exclusive, not inclusive, industrial and then commercial zones.<sup>92</sup> The exclusive industrial zone was apparently an attempt to maintain high tax ratables but excluding homes from commercial zones was accompanied by the odor of snob zoning.

Hindsight instructs us that courts made a mistake when they approved noncumulative zoning, even though judicial sanction contributed to the feature's popularity throughout the nation. From the beginning, critics asked if it is the best use of government regulators' time and expertise to disallow owners from doing something on their own land that others think is not in the owners' financial interest.<sup>93</sup> For example, a purchaser of a lot zoned for commercial use could pay a premium for the parcel and then build a house next door to an empty lot that could one day house a strip shopping center. As long as there are no negative environmental externalities for nearby commercial property owners, what, other than the potential loss of tax revenue for the public coffers, is the harm?

In a 1977 Illinois appellate case the court considered and approved an exclusive industrial zone that a local government had established eight years before.<sup>94</sup> The plaintiffs sought to build "738 multiple-family dwelling units" on a 50-acre, vacant parcel that was zoned for industrial use.<sup>95</sup> In affirming the lower court's ruling against the plaintiffs, the court explained:

In 1969 the village comprehensively amended the zoning ordinances in all respects and changed from an inclusive to an exclusive zoning ordinance. Under the exclusive zoning ordinance only the specific uses listed in the zoning ordinance are allowed within the various designated areas. The subject property was maintained in the B-2 (Industrial) classification. Because of the change from an inclusive to an exclusive type zoning ordinance only industrial development was to be allowed on

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91. *One Flew Over the Conners' Nest*, IMDB, <https://www.imdb.com/title/tt8595154/> [<https://perma.cc/U7FT-DZJY>] (last visited Oct. 4, 2021).

92. See, e.g., MANDELKER & WOLF, *supra* note 49, § 5.41; SALKIN, *supra* note 499, § 9.15.

93. See *Corthouts v. Town of Newington*, 99 A.2d 112, 115 (Conn. 1953) ("The plaintiff is simply insisting that he be permitted to devote his land to residential use until such time as need of it for industrial purposes arises. Since the amendment, in effect, prevents the plaintiff from using his land for any feasible purpose, it is unreasonable and confiscatory.").

94. *First Nat'l Bank v. Vill. of Vernon Hills*, 371 N.E.2d 659, 663, 666 (Ill. App. Ct. 1977).

95. *Id.* at 660.

the subject property. At all relevant times herein the subject property has remained vacant regardless of the types of development permitted under the applicable zoning.<sup>96</sup>

The appellate court held that the property owners had failed to carry their burden of proving that the zoning classification did not “bear[] any substantial relationship to the public health, safety, morals or general welfare,” even though “the existence of apparently large amounts of vacant industrial property in this area does tend to support plaintiffs’ position that there is no demand for more industry.”<sup>97</sup> Had the developer submitted its plans to build a multi-family housing project before 1969, under a cumulative zoning scheme, there would have been no problem as far as the zoning classification went. Opponents of the affordable housing project would have had to resort to other stratagems for blocking the plaintiffs’ plans.<sup>98</sup>

During the first year of the pandemic, tens of millions of American urbanites and suburbanites experienced profoundly negative effects from the segregation of home from workplaces, stores selling groceries and other essentials, medical care facilities, and restaurants—all despite the availability of tele-work, food and grocery delivery services, and tele-medicine for the more affluent segments of the population. Transit-Oriented Development (TOD) was a popular idea over the last few decades, and the efforts of Peter Calthorpe and others to locate residential uses near transportation nodes were justifiably admired.<sup>99</sup> In the middle of a pandemic when crowds must be avoided to protect one’s health, however, the advantages of living near a bus, rapid transit, or subway station disappear. Today, and for the foreseeable future, we have a need for Pedestrian Oriented Development (POD). That is why cities are closing streets, and why High Lines,<sup>100</sup> Underlines,<sup>101</sup> and other urban parks are more important to our health and sanity than the transportation

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96. *Id.* at 663–64.

97. *Id.* at 665.

98. Regarding the difficulties faced by affordable housing developers to secure judicial protection from opponents in and outside of government, see Michael Allan Wolf, *There’s Something Happening Here: Affordable Housing as a Nonstarter in the U.S. Supreme Court*, in RACIAL JUSTICE IN AMERICAN LAND USE (Craig Anthony Arnold, Cedric Merlin Powell, Catherine Fosl & Laura Rothstein eds., forthcoming) [hereinafter Wolf, *There’s Something Happening Here*].

99. See, e.g., John R. Nolon, *Land Use for Energy Conservation and Sustainable Development: A New Path Toward Climate Change Mitigation*, 27 J. LAND USE & ENV’T L. 295, 319 & n.135 (2012).

100. *The High Line*, NYC PARKS, <https://www.nycgovparks.org/parks/the-high-line> [https://perma.cc/8PB6-T6YQ] (last visited Oct. 4, 2021) (“The High Line is an elevated freight rail line transformed into a public park on Manhattan’s West Side.”).

101. *The Underline*, MIAMI-DADE CNTY., <https://www8.miamidade.gov/global/transportation/the-underline.page> [https://perma.cc/8WSF-WYRU] (last visited Oct. 4, 2021).

lines under and next door to which they are located. A move back to cumulative zoning would be a meaningful first step for localities to take in order to facilitate POD.

Another advantage of comprehensive cumulative zoning would be to eliminate from zoning ordinances vestigial provisions banning urban agriculture. As Professor Sarah Schindler has noted:

Throughout the country, antiquated land use ordinances restrict homeowners and renters from undertaking practices such as raising chickens for eggs, planting gardens in front of their homes, or selling produce they have grown. These forbidden practices fall into a broader category of activities and movements with many names and variations: “urban homesteading,” “locavorism,” “relocalization,” “urban agriculture,” “recession gardening,” “food sovereignty,” and “regional foodsheds.” The reasons for these restrictive ordinances vary. Some have been in place since Euclidean zoning and land use ordinances were first created, with a purpose of separating and isolating residential uses from agricultural uses. In other jurisdictions, these practices fall as the incidental victims of neighborhood uniformity and aesthetic demands for neat and tidy front lawns. Bans on raising farm animals within city limits often stem from nuisance-related concerns about noise and odor.<sup>102</sup>

The “golden age of gardening” has been a silver lining among the cumulonimbus of the COVID-19 pandemic.<sup>103</sup> Seed supply companies are struggling to keep up with the explosive demand,<sup>104</sup> and it would be reasonable to expect that some if not many Americans who began to engage in, or intensified existing, urban agriculture will continue these practices even after the end of the pandemic. In other words, there has never been a better time to ensure that zoning barriers to home agriculture are removed.

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102. Schindler, *supra* note 87, at 233–34 (footnotes omitted).

103. See, e.g., Dana Cronin, *Seed Companies Struggle to Keep Up with the Demand*, NPR (Feb. 4, 2021, 5:02 AM) <https://www.npr.org/2021/02/04/963913547/seed-companies-struggle-to-keep-up-with-the-demand> [<https://perma.cc/8ZYG-3N7T>] (“People have done a lot of that during the pandemic with more people working from home and also wanting to grow their own food, which has increased the demand for seeds. Illinois Public Media’s Dana Cronin reports seed companies are struggling to keep up.”); see also Laurel Schwartz, *D.C. Urban Gardens Flourish in the Pandemic as People Dig In to ‘Fill the Isolated Life’*, WASH. POST (Oct. 9, 2020, 6:00 AM), <https://www.washingtonpost.com/lifestyle/2020/10/09/dc-urban-gardens-flourish-pandemic-people-dig-fill-isolated-life/> [<https://perma.cc/AHW9-C6QZ>] (“Many [of Washington D.C.’s 68 community] gardens have years-long waitlists and have become even more in-demand during the pandemic, as people are stuck at home, and many are looking for new, healthy hobbies.”).

104. See, e.g., Jodi Helmer, *Be Prepared for a Possible Seed Shortage*, MOD. FARMER (Jan. 18, 2021), <https://modernfarmer.com/2021/01/be-prepared-for-a-possible-seed-shortage/> [<https://perma.cc/U8DY-RAQM>].

Neighbors who are disturbed by loud noises (roosters crowing), offensive odors (manure), and other negative impacts of urban agriculture can still resort to private nuisance law, which is not preempted by zoning.<sup>105</sup> Making cities and suburbs more walkable and encouraging urban agriculture through cumulative zoning and other modifications of land use regulation will also yield benefits from a sustainability and resilience perspective. We can view this as one of several examples of planning and zoning BOGO: the lawmakers who “buy” pandemic response “get” enhanced sustainability for free.

#### *E. Addressing the Hazards of High-Rise Living, Working, and Shopping*

While planned unit developments and New Urbanist town centers are examples of the horizontal version of mixing uses, they have their vertical counterpart—the high-rise building that combines living, working, recreating, and shopping. Much like in a Stephen King novel (or the movies based thereon), in 2020 mid- and high-rise residents and businesses discovered a monster, an *It*,<sup>106</sup> waiting to pounce on residents, clients, patients, and shoppers who fail to distance themselves from each other and shield their breaths, coughs, and sneezes as they head upstairs, downstairs, or in and out of the building and its component units. This is not a shape-shifting killer clown who hangs out in storm and sewer drains, but a dangerous virus that haunts its victims in crowded and confined spaces. The elevator industry has even developed a new etiquette for the use of their products.<sup>107</sup>

Those living above the third floor of any residential building, such as a mid-rise apartment complex, faced a challenge in safely reaching their unit after picking up the mail or Amazon Prime deliveries. Moreover, if crowds of business invitees and workers were moving in and out of the entrance to one’s apartment or condominium building, taking the dog for a walk was a lot riskier than normal. Permitting for future vertical multi-use buildings must take these realities into consideration, as suggested by the work of innovative architects beginning in the spring of 2020.

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105. See, e.g., WOLF, POWELL ON REAL PROPERTY, *supra* note 55, § 64.06[2].

106. See STEPHEN KING, *IT* (1986); see also *IT* (New Line Cinema 2017).

107. *Coronavirus (COVID-19) Resources*, NAT’L ELEVATOR INDUS., INC., <https://national.elevatorindustry.org/coronavirus-covid-19-resources/> [<https://perma.cc/JF43-N3YJ>] (last visited Oct. 4, 2021); see also Matt Richtel, *Going Up? Not So Fast: Strict New Rules to Govern Elevator Culture*, N.Y. TIMES (Oct. 26, 2020), <https://www.nytimes.com/2020/06/26/health/coronavirus-elevator-reopen.html> [<https://perma.cc/ER3P-NAD3>].

Consider this example of a company headquarters building with features that are reminiscent of the *Starship Enterprise*:<sup>108</sup>

ZHA's new HQ for the Bee'ah waste management company in Sharjah, UAE, has been designed around "contactless pathways", meaning employees will rarely have to touch a surface with their hands to navigate through the building. Lifts can be called from a smartphone, avoiding the need to press a button both outside and in, while office doors will open automatically using motion sensors and facial recognition.<sup>109</sup>

From this point forward, zoning ordinances governing vertical mixed-use need to incorporate requirements that these and other measures designed to prevent the spread of disease must be included, either in the definition of "mixed-use" or as conditions that must be fulfilled before local officials grant a special use permit.

Mother Nature has a way of humbling us, by deluging our flood-proof cities, by making it too hot for planes to take off,<sup>110</sup> by sending superstorms to the northeast coast, and by transferring lethal viruses from animals to humans. Many super-rich Manhattanites are now reconsidering their first, second, and third homes on the island, an increasing number of which are located in "pencil towers"—thin skyscrapers that overlook their already-tall neighbors.<sup>111</sup> These towers are the products of zoning loopholes. We have seen architects and developers respond to the zoning envelope before. The most famous example is the wedding-cake building that incorporated the height and setback regulations in zoning's earliest iterations.<sup>112</sup> But

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108. See, e.g., *Star Trek Starship Enterprise*, SMITHSONIAN NAT'L AIR & SPACE MUSEUM, <https://airandspace.si.edu/albums/star-trek-starship-enterprise> [https://perma.cc/L527-KYTG] (last visited Oct. 4, 2021); see also FLUXED, *Star Trek The Motion Picture//Doors/Corridors*, YOUTUBE (Apr. 20, 2014), <https://www.youtube.com/watch?v=YTNqZqg9gUI&t=50s> [https://perma.cc/FU3X-X72U].

109. Oliver Wainwright, *Smart Lifts, Lonely Workers, No Towers or Tourists: Architecture after Coronavirus*, GUARDIAN (Apr. 13, 2020, 1:00 AM), <https://www.theguardian.com/artanddesign/2020/apr/13/smart-lifts-lonely-workers-no-towers-architecture-after-covid-19-coronavirus> [https://perma.cc/9RBC-Q3PL].

110. Matthew Cappucci, *Sometimes, Like Right Now in the Western U.S., It's Too Hot for Airplanes to Fly. Here's Why.*, WASH. POST (July 27, 2018), <https://www.washingtonpost.com/news/capital-weather-gang/wp/2018/07/27/sometimes-its-too-hot-for-airplanes-to-fly-heres-why/> [https://perma.cc/79PH-XFUS].

111. Oliver Wainwright, *Super-Tall, Super-Skinny, Super-Expensive: The "Pencil Towers" of New York's Super-Rich*, GUARDIAN (Feb. 5, 2019, 1:00 AM), <https://www.theguardian.com/cities/2019/feb/05/super-tall-super-skinny-super-expensive-the-pencil-towers-of-new-yorks-super-rich> [https://perma.cc/T67G-B7AS].

112. See, e.g., Norman Marcus, *Air Rights in New York City: TDR, Zoning Lot Merger and the Well-Considered Plan*, 50 BROOK. L. REV. 867, 871 (1984) ("Prior to 1961, the regulations that governed the size and shape of commercial office structures in Manhattan's central business district

manipulating Floor Area Ratio, Transferable Development Rights, and rules that do not count floors that contain structural and mechanical equipment takes the legal legerdemain of the loophole to another level, literally!<sup>113</sup> Many of those investors who went into debt to finance the purchase of apartment units to be rented out as Airbnb alternatives to hotels must be having second thoughts right now.<sup>114</sup> Plugging loopholes is almost always a good idea, and doing so with high-rise urban residential zoning should be a step we take soon.

### III. ACCOMMODATING AND FACILITATING CHANGE

The bread and butter of the land use attorney is and always has been changes in and of zoning, not just those unfriendly ones like downzonings that are imposed by government regulators,<sup>115</sup> but also the changes that are eagerly pursued by developers and landowners and, in turn, loudly opposed by concerned neighbors and worried competitors.

Small-scale zoning amendments and more comprehensive rezonings, variances, special use permits, and nonconforming uses and buildings take up a lot of time in local legislative and planning board meetings and a lot of space in land use casebooks and in regional and federal case reporters. As with the basics of Euclidean zoning, the stresses on our land use system rendered by 2020's challenges expose several weaknesses, and we would be remiss not to use this crucial opportunity to consider the implementation of modifications of zoning change mechanisms.

The reinvigorated social justice movement and the devastation

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provided height and setback controls derived from adjacent street width. These regulations produced the characteristic 'wedding cake' buildings of the period.”).

113. See *id.* at 871–72; Matthew Haag, *How Luxury Developers Use a Loophole to Build Soaring Towers for the Ultrarich in N.Y.*, N.Y. TIMES (Apr. 20, 2019), <https://www.nytimes.com/2019/04/20/nyregion/tallest-buildings-manhattan-loophole.html> [<https://perma.cc/SMY8-56VG>] (“Floors reserved for structural and mechanical equipment, no matter how much, do not count against a building’s maximum size under the laws, so developers explicitly use them to make buildings far higher than would otherwise be permitted.”).

114. See Stefanos Chen, *The Downside to Life in a Supertall Tower: Leaks, Creaks, Breaks*, N.Y. TIMES (Sept. 23, 2021), <https://www.nytimes.com/2021/02/03/realestate/luxury-high-rise-432-park.html> [<https://perma.cc/68CP-89KW>] (“There have been a number of floods in the building, including two leaks in November 2018 that the general manager of the building, Len Czarnecki, acknowledged in emails to residents. . . . Both events occurred on mechanical floors that have been criticized for being excessively tall—a design feature that allowed the developers to build higher than would otherwise have been permitted, because mechanical floors do not count against the building’s allowable size.”).

115. See 1 BRONIN & MERRIAM, *supra* note 49, § 1:37; MANDELKER & WOLF, *supra* note 49, § 6.36.

wrought by COVID-19 in minority communities have brought new salience to the findings of Richard Rothstein and others who have convincingly demonstrated how government-sanctioned racial discrimination in federal home financing, transportation, and urban renewal programs contributed to the yawning wealth gap between white and African American and Latinx families, a gap that is only exacerbated by smaller inheritances and lesser home equity for families of color.<sup>116</sup> Housing segregated by race and caste has also resulted in gross disparities in funds available for public schools, which translates into lower college attendance and graduation rates, lower-paying jobs, and fewer retirement benefits.<sup>117</sup> Seemingly innocuous features of Euclidean zoning have played a part in creating and widening this wealth and health gap, and changes are long past due.

#### *A. Allowing Variances for Emergency and Medical Hardships*

Variance abuse has long plagued local governments nationwide,<sup>118</sup> as in many communities citizen members of the board of adjustment (also known also as the board of zoning appeals) have found it difficult to say “no” to neighbors pleading a special hardship, who want to make otherwise unpermitted uses of their property or to increase the height or bulk of structures beyond the mandated restrictions within the relevant zoning classification. Unchecked, variance abuse can lead to the seemingly arbitrary hodgepodge of uses and buildings that seem contrary to the notion of comprehensive zoning. For this and other reasons, many states and localities have outlawed use variances,<sup>119</sup> and this practice should be universal in American zoning ordinances and enabling

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116. ROTHSTEIN, *supra* note 333, at 154 (noting that the result of housing segregation caused in large part by government is “smaller disposable incomes and fewer savings for black families, denying them the opportunity to accumulate wealth and contributing to make housing in middle-class communities unaffordable”); Neil Bhutta, Andrew C. Chang, Lisa J. Dettling & Joanne W. Hsu, *Disparities in Wealth by Race and Ethnicity in the 2019 Survey of Consumer Finances*, BD. OF GOVERNORS OF THE FED. RESRV. SYS. (Sept. 28, 2020), <https://www.federalreserve.gov/econres/notes/feds-notes/disparities-in-wealth-by-race-and-ethnicity-in-the-2019-survey-of-consumer-finances-20200928.htm> [<https://perma.cc/NL6U-G4KW>].

117. See Bhutta et al., *supra* note 116.

118. See, e.g., David W. Owens, *The Zoning Variance: Reappraisal and Recommendations for Reform of a Much-Maligned Tool*, 29 COLUM. J. ENV'T L. 279, 280 (2004) (“The authority to grant a variance has always been considered a significant source of potential mischief in zoning administration.”); Ronald M. Shapiro, *The Zoning Variance Power—Constructive in Theory, Destructive in Practice*, 29 MD. L. REV. 3, 3 (1969); Jesse Dukeminier, Jr. & Clyde L. Stapleton, *The Zoning Board of Adjustment: A Case Study in Misrule*, 50 KY. L.J. 273, 273 (1962).

119. See HAAR & WOLF, *supra* note 46, at 306; Owens, *supra* note 118, at 320 n.172.



legislation. Because the rezoning process, the traditional route for changing the use classification of a parcel, provides adequate protections for landowners, neighbors, and the community, the time of zoning by use variance has come and gone.

Courts, beginning as far back as the 1920s, disqualified owners from seeking variances if the claimed hardship was self-created,<sup>120</sup> and some drafters of zoning ordinances then followed suit. While generally this is another commendable modification designed to curb variance abuse, the COVID-19 pandemic has exposed a weak spot in this popular variance fix. As noted previously, unprecedented numbers of Americans are working remotely, and even after stay-at-home orders were lifted, many workers who are particularly vulnerable to the virus because of age or preexisting conditions were granted permission to tele-work. The needs of some of these workers can be accommodated by modifications to home occupation restrictions, as suggested in Part I.A. above. Many others, especially those forced to run retail or wholesale businesses from their homes, will require variances from height or area restrictions.

For example, a retailer unable to travel to a closed workplace may need to build a shed in order to store inventory on a residentially zoned parcel, or an educator may need to convert and expand a garage into a classroom in order to facilitate remote teaching and learning, or a family might need to add an additional story onto a house or construct an addition in order to accommodate elderly family members and their caretakers who cannot risk exposure in a nursing home hotspot. A strict application of the rule disqualifying self-created hardships would jeopardize all of these plans occasioned by the pandemic emergency.

Currently, zoning ordinances do not make provisions for medical and emergency variances. The variance provisions in the *Code of the City of Orlando* contain typical language, as in the section providing,

A zoning variance may be approved only if each of the following six standards is satisfied:

*Special Conditions and Circumstances.* Special conditions and circumstances exist which are peculiar to the land, structure, or building involved and which are not applicable to other lands, structures, or buildings in the same zoning district. Zoning violations or nonconformities on neighboring properties do not constitute grounds for approval of any proposed zoning variance.

*Not Self-Created.* The special conditions and circumstances **do not**

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120. See Wolf, *Common Law of Zoning*, *supra* note 14, at 800–02.

**result from the actions of the property owner.** A self-created hardship does not justify a zoning variance.

*No Special Privilege Conferred.* Approval of the zoning variance requested **will not confer on the applicant any special privilege** that is denied by the Land Development Code to other lands, buildings, or structures in the same zoning district.

*Deprivation of Rights.* Literal interpretation of the provisions contained in the Land Development Code would deprive the applicant of rights commonly enjoyed by other properties in the same zoning district and would impose unnecessary and undue hardship on the property owner. Financial loss or business competition does not constitute grounds for approval of any variance. Purchase of property with intent to develop in violation of the restrictions of the Land Development Code also does not constitute grounds for approval.<sup>121</sup>

It is not difficult to appreciate how the language in bold conflicts with several modifications attributable to pandemic response or to the sudden influx of climate change refugees as Houston and Atlanta experienced following Hurricane Katrina.<sup>122</sup>

Courts, too, have generally been unresponsive to appeals for relief from zoning restrictions based on individual, rather than realty-related, needs. For example, in a 2002 Connecticut state trial court case, *Lage v. Old Lyme Zoning Board of Appeals*,<sup>123</sup> the judge sided with neighbors who objected to the grant of a variance to a disabled property owner who sought the variance “to allow interior access to an existing exterior pump room.”<sup>124</sup> The court, following blackletter law, duly noted that “[a]n applicant for a variance must show that, because of some peculiar characteristic of its property, the strict application of the zoning regulation produces an unusual hardship as opposed to the general import which the regulations has on other properties in the zone.”<sup>125</sup> As for the specific nature of the variance sought, the neighbors asserted

that Massa [the applicant for the variance] should not have been allowed

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121. ORLANDO, FL., CODE OF ORDINANCES § 65.382 (2021) (emphasis added), [https://library.municode.com/fl/orlando/codes/code\\_of\\_ordinances?nodeId=TITIICICO\\_CH65OFB\\_OPR\\_PT2ZOAPPR\\_2JZOVA\\_BOZOADVA\\_S65.382STREZOVAAP](https://library.municode.com/fl/orlando/codes/code_of_ordinances?nodeId=TITIICICO_CH65OFB_OPR_PT2ZOAPPR_2JZOVA_BOZOADVA_S65.382STREZOVAAP) [<https://perma.cc/82FH-Q8RA>] (last visited Oct. 5, 2021) (“Standards of Review for Zoning Variance Applications”).

122. See Campo-Flores & Ailworth, *supra* note 73; Joshua Levs, *Atlanta Hotels Fill up with Katrina Refugees*, NPR (Sept. 1, 2005, 12:00 AM), <https://www.npr.org/templates/story/story.php?storyId=4827832> [<https://perma.cc/9Q8A-AT6N>].

123. No. 561238, 2002 Conn. Super. LEXIS 4121 (Conn. Super. Ct. Dec. 18, 2002).

124. *Id.* at \*2.

125. *Id.* at \*5–6.

to testify about a claim of hardship not stated in his application. On the application for the variance, defendant Massa claimed that the hardship upon which he was basing his request for a variance was “degenerative arthritis of the knees and spinal stenosis make it very difficult to walk the grounds. In case of an emergency, such as a winter storm, snow accumulation, or ice . . . there would be extreme difficulty accessing the pump room. Please see attached medicals.” In answer to the question on the application indicating that the hardship would be unique and not shared by others in the area because Mr. Massa included the following: “I’m not quite sure how to answer this. With the exterior pump room, and my combined disabilities, having to walk on rough terrain and short distances makes my request unique.” A review of the application indicates that physical disability was the sole claim of hardship in the application.

At the public hearing, defendant Massa explained to the Board why he applied for the variance and then stated, “In addition to that, I have several medical problems that would necessitate . . .” The chairman then informed him that “those are personal hardships.” “And they really don’t apply to a variance,” to which Massa replied, “I wasn’t sure.”<sup>126</sup>

The court sided with the neighbors and reversed the variance, noting that “the decision of the Board [to grant relief] is not reasonably supported by the record.”<sup>127</sup>

The *annus horribilis* 2020 has revealed a weak link in the variance chain. Much like owners of nonconforming buildings who suffer physical damage to their property by fires, hurricanes, and other acts beyond their control may be allowed to rebuild despite the strictures of the current zoning controls,<sup>128</sup> there should be a variance option available to property owners who have unanticipated financial and medical needs attributable to a pandemic.

#### *B. Preventing the Loss of Protections Afforded Nonconforming Uses and Structures (Discontinuance and Amortization)*

Zoning ordinances for the most part protect the vested rights of owners to continue their existing uses even if the property is zoned for the first

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126. *Id.* at \*8–9.

127. *Id.* at \*21.

128. *See, e.g.,* Mayer-Wittmann v. Zoning Bd. of Appeals, 218 A.3d 37, 41 (Conn. 2019) (“The sea cottage was severely damaged by Hurricane Sandy in late October, 2012, and Breunich wishes to rebuild it. Because the cost of repairs exceeds 50 percent of the sea cottage’s value, however, the zoning board and Breunich agree that the sea cottage must conform to certain current regulations governing flood prone areas, including the minimum elevation requirement, notwithstanding the fact that the sea cottage is a legally nonconforming structure.”).

time, rezoned, or if the regulatory classification of the parcel otherwise changes. Because nonconformities by their nature run counter to the ideal of relative uniformity within each zone, state and local lawmakers have implemented two basic approaches designed to bring these parcels back in line. The first and most popular tactic is to take away the landowner's right to continue the nonconformity if the owner expands, enlarges, or materially alters the use of the property or the physical dimensions of a nonconforming building.<sup>129</sup> The second and more controversial tool is amortization, whereby the landowner is given a set period of months or years within which to bring the property into compliance with extant restrictions.<sup>130</sup> The dislocations caused by the COVID-19 pandemic and climate-change disasters have brought into focus problems with both approaches.

Despite the statements of the former Optimist-in-Chief, economists have serious doubts about a swift and total recovery for the nation's economy, which has been staggered by the pandemic body blow.<sup>131</sup> The cold, hard truth is that thousands of shuttered businesses are never coming back, and many of those businesses were nonconforming uses or were located in nonconforming structures. A few examples will illustrate the problems posed by the application of existing law to the land-use disruptions caused by COVID-19 and climate change-related disasters such as fires, flooding, and superstorms.

Imagine, for example, that five decades ago Restaurant #1 was built in an unincorporated section of a rural county that had no zoning ordinance. By 2000, suburban sprawl overtook the surrounding area, and the now-urbanized county adopted zoning that year, designating the surrounding neighborhood for residential use only. The rights of the then-current owners of the restaurant to continue their nonconforming commercial use would generally be protected in any jurisdiction, at least temporarily. Now, imagine that in June 2020, the restaurant owners, like so many owners of businesses that rely on live customers, decide to shutter the restaurant, letting go of all of their employees and selling their kitchen equipment and furniture. Under prevailing zoning law in nearly every state, by closing the restaurant the owners would forfeit their vested right to open a new commercial business, even a restaurant in the same building.

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129. See, e.g., MANDELKER & WOLF, *supra* note 4949, § 5.75; SALKIN, *supra* note 49, § 12:19.

130. See, e.g., MANDELKER & WOLF, *supra* note 49, §§ 5.78–.92; SALKIN, *supra* note 49, § 12:23.

131. See Jane C. Timm, *Trump is Predicting a Rapid Economic Recovery. Experts Say It's Not Likely.*, NBC NEWS (Apr. 15, 2020, 2:54 PM), <https://www.nbcnews.com/politics/donald-trump/trump-predicting-rapid-economic-recovery-experts-say-it-s-not-n1184496> [https://perma.cc/Z2VD-BM8J].

Now imagine that the owners of a different business, Restaurant #2, established in 1990 two blocks from Restaurant #1 and, after 2020, located in the identical residential zone, have enough capital to make significant physical modifications on their site in order to accommodate customers while following pandemic-related emergency orders issued by the state and county. The owners purchase several tables, umbrellas, and transparent plastic barriers for their customers, locating those tables in the private parking lot on one side of the building. They build an addition onto the building and reconfigure driveways on the lot to create a drive-through window to allow contact-less meal pick-up by customers who do not feel safe eating inside or outside Restaurant #2.<sup>132</sup> They reconfigure the lot to accommodate a drive-through window and curb service, install a new HVAC system, and reshape the interior space to reduce the risk of airborne transmission of the virus. Once again, applying standard zoning law to this situation would result in the owners' immediate loss of their nonconforming use protected status.

Now imagine a third eatery—Restaurant #3, which is located a few miles from the other two restaurants, within the boundaries of a small city that decades ago implemented a scheme for amortizing all nonconforming uses and buildings. All such nonconformities must be brought into compliance not later than two years after a new zoning or other land use regulation goes into effect. The owners of Restaurant #3 are concerned because they opened their business on June 1, 2019, six months to the day before the city rezoned the neighborhood for residential uses only. Because of a stay-at-home order in March 2020, and the drastic reduction in the customer base attributable to the pandemic, the owners are concerned that, even if they can somehow stay in business with pick-ups and deliveries of meals, they will never be able to recoup their investment, given the short amortization period.

Case law gives us insights regarding the flaws in the restrictions on nonconformities that burden not only our imaginary restaurants but many real businesses and their owners. Consider the decision of the Supreme Court of Nebraska in *Rodehorst Brothers v. City of Norfolk Board of*

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132. See *Implementing a Layered Approach to Address COVID-19 in Public Indoor Spaces*, U.S. ENV'T PROT. AGENCY, <https://www.epa.gov/coronavirus/implementing-layered-approach-address-covid-19-public-indoor-spaces> [<https://perma.cc/Z697-UEZP>] (last visited Oct. 5, 2021). For more general information about workplace safety, see U.S. DEP'T OF LAB., OCCUPATIONAL SAFETY AND HEALTH ADMIN., *GUIDANCE ON PREPARING WORKPLACES FOR COVID-19* (2020), <https://www.osha.gov/Publications/OSHA3990.pdf> [<https://perma.cc/SSV3-ZDXZ>].

*Adjustment*,<sup>133</sup> in which the court refused to allow the continued use of a building, now located in a zone limiting residences to one and two families, as a four-plex, because “the record show[ed] that Rodehorst discontinued the use for 1 year.”<sup>134</sup> The state high court rejected three arguments offered by the landowner: (1) “that both the district court and the Board erred in determining that Rodehorst had forfeited its right to continue its nonconforming use,”<sup>135</sup> (2) “that the Board should have granted it a ‘use’ variance to otherwise allow its nonconforming use to continue” and “that the district court erred in affirming the Board’s conclusion that it did not have the authority to consider and grant Rodehorst such a variance,”<sup>136</sup> and (3) that the lower court erred in its “failure to recognize that this was an unconstitutional taking o[f] property.”<sup>137</sup>

The fatal flaw in Rodehorst’s first allegation was the failure to adhere to the exact language of the state zoning enabling act, reading, in pertinent part: “If such nonconforming use is in fact *discontinued* for a period of twelve months, such right to the nonconforming use shall be forfeited and any future use of the building and premises shall conform to the regulation.”<sup>138</sup> The court explained the significance of the italicized word:

The use of the term “discontinued,” as opposed to “abandoned,” is important. Generally, the right to continue a nonconforming use may be lost through abandonment. Abandonment requires not only a cessation of the nonconforming use, but also an intent by the user to abandon the nonconforming use. But as various commentators have recognized, where a legislature or other zoning authority has used the word “discontinued,” (or other similar term, such as “ceased”), instead of “abandoned,” their purpose “is to do away with the need to prove intent to abandon.”<sup>139</sup>

The justices rejected the approach taken by some courts to “simply interpret[] ‘discontinued’ to be synonymous with ‘abandoned,’ and still require a showing that the user intended to abandon the nonconforming use.”<sup>140</sup>

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133. 844 N.W.2d 755 (Neb. 2014).

134. *Id.* at 759.

135. *Id.* at 761.

136. *Id.* at 767.

137. *Id.* at 768 (alteration in original).

138. NEB. REV. STAT. ANN. § 19-904.01 (LexisNexis 2019) (emphasis added).

139. *Rodehorst*, 844 N.W.2d at 762 (footnotes omitted).

140. *Id.*

The *Rodehorst* court's revealing justification for its ruling illustrates the difficulties faced by owners who attempt to cling to their vested rights: "Modern zoning laws generally attempt to eliminate nonconforming uses as quickly as reasonably possible."<sup>141</sup> In my estimation, early zoning proponents protected nonconformities for the simple reason that if local governments told owners of profitable businesses that they had immediately to close up shop, courts would have deemed zoning to be an unconstitutional deprivation of property. So, the first zoners hoped that the nonconformities would somehow fade away. When the owners persisted with their undesirable uses, and when in some cases their businesses thrived because of the competitive advantage (such as the only gas station or restaurant within a large residential district), localities first resorted to discontinuance provisions and restrictions regarding expansion, replacement, and the like.

While it is not unusual for zoning laws to provide relief to owners whose property is destroyed or badly damaged by fire, flood, or other Acts of God, this is not the universal rule by far. In some instances, if the Act of God results in significant damage to the property, the nonconforming status is lost; other zoning laws will permit rebuilding after a disaster, but within a relatively short time frame. In order to protect land and business owners, such as the owners of Restaurant #1, states should pass legislation that permits owners of nonconforming businesses closed because of COVID-19 to reopen when the pandemic is over notwithstanding discontinuance or abandonment language found in zoning ordinances or state enabling acts.

Extending, altering, intensifying, reconstructing, and repairing nonconformities can trigger the loss of the vested right to maintain a use or structure that is not in compliance with extant regulations. There is an exception to these strictures, however, that should be applied to situations, as with Restaurant #2, in which owners make even substantial modifications in order to remain above water during a pandemic. This exception, which has its origins in the early years of zoning jurisprudence in Pennsylvania, is labeled "the doctrine of natural expansion."<sup>142</sup>

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141. *Id.* at 764.

142. *See, e.g., In re Gilfillan's Permit*, 140 A. 136, 138 (Pa. 1927) ("[A]s the property was then used for lawful purposes, the city was without power to compel a change in the nature of the use, or prevent the owner from making such necessary additions to the existing structure as were needed to provide for its *natural expansion* and the accommodation of increased trade, so long as such additions would not be detrimental to the public welfare, safety and health.") (emphasis added). *But see Ranney v. Istituto Pontificio Delle Maestre Filippini*, 119 A.2d 142, 145 (N.J. 1955) ("We have adopted a more strict interpretation of [the state zoning enabling act], and municipal enactments pursuant thereto,

In a 2016 decision of the Commonwealth Court of Pennsylvania, for example, the court allowed a tenant to modify the use of a garage site from the “storage, fueling, parking and routine maintenance of [the prior owner’s] school buses and vehicle fleet,”<sup>143</sup> to the parking, fueling, upkeep, and maintenance of 25 water trucks that “would provide fresh water to gas well drillers and operators in southwest Pennsylvania.”<sup>144</sup> After noting that “[t]he proposed use need not . . . be identical to the existing use; similarity in use is all that is required,” the court explained that “whether a proposed use bears adequate similarity to an existing nonconforming use, the doctrine of natural expansion must be given effect.”<sup>145</sup> With that as a background principle, the appellate court reversed the trial court’s ruling that the nonconformity would be lost, concluding that “[t]he incidental storage of roll-off boxes and other containers is an increase in the intensity of the prior use, but is not sufficiently dissimilar to the School District’s vehicle garage as to constitute an impermissible expansion of the prior nonconforming use.”<sup>146</sup>

State lawmakers should pass legislation that in effect applies the natural expansion doctrine to shield businesses such as Restaurant #2 that make even costly and substantial changes in order to accommodate customer needs and health and safety orders of state and local governments during the course of the pandemic.

The most ambitious, and controversial, method for eliminating nonconformities is amortization, in which owners are allowed to continue their noncompliance with zoning regulations for a period usually set forth in the zoning ordinance.<sup>147</sup> While a few jurisdictions have disallowed amortization by statute<sup>148</sup> or by a ruling of the state high court,<sup>149</sup> in most American jurisdictions amortization is considered a legitimate method for

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and a view which we believe consonant with the spirit of zoning.”).

143. *Itama Dev. Assocs., LP v. Zoning Hearing Bd. of Rostraver*, 132 A.3d 1040, 1043 (Pa. Commw. Ct. 2016).

144. *Id.* at 1044.

145. *Id.* at 1051.

146. *Id.*

147. *See supra* note 130 and accompanying text.

148. *See, e.g.*, COLO. REV. STAT. ANN. § 38-1-101(3)(a) (West 2020) (“Notwithstanding any other provision of law to the contrary, a local government shall not enact or enforce an ordinance, resolution, or regulation that requires a nonconforming property use that was lawful at the time of its inception to be terminated or eliminated by amortization.”).

149. *See, e.g.*, *PA Nw. Distributions, Inc. v. Zoning Hearing Bd. of Moon*, 584 A.2d 1372, 1376 (Pa. 1991) (“It is clear that if we were to permit the amortization of nonconforming uses in this Commonwealth, any use could be amortized out of existence without just compensation. . . . Such a result is repugnant to a basic protection accorded in this Commonwealth to vested property interests.”).



eliminating nonconformities. This does not mean, however, that courts treat amortization schemes as valid *per se*. Instead, following judicial precedent, the terms of the zoning ordinance,<sup>150</sup> or both, courts will typically consider the reasonableness of the amortization period as applied to the landowner's specific situation.

For example, in a long-running legal dispute between the owners of an asphalt plant and a Long Island beach community, a state trial court considered a constitutional challenge to the five-year amortization period.<sup>151</sup> The court agreed with the owner "that the relevant inquiry is whether the plaintiff has been given a fair opportunity to recoup its investment in the nonconforming asphalt plant," but cautioned that

the court is given wide latitude to consider a variety of factors including, but not limited to, the nature of the business and of the surrounding neighborhood, the value and condition of the improvements on the premises, the nearest area to which the owner may relocate the business, and the cost of such relocation. Other factors include, *inter alia*, the initial capital investment, investment realization to date, life expectancy of the investment, and the existence or nonexistence of a lease obligation.<sup>152</sup>

In the case before it, the court delivered the bad news to the business owner that it would be using the period from 2000–2016 (including about a decade of litigation) in order to determine whether the investment was recouped, not the original five-year amortization period that ran from 2000–2005.<sup>153</sup>

Rather than forcing landowners such as the owners of Restaurant #3 to carry the burden of showing the unreasonableness of the two-year amortization provision, and thus burdening courts with balancing the

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150. *See, e.g.*, Baird v. City of Melissa, 170 S.W.3d 921, 925–26 (Tex. Ct. App. 2005) (footnote omitted) ("The Amortization Ordinance permits the City to order a non-conforming use terminated upon finding a 'public necessity for expedited compliance' with the zoning regulations, based on an examination of the character of the surrounding neighborhood, the degree of incompatibility of the use, and the effect of its use or cessation of use. The ordinance also provides a number of factors that must be considered in determining a reasonable amortization period, including the owner's capital investment and return on that investment and costs resulting from discontinuing the use." (quoting MELISSA, TEX., CODE OF ORDINANCES § 30.8)). For the current, amended amortization language, *see* MELISSA, TX., CODE OF ORDINANCES § 30.10 (2021), [https://library.municode.com/tx/melissa/codes/code\\_of\\_ordinances?nodeId=CH12PLZO\\_ART12.300ZOOORAD](https://library.municode.com/tx/melissa/codes/code_of_ordinances?nodeId=CH12PLZO_ART12.300ZOOORAD) [https://perma.cc/6J9G-7L RB].

151. Suffolk Asphalt Supply, Inc. v. Bd. of Trs. of Westhampton Beach, 25 N.Y.S.3d 809, 811 (N.Y. Sup. Ct. 2016).

152. *Id.* at 814–15 (citation omitted).

153. *Id.* at 816.

various factors regarding recoupment and reasonableness, states should pass legislation that tolls amortization provisions for the period beginning with the first COVID-19 state of emergency declaration in the state and ending when the pandemic is over.<sup>154</sup>

Once the pandemic has passed, state and local officials should create an inventory of buildings and campuses that were COVID-19 hot spots—meat and poultry processing plants, prisons, lower-income housing developments, nursing homes, and the like—and that have been open and in operation for more than a few years. In those jurisdictions that allow for amortization in the nonconformities context, legislation should be passed to phase out these hot spots unless the owners agree to implement improvements within a relatively short time-frame (for example, up to one year) to avoid a repetition of the COVID-19 experience, or to convert the building or buildings to another use that is in compliance with existing land use regulations.

The double-whammy of climate change and a pandemic warrants a new approach to owners of nonconforming uses and buildings that have suffered physical damage or economic loss at the hands of nature. Few localities throughout the nation have adhered strictly to the Euclidean ideals of uniform neighborhoods—by denying variances except in the very rare case involving a unique hardship, by refusing to spot zone (that is, rezone a relatively small geographic area to a more intensive use than its adjoining and surrounding neighbors),<sup>155</sup> and by adhering strictly to comprehensive plans despite the intense economic and political pressures of developers or anti-growth organizations. The negative effect of COVID-19 on businesses such as our three imaginary restaurants should inspire state and local lawmakers to reconsider the limitations imposed on nonconforming uses and buildings in order to achieve the unachievable utopian vision of the first zoners—from discontinuance and abandonment, to alterations and extension, to amortization. The American law of zoning (and the hundreds of millions within the reach of its umbrella) will benefit in the long run.

*C. Reinvigorating Inclusionary Zoning by Enhancing the Amenities  
Offered to Developers and Builders of Affordable Housing Units*

Political and community leaders in person and on social media talk a

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154. Similar protections could be afforded victims of hurricanes, tropical storms, floods, fires, and other natural hazards.

155. See 1 BRONIN & MERRIAM, *supra* note 49, § 1:39; MANDELKER & WOLF, *supra* note 49, §§ 6.27–31; SALKIN, *supra* note 49, §§ 6A:1–6.

good game about newly appreciated COVID-19 front-line workers who even in the pre-pandemic economy struggled to earn a living wage—hospital employees, firefighters, police officers, EMTs and ambulance drivers, grocery store workers, factory and meat processing plant workers, aides and caregivers in nursing homes, public school teachers and daycare workers, those who deliver restaurant food and grocery items, those who load essential goods into vehicles, and more. These essential workers' insufficient salaries would not allow them to return to a home with literal and figurative breathing space; many of them had to risk infection while traveling several miles to work on buses, subways, and other forms of public transportation. COVID-19 should reawaken all of us to the need to implement inclusionary devices that will make it economically feasible for developers to include meaningful percentages of affordable units in their construction plans for these workers and their families and to others who, burdened by class, racial, or ethnic discrimination, are under-housed, have reduced access to preventive medical care and treatment, and live far from amply stocked grocery stores, making them more vulnerable to health challenges and contagion.

Many Americans have ideological or political objections to government-sponsored programs designed to improve the housing and health conditions of those situated in the lower rungs of the socioeconomic ladder, especially if they are perceived to add on to the cost of “conventional” housing. For these and sometimes more invidious reasons, they have always consistently opposed inclusionary zoning devices designed to reduce the physical distance between insiders and those considered outsiders. Today, a wider swath of the American public can appreciate the palpable benefits of ensuring that those who come in close contact with older and disabled relatives, hospital patients, and children; those who stock our food shelves and handle our food; and those who protect us from fire and criminal activity, live in less-congested housing that is closer to their jobs, to first-class health care, and to those whose need for their services is much more acute during these stressful times.

Advocates of inclusionary zoning breathed a collective sigh of relief when in 2015 the Supreme Court of California upheld a 2010 San Jose ordinance “that, among other features, requires all new residential development projects of 20 or more units to sell at least 15 percent of the for-sale units at a price that is affordable to low or moderate income households.”<sup>156</sup> The court in *California Building Industry Association v.*

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156. Cal. Bldg. Indus. Ass'n v. City of San Jose, 351 P.3d 974, 978 (Cal. 2015), cert. denied, 577 U.S. 1179 (2016).

*City of San Jose* rejected the CBIA's challenge that was based "on 'the unconstitutional conditions doctrine, as applied to development exactions' under the takings clauses (or, as they are sometimes denominated, the just compensation clauses) of the United States and California Constitutions."<sup>157</sup>

According to a helpful description found on the web site of the U.S. Department of Housing and Urban Development that was cited in part by the state high court,<sup>158</sup>

[a]dvocates have long promoted inclusionary zoning (IZ) as a viable, market-based strategy for increasing affordable housing and creating mixed-income communities. IZ policies require or encourage developers to set aside a certain percentage of housing units in new or rehabilitated projects for low- and moderate-income residents. This integration of affordable units into market-rate projects creates opportunities for households with diverse socioeconomic backgrounds to live in the same developments and have access to same types of community services and amenities. And because it leverages private-sector development, IZ requires fewer direct public subsidies than do many other state and federal programs that promote mixed-income communities. . . . Since the nation's first IZ ordinance was enacted 40 years ago, more than 400 jurisdictions have adopted the strategy in some form or another.<sup>159</sup>

Right now, the majority of inclusionary zoning programs "offer developers incentives such as density bonuses, expedited approval, and fee waivers to offset some of the costs associated with providing the affordable units," while many require "developers to pay fees or donate land in lieu of building affordable units or providing the units offsite."<sup>160</sup>

While the U.S. Supreme Court denied certiorari in *San Jose*,<sup>161</sup> the composition of the Court has shifted decidedly rightward in the interim. Because there is no indication that the three Trump appointees will be less protective of property rights than Chief Justice Roberts and Justices Thomas and Alito,<sup>162</sup> inclusionary zoning programs that are not totally

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157. *Id.*

158. *Id.* at 977.

159. *Inclusionary Zoning and Mixed-Income Communities*, EVIDENCE MATTERS (Spring 2013) [hereinafter HUD on Inclusionary Zoning] (footnote and citation omitted), <http://www.huduser.org/portal/periodicals/em/spring13/highlight3.html> <https://perma.cc/6DKX-Z69D>.

160. *Id.* (footnote omitted).

161. 577 U.S. 1179 (2016).

162. In a 2021 decision, for example, the Trump appointees (Justices Barrett, Gorsuch, and Kavanaugh) joined Chief Justice Roberts's majority opinion (along with Justices Alito and Thomas), finding that a California regulation allowing "labor organizations a 'right to take access' to an

voluntary (those that, like San Jose's, require rather than encourage or incentivize set-asides of affordable units), run the real risk of judicial override.

The responses to this gloomy scenario by state and local government officials who are committed to continuing the inclusionary zoning experiment should not be surrender and abandonment, however. Instead, public officials should augment the list of incentives by offering to cooperative developers the relief from allegedly onerous land use restrictions about which they often complain. The idea is to reconceive of the development permission resulting from the government approval of discretionary zoning changes as public amenities that are at least as valuable as density bonuses.

For example, a developer that desires to build in violation of existing height, setback, or side yard limitations, but that cannot demonstrate a unique hardship not shared by other property owners, will nevertheless be eligible for a variance in exchange for an affordable housing set-aside. The same will be true of developers seeking rezonings in order to allow an assortment of single-family and multi-family housing, a mixture of residential and commercial uses, or both, even if in the absence of the affordable housing opportunity the grant of a rezoning would be deemed invalid spot zoning.<sup>163</sup> Perhaps a nonconforming structure sits on the property that is subject to amortization or cannot be expanded under current law; either of these restrictions could be waived should affordable units be part of the proposed development. Uses otherwise subject to special use permitting requirements could be made available as of right to developers willing to set aside affordable units.

The key is to get residential developers to view the rules and regulations associated with zoning changes as opportunities rather than as barriers, or, stated otherwise, to consider the untapped value of development rights that are currently "trapped" by zoning restrictions. Local governments can thus exchange the enhanced development rights sought by property owners for the social good of socioeconomically (and, it is hoped, racially) diverse neighborhoods and multi-family housing complexes.

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agricultural employer's property in order to solicit support for unionization" up to four 30-day periods per year amounted to "a *per se* physical taking under the Fifth and Fourteenth Amendments." *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2069 (2021).

163. See Wolf, *Common Law of Zoning*, *supra* note 14, at 777, 792–95.

*D. Eliminating Ballot-Box Zoning Measures that Target Affordable Housing Developments*

Affordable housing developers in many states have long been subject to the hazards of public referenda and other forms of “ballot-box zoning;” that is, measures by which the public at large can veto zoning changes, subdivision or plat approval, or site plans.<sup>164</sup> On several occasions, the U.S. Supreme Court has entertained, and then rejected, constitutional challenges to plebiscites in which local voters sought to thwart efforts to build affordable developments, often with financial support from government agencies.<sup>165</sup> Given the ideological make-up of the current Court, there is little likelihood that a majority of Justices will be interested in abandoning the problematic intent requirement in Equal Protection jurisprudence,<sup>166</sup> which makes it that much harder for court challenges to ballot measures involving suspected discrimination against racial minorities who are seeking to improve their families’ lives in suburban and other middle-class settings.

Because of explicit and implicit bias based on race and caste, and

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164. See, e.g., MANDELKER & WOLF, *supra* note 49, §§ 6.74–77; Marcilynn A. Burke, *The Emperor’s New Clothes: Exposing the Failures of Regulating Land Use Through the Ballot Box*, 84 NOTRE DAME L. REV. 1453, 1461 (2009) (“[T]he use of ballot initiatives to adopt land use regulation produces a planning failure. Successful land use planning requires technical expertise and long-term vision to advance the public interest, while protecting the rights of disadvantaged social groups. Ballot initiatives by their nature are limited in scope and interest-group centric.”).

165. See *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188, 195 (2003) (“By placing the referendum on the ballot, the City did not enact the referendum and therefore cannot be said to have given effect to voters’ allegedly discriminatory motives for supporting the petition [to put to a popular vote site plan approval for an affordable housing development.]”); *City of Eastlake v. Forest City Enters., Inc.*, 426 U.S. 668, 672 (1976) (rejecting the holding of the Supreme Court of Ohio that a zoning referendum was an improper delegation of power, because “[u]nder our constitutional assumptions, all power derives from the people, who can delegate it to representative instruments which they create”); *James v. Valtierra*, 402 U.S. 137, 143 (1971) (“This procedure for democratic decisionmaking does not violate the constitutional command that no State shall deny to any person ‘the equal protection of the laws.’”).

166. See *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 254, 270 (1977) (“In 1971 respondent Metropolitan Housing Development Corporation (MHDC) applied to petitioner, the Village of Arlington Heights, Ill., for the rezoning of a 15-acre parcel from single-family to multiple-family classification. Using federal financial assistance, MHDC planned to build 190 clustered townhouse units for low- and moderate-income tenants. The Village denied the rezoning request. . . . Respondents simply failed to carry their burden of proving that discriminatory purpose was a motivating factor in the Village’s decision.”); cf. *Tex. Dep’t of Hous. & Cmty. Affs. v. Inclusive Cmty. Project, Inc.*, 576 U.S. 519, 545–46 (2015) (“The Court holds that disparate-impact claims are cognizable under the Fair Housing Act upon considering its results-oriented language, the Court’s interpretation of similar language in Title VII and the ADEA, Congress’ ratification of disparate-impact claims in 1988 against the backdrop of the unanimous view of nine Courts of Appeals, and the statutory purpose.”).

despite Supreme Court rulings in support of ballot-box zoning, state lawmakers and voters (via, interestingly enough, ballot measures) are free to decide on their own, and should decide, that zoning, subdivision, and site plan decisions will no longer be subject to popular approval or veto.<sup>167</sup> The author acknowledges that this is an area in which there may be a conflict between achieving racial and social justice goals on the one hand and pursuing a sustainability agenda on the other, as sometimes members of the public are motivated to oppose a residential development proposal because of environmental protection concerns. Still, on balance, because (1) it is not possible to discern a voter's actual intent, (2) there is a long history of suburban residents voicing social and racial concerns when opposing affordable housing projects,<sup>168</sup> and (3) environmentalists who live in the affected community have access to local government officials that is not available to outsiders hoping to move to a better life in a new community, eliminating ballot-box zoning is more just and efficient than relying on voters to "do the right thing," or attempting to create workable categories of acceptable and unacceptable ballot-box zoning measures.

*E. Using Incentive Zoning for Factories and Warehouses That Can Easily Switch to Production and Storage of Essential Supplies and Equipment*

In the 1960s, some planning and zoning authorities developed and implemented alternatives to traditional command-and-control regulations that simply prohibit illegal uses or structures. For example, New York City famously experimented with incentive zoning.<sup>169</sup> In exchange for additional developments rights, hundreds of landowners chose to dedicate part of their parcels to public spaces. As so perceptively chronicled by Professor Jerold Kayden, this program was far from an unqualified success, particularly in terms of public access.<sup>170</sup> Nevertheless, as with

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167. See, e.g., FLA. STAT. § 163.3167(8)(c) (2021) ("It is the intent of the Legislature that initiative and referendum be prohibited in regard to any development order. It is the intent of the Legislature that initiative and referendum be prohibited in regard to any local comprehensive plan amendment or map amendment, except as specifically and narrowly allowed by paragraph (b).").

168. See Wolf, *There's Something Happening Here*, *supra* note 98.

169. See, e.g., Lee Anne Fennell & Eduardo M. Peñalver, *Exactions Creep*, 2013 SUP. CT. REV. 287, 305–06 (2013) (describing incentive zoning as arrangements "in which landowners obtain permission to exceed zoning limits in exchange for providing various public goods (such as low-income housing or public space)").

170. JEROLD S. KAYDEN, *PRIVATELY OWNED PUBLIC SPACE: THE NEW YORK CITY EXPERIENCE* 18–19 (2000).

development agreements,<sup>171</sup> affordable housing,<sup>172</sup> inclusionary zoning,<sup>173</sup> conditional rezoning,<sup>174</sup> and other voluntary programs, significant steps had been taken to provide an innovative mix of regulatory tools.

When full recovery happens, local and state government officials need to be creative in designing strategies for avoiding a repeat of the tragic shortages of personal protective equipment (PPE), sanitizers, reagents, swabs, respirators, and other essential medical equipment that the nation experienced in 2020. Placing additional financial burdens on existing businesses that are financially strapped makes no practical or political sense. Land use regulators should dust off incentive zoning and redeploy it to secure pandemic-related public amenities.

Lest one think that incentive zoning can only be used to provide public plazas and density bonuses, consider the Wind Energy Incentive Zones that were unsuccessfully challenged in a New York trial court case from 2009, *Finger Lakes Preservation Association v. Town Board of Italy*.<sup>175</sup> In exchange for permitting the negative externalities associated with wind farms—“including noise, shadow flicker and visual aesthetic degradation”<sup>176</sup>—the town planned to exact public benefits such as noise mitigation and substantial setbacks from neighboring properties.<sup>177</sup>

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171. See, e.g., Ngai Pindell, *Developing Las Vegas: Creating Inclusionary Affordable Housing Requirements in Development Agreements*, 42 WAKE FOREST L. REV. 419, 443–44 (2007) (footnote omitted) (“Both developers and local governments value the land use planning flexibility embodied by the development agreement. Developers obtain certainty of land use regulation over the long period of time it can take to develop a large project. Local government obtains developer concessions and conditions that would be difficult to obtain otherwise.”).

172. See, e.g., *Incentive Zoning for Affordable Housing*, SEATTLE.GOV, <https://www.seattle.gov/housing/housing-developers/incentive-zoning> [<https://perma.cc/G7KV-2FS6>] (last visited Oct. 6, 2021).

173. See, e.g., 2 BRONIN & MERRIAM, *supra* note 49, § 22:27; MANDELKER & WOLF, *supra* note 49, §§ 7.25–.30; SALKIN, *supra* note 49, §§ 22:40–43.

174. See VA. CODE ANN. § 15.2-2303(A) (2019) (“A zoning ordinance may include reasonable regulations and provisions for conditional zoning as defined in § 15.2-2201 and for the adoption, in counties, or towns therein which have planning commissions, wherein the urban county executive form of government is in effect, or in a city adjacent to or completely surrounded by such a county, or in a county contiguous to any such county, or in a city adjacent to or completely surrounded by such a contiguous county, or in any town within such contiguous county, and in the counties east of the Chesapeake Bay as a part of an amendment to the zoning map of reasonable conditions, in addition to the regulations provided for the zoning district by the ordinance, when such conditions shall have been proffered in writing, in advance of the public hearing before the governing body required by § 15.2-2285 by the owner of the property which is the subject of the proposed zoning map amendment.”).

175. 887 N.Y.S.2d 499 (N.Y. Sup. Ct. 2009).

176. *Id.* at 504.

177. *Id.* at 505–06. Despite the green light given by the court, the Italy Town Board denied an application for the incentive zoning and adopted a sixth-month moratorium on wind farm development. Gwen Chamberlain, *Italy Says “No” to Ecogen Wind Farm*, CHRON.-EXPRESS (Oct. 6,



State and local governments should explore ways of using the land use regulatory regime to incentivize the production and storage of pandemic-related equipment, as well as vaccines and antiviral drugs. Should owners proposing new (or newly renovated and expanded) factories and warehouses seek approval in the form of a rezoning, special use permit, or building permit, the government can offer the option of receiving private benefits (such as taller or bulkier structures than permitted under the current zoning envelope) in exchange for enforceable agreements to produce or store pandemic-related necessities.

*F. Requiring Owners of New and Renovated Commercial, Industrial, and Recreational Buildings to Provide Alternative Social-Distancing Blueprints*

In the early years of the twenty-first century, when sustainability became a major focus of government officials responsible for drafting zoning ordinances and comprehensive plans, several localities began to experiment with the incorporation into land use regulations of green building standards, such as the United States Green Building Council's LEED certification program.<sup>178</sup> In fact, the author published an article that, while pointing out some of the problems with mixing privately generated standards and public law, applauded the efforts of private and public actors to respond to environmental and climate change concerns.<sup>179</sup>

Piggy-backing on this experience, localities and states should investigate a similar program for incorporating social-distancing building design for new and renovated commercial, office, and industrial buildings, and for mid- and high-rise residential and mixed-use structures. As these design elements are neither fish (classic zoning) nor fowl (building codes), it would be easy for those responsible for drafting zoning codes to leave this task to building code experts, and vice versa. That would be an unfortunate development.

Many local governments are already experimenting with form-based

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2009, 6:18 AM), <https://www.chronicle-express.com/article/20091006/NEWS/310069997> [<https://perma.cc/G9NG-PNSR>]; see also *Incentive Zoning*, GWINNETT CNTY. UNIFIED DEV. ORDINANCE, [https://www.gwinnettcountry.com/static/departments/planning/unified\\_development\\_ordinance/pdf/ipa\\_incentive\\_zoning.pdf](https://www.gwinnettcountry.com/static/departments/planning/unified_development_ordinance/pdf/ipa_incentive_zoning.pdf) [<https://perma.cc/73FN-BVDR>] (last visited Oct. 6, 2021).

178. See *LEED Rating System*, U.S. GREEN BLDG. COUNCIL, <https://www.usgbc.org/leed> [<https://perma.cc/V75P-77EK>] (last visited Oct. 6, 2021).

179. See generally Michael Allan Wolf, *A Yellow Light for "Green Zoning": Some Words of Caution about Incorporating Green Building Standards into Local Land Use Law*, 43 URB. LAW. 949 (2011).

codes as an alternative to Euclidean zoning.<sup>180</sup> These innovative approaches to land use regulation, in which the focus is on exterior design rather than use,<sup>181</sup> are justifiably subject to attack based on their subjectivity.<sup>182</sup> Given more important priorities and limited resources, it would be wise to put this experimentation, and any other programs that require precious time, energy and money to implement, on hold, unless there is a direct and tangible connection to climate change adaptation and resiliency, social justice and structural racism, or pandemic prevention and response.

Social-distancing requirements based on health and safety guidelines issued by government agencies are more in line with traditional police power regulations. Therefore, when owners and developers seek rezonings; variances; planned unit development or subdivision approval; or special use permits for stores, restaurants, gaming areas, professional and business offices, developments with clubhouses and similar public spaces, factories and other industrial workspaces, and the like, officials should require the submission of social-distancing plans in the event of a future pandemic.

### *G. Updating Special Use Permitting for Assisted Living and Senior Living Facilities*

Over the last few decades, as courts have cracked down on spot zoning and attempted to check variance abuses, special use permits (also known

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180. See, e.g., DANIEL G. PAROLEK, KAREN PAROLEK & PAUL C. CRAWFORD, *FORM-BASED CODES: A GUIDE FOR PLANNERS, URBAN DESIGNERS, MUNICIPALITIES, AND DEVELOPERS* (2008); Robert J. Sitkowski & Brian W. Ohm, *Form-Based Land Development Regulations*, 38 *URB. LAW.* 163, 163–64 (2006) (“Standing in contrast to conventional land development regulations (which, it is argued, favor regulating use over form), form-based regulations are designed to place the ultimate form of the development in a superior position to the use to which the property is put.”); *Library of Codes*, Form-Based Codes Inst., <https://formbasedcodes.org/codes/> [<https://perma.cc/M2MD-7CHK>] (last visited Oct. 7, 2021).

181. See Sitkowski & Ohm, *supra* note 180, at 164 (quoting Paul Crawford of the Form-Based Codes Institute) (“Form-based codes instead address the details of relationships between buildings and the public realm of the street, the form and mass of buildings in relation to one another, and the scale and type of streets and blocks.”).

182. Elizabeth Garvin & Dawn Jourdan, *Through the Looking Glass: Analyzing the Potential Legal Challenges to Form-Based Codes*, 23 *J. LAND USE & ENV'T L.* 395, 412–13 (2008) (“Because some of the terms incorporated into aesthetic controls are unique to design professionals, they can be easily misunderstood by the general public (and are even subject to differing interpretations among design professionals). Nevertheless, they are frequently used in design guidelines. Because of their subjective meanings, these terms must both be defined and placed in context in order to avoid confusion.”); see also Andrew Bauman, *Legally Enabling a Modern-Day Mayberry: A Legal Analysis of Form-Based Zoning Codes*, 50 *URB. LAW.* 41, 82–83 (2019).

as special exceptions and conditional use permits) have become the workhorse of local land use regulation.<sup>183</sup> There are two basic approaches found within the zoning ordinance—an open-ended provision that invites applicants to propose a range of alternatives to the uses permitted as of right within the zoning district, or a detailed provision that lists the relevant factors associated with specific uses listed within the use classification. Judicial review of special use permit decisions, typically, though not always, made by an administrative body such as the board of zoning appeals, depends on whether the court characterizes the decision as legislative and thus subject to generous deference, or non-legislative (that is, quasi-judicial or administrative) and thus warranting a little more judicial attention that is often focused on a record of the proceedings.<sup>184</sup>

At times, and in the wrong hands, this tool can be abused. Perhaps the best example of abuse prompted the U.S. Supreme Court, in *City of Cleburne v. Cleburne Living Center*, to strike down the imposition of a special use permit requirement on a group home for the intellectually disabled as a violation of the Equal Protection Clause.<sup>185</sup> In other instances, individuals and groups protected by the Fair Housing Act (FHA) and the Religious Land Use and Institutionalized Persons Act (RLUIPA) have brought and at times prevailed in lawsuits resulting from the discriminatory use of the device.<sup>186</sup> One additional complication is that, as with spot zoning and variances, too much generosity by legislative and administrative decision-makers can result in a frustration of the goals of the comprehensive plan.

There is a relatively simple fix for many of these problems: drafters of

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183. See, e.g., 2 BRONIN & MERRIAM, *supra* note 49, § 24:29; MANDELKER & WOLF, *supra* note 49, §§ 6.50–.56; SALKIN, *supra* note 49, §§ 14:1–19.

184. See, e.g., *City of Chi. Heights v. Living Word Outreach Full Gospel Church & Ministries, Inc.*, 749 N.E.2d 916, 925 (Ill. 2001) (“Although the clear weight of authority in the United States holds that a legislative body acts administratively when it rules on applications for special use permits, there is authority in this state which holds that the granting or denial of a permit application is a legislative act.”).

185. 473 U.S. 432, 450 (1985).

186. See, e.g., *Elijah Grp., Inc. v. City of Leon Valley*, 643 F.3d 419, 424 (5th Cir. 2011) (“When we analyze the City’s ordinance within this framework, we are convinced that it is invalid because it prohibits the Church from even applying for a SUP [special use permit] when, e.g., a nonreligious private club may apply for a SUP despite the obvious conclusion that the Church and a private club must be treated the same, i.e., on ‘equal terms’ by the ordinance, given the similar non-B-2 nature of each. . . . We conclude therefore that the imposition of the City’s ordinance violates the RLUIPA’s Equal Terms Clause.”); *Keys Youth Servs., Inc. v. City of Olathe*, 248 F.3d 1267, 1269 (10th Cir. 2001) (“Keys alleged in its suit that Olathe and four city council members denied it a special use permit for its juvenile group home based on the potential occupants’ ‘familial status’ and ‘handicaps’ in violation of the FHA.”).

zoning ordinances should eliminate open-ended special use permit provisions and instead take the time to craft detailed elements that match the externalities associated with specific, listed uses. For example, if houses of worship are listed as available in residential zones via a special use permit, the ordinance should list detailed, uniform requirements regarding ingress and egress for automobile and pedestrian traffic, hours of operation, external lighting, parking, and the like. Those responsible for drafting and enacting these requirements can keep in mind the need to reconcile these measured complements to as-of-right uses with the letter and spirit of the comprehensive plan and the overall zoning scheme. Moreover, reducing the amount of discretion should shield decision-makers from allegations of arbitrary, confiscatory, or discriminatory regulation.

Nursing homes, assisted living facilities, memory units, and other forms of housing for seniors and the disabled often require special use permits to locate in residential and commercial areas.<sup>187</sup> The time is right to ensure that, should another pandemic strike, residents, caregivers and other employees, family members, and other guests can avoid the nightmare scenarios associated with COVID-19. Government officials, working closely with medical and public health professionals, and with planners and interior and exterior design experts, can craft amendments so that meaningful and effective protections are in place before special use permits are granted to this class of applicant.

#### *H. Repurposing Large Venues for Pandemic and Climate Change Resiliency*

Many zoning and eminent domain disputes have centered on proposals to build large sports stadiums and arenas; casinos, theme parks, and other entertainment venues; conventions centers and other structures featuring open internal spaces to accommodate large crowds; and factories and other large structures that pose environmental risks to nearby residents who are often members of vulnerable groups such as racial minorities.<sup>188</sup> These

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187. See, e.g., WYANDOTTE CNTY., KAN., CODE OF ORDINANCES § 27-593(a)(19) (2021); CORONADO, CAL., MUN. CODE § 86.55.170 (2021); *Jamil v. Vill. Of Scarsdale Plan. Bd.*, 808 N.Y.S.2d 260, 260–61 (N.Y. App. Div. 2005).

188. See, e.g., *Lake Lucerne Civic Ass'n v. Dolphin Stadium Corp.*, 878 F.2d 1360, 1362 (11th Cir. 1989) (“The institution of this federal case is the latest round of litigation following a series of state trial and appellate court proceedings related to the construction of a new sports stadium complex in Dade County, Florida. In this federal case, appellants, three individual homeowners and three homeowner associations, assert . . . that the applicable zoning resolution of the Board of

disputes, like sporting events and other games, result in real winners and losers, with the integrity of the comprehensive plan and environmentally sensitive lands such as wetlands and critical habitats at risk.

Rather than waiting for a team, theme park, or factory owner to pounce on a specific site and thereby send affected residents and businesses scrambling for legal assistance, state and local governments should take advantage of a longstanding zoning tool—the floating zone<sup>189</sup>—so that a procedure is already in place for processing large-scale development proposals fairly and efficiently. Whereas one can easily find a multi-family or light industrial district on a properly annotated and color-coded zoning map, a floating zone (as the name suggests) hovers over the municipality waiting for a landowner or developer to make a proposal matched to a specific location. The planning and zoning requirements for the proposed use—be it a town village shopping area, a stadium, or a casino—will have already been spelled out in the ordinance.

In order to reduce the risks of environmental racism and negative environmental externalities (ranging from nuisance-like noise, odors, and vibrations all the way to cancer clusters),<sup>190</sup> local officials should amend floating zone regulations in two ways. First, the ordinance will require the developer to investigate and report on the socioeconomic and racial makeup of residents within a set radius (for example, one or two miles) of the proposed site. If this study reveals that racial minorities, residents at

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Commissioners of Dade County was adopted in violation of appellants' substantive due process rights. . . ."); *Casino Reinvestment Dev. Auth. v. Banin*, 727 A.2d 102, 103 (N.J. Super. Ct. Law Div. 1998) ("These three cases involve a challenge to Casino Reinvestment Development Authority's (CRDA's) attempt to exercise its power of eminent domain. CRDA and Trump seek a judgment determining that CRDA is duly vested with the power of eminent domain and has appropriately exercised the power."); see also Mark Schleifstein, *Black Residents of Mossville Win Hearing in Legal Battle over Industrial Pollution*, NOLA.COM (June 25, 2019, 2:41 PM), [https://www.nola.com/news/crime\\_police/article\\_548a59ef-7724-5181-8c78-ea324648f933.html](https://www.nola.com/news/crime_police/article_548a59ef-7724-5181-8c78-ea324648f933.html) [<https://perma.cc/9J9M-XCG7>]; Yee Huang, *Inter-American Spotlight on the United States: Louisiana Residents Take Pollution Case to International Court*, CTR. FOR PROGRESSIVE REFORM (Apr. 26, 2010), <http://progressivereform.org/cpr-blog/inter-american-spotlight-on-the-united-states-louisiana-residents-take-pollution-case-to-international-court/> [<https://perma.cc/WT4R-Q53U>]; *International Human Rights Commission Takes Jurisdiction over Louisiana Environmental Racism Case Residents of Mossville, LA Celebrate Landmark Decision*, ADVOCS. FOR ENV'T HUM. RTS. (June 21, 2019), [http://www.ehumanrights.org/news\\_release\\_mar30-10.html](http://www.ehumanrights.org/news_release_mar30-10.html) [<https://perma.cc/9EE9-6K6Y>].

189. See, e.g., 3 BRONIN & MERRIAM, *supra* note 49, ch. 45; MANDELKER & WOLF, *supra* note 49, § 6.58; SALKIN, *supra* note 49, §§ 9:80–82.

190. Professor Tony Arnold has discussed the potential for abuse with floating zones, which is why the author proposes a modified version of this tool. See Craig Anthony (Tony) Arnold, *Planning Milagros: Environmental Justice and Land Use Regulation*, 76 DENV. U. L. REV. 1, 120 (1998) ("Floating zones pose an uncertain threat to local residents and landowners, who do not know whether a neighboring property will be chosen for a floating zone use. If it is chosen for this designation, they may face (in some cases, literally!) an unexpected new use." (footnote omitted)).

the lower end of the income scale, or both will bear a greater burden than the community at large, the project will not be approved. Second, the ordinance will require the developer to conduct an environmental review of the site and produce a written report that (1) provides details on potential impacts that construction and operation of the new facility will have on wetlands, groundwater, the airshed, and critical habitats of protected species; and (2) accounts for additional greenhouse gas emissions attributable to construction and operation of the facility, including additional traffic generated by suppliers, customers, and consumers. In this way, the development cart, and all of the economic pressures in its wake, will not come before the regulatory horse.

The current pandemic has also shifted our perspective regarding indoor spaces designed to accommodate large crowds. Will we ever look at the Javits Center again without thinking about its reuse during the height of New York City's COVID-19 crisis?<sup>191</sup> It is time to view other large structures that will not be usable for their primary functions as potential shelters from the pandemic storm and from actual storms, floods, and fires. We should never see a repeat of the shame of the Superdome following Katrina or need to resort to a tent hospital in Central Park. State lawmakers should develop programs for encouraging and incentivizing the retrofitting of existing structures.

Complementing those efforts, local governments should institute conditional permitting for large structures that cannot be used for normal purposes during quarantine periods and during climate change-related emergencies such as hurricanes and wildfires, in order to achieve storage of PPE and medical equipment and conversion to medical treatment, testing, vaccine storage and distribution, and other health-related functions. These conditions could be imposed in various regulatory settings, depending on variations in state and local zoning regimes, such as conditional rezoning, special use permitting, development agreements, variances coupled with conditions, and development exactions. Land use regulators should use all of these bargaining alternatives to traditional command-and-control, *Euclid*-era zoning so that Americans can hit the road running not only in the event of a pandemic, but also when unprecedented weather events resulting from climate change strike, such

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191. Margot Sanger-Katz, *Hospital Safety Rules Are Relaxed to Fight Coronavirus*, N.Y. TIMES (Mar. 30, 2020), <https://www.nytimes.com/2020/03/30/upshot/hospital-rules-relaxed-coronavirus-fight.html> [<https://perma.cc/6WWQ-4E2L>] (“FEMA and local officials have already begun unconventional expansions that would not meet normal federal standards, like the conversion of New York City’s Javits Convention Center into a temporary hospital facility. The new guidance would allow other communities to employ similar strategies.”).

as superstorms, flooding, and wildfires that can and have injured and displaced hundreds, even several thousands, within a very short timeframe.

#### IV. UPDATING COMPREHENSIVE PLANS BY INCORPORATING PANDEMIC RESILIENCY AND SOCIAL JUSTICE

Zoning is but one piece of the puzzle of envisioning and actualizing more livable and equitable cities, counties, towns, and suburbs. Logic would suggest that planning precede zoning, especially if, as so many enabling acts have stated, zoning must be in accordance with the comprehensive plan. As an historical matter, this logical order is not necessarily followed, because legislatures, with the blessing of the courts, allowed localities to implement zoning even without preparing a separate, written comprehensive plan.<sup>192</sup> In the last four decades, planning has caught up with zoning in many if not most localities of size, and in many communities with smaller populations. Except for localities that have one use zone in which height and area limitations are uniform—the classic bedroom community—state legislatures need to ensure that *all* localities that use zoning have a freestanding comprehensive or master plan with which that zoning will, by law, comply.

Comprehensive plans traditionally have an aspirational component, which matches the time and place of its composition. For example, the plan for a Midwestern industrial city in the 1960s will reflect the community's needs for modern infrastructure such as bridges and highways, vocational training in public schools, and public transportation to move workers from affordable housing to factories and back again. In contrast, those responsible for drafting a “left coast” city in the 1990s would work to ensure that construction, transportation, education, housing, commerce, and industry follow sustainability guidelines in order to reduce air and water pollution, with a special focus on shrinking greenhouse gas emissions.<sup>193</sup>

Growth management was the mantra for master planning in the closing decades of the twentieth century, in many cases part of a more ambitious effort to make cities and regions more environmentally responsible and development more sustainable.<sup>194</sup> In the current century, the orientation is toward resiliency, as the tension between development and environmental

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192. See, e.g., MANDELKER & WOLF, *supra* note 49, § 3.14.

193. For illustrative excerpts from actual comprehensive plans, see HAAR & WOLF, *supra* note 46, at 9–12.

194. *Id.* at 539–70.

protection is even more taut. The grim reality is that the politicization of climate science has grounded ambitious regulatory responses at the federal level, as well as in a majority of states, and has impelled many municipalities to include resiliency as a major focus of their comprehensive plans.

The strong connections between patterns of settlement and social and economic class, race, and ethnicity predate the introduction and explosive growth of Euclidean zoning.<sup>195</sup> The public's anger and indignation over notorious examples of police violence directed at African Americans have brought long-overdue attention to the structural racism that has for decades undergirded patterns of land use development and modes of regulation.<sup>196</sup> Comprehensive planning for the foreseeable future must have two new components—(1) pandemic response and resiliency, with, based on the shameful statistics regarding COVID-19 infections and deaths, a special emphasis on caste and race; and (2) social justice, whereby local governments at the state's direction will begin to address comprehensively the ways in which segregation of housing and exposure of lower-income and minority residents to environmental hazards effected by zoning and other land use controls contribute in significant ways to disparate outcomes in education, health, employment, policing, and the accumulation and preservation of family wealth.

Ideally, state legislators will amend state planning and zoning legislation to mandate the incorporation of these two elements into local and regional comprehensive plan documents.<sup>197</sup> In the absence of (or

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195. See, e.g., WILKERSON, *supra* note 3 and accompanying text; see generally ROTHSTEIN, *supra* note 33; WOLF, *ZONING OF AMERICA*, *supra* note 22, at 138–43.

196. For the important connections between segregated neighborhoods and increased police presence, see Monica C. Bell, *Located Institutions: Neighborhood Frames, Residential Preferences, and the Case of Policing*, 125 AM. J. SOCIO. 917, 925 (2020) (“Policing theory over the past four decades has moved from a position that police were powerless to stop crime to positions that favor a multitude of preemptive policing models—variably labeled ‘proactive policing,’ ‘community policing,’ ‘quality-of-life policing,’ ‘broken windows,’ ‘problem-solving policing,’ ‘focused deterrence,’ and increasingly, algorithm-based ‘predictive policing’ or ‘hot-spot policing’—meaning that police have had an intensified presence in many urban communities of color . . . .”); Jeffrey Fagan & Elliott Ash, *New Policing, New Segregation: From Ferguson to New York*, 106 GEO. L.J. ONLINE 33, 120 (2017) (“When police routinely and promiscuously intervene in the everyday lives of citizens, they impose interaction costs that inevitably deter residents from moving freely. And when these police actions produce legal and economic consequences for those already in disadvantaged social positions, those consequences effectively lock them in already disadvantaged places by constraining choices of neighborhood selection.”).

197. See, e.g., LYNN ROSS, SUSAN WOOD, DAVID BURGY, CARLTON ELEY, MONICA GUERRA, TIERRA HOWARD, EDNA LEDESMA, ANINDITA MITRA, MANUEL OCHOA, ADAM PERKINS, CANDACE STOWELL & MIGUEL VAZQUEZ, AM. PLAN. ASS'N, *PLANNING FOR EQUITY POLICY GUIDE 19* (2019), [https://planning-org-uploaded-media.s3.amazonaws.com/publication/download\\_pdf/Planning-for-](https://planning-org-uploaded-media.s3.amazonaws.com/publication/download_pdf/Planning-for-)



while awaiting) state law changes, local plan amendments would be an appropriate stopgap. Four examples of comprehensive plan amendments follow, but this is by no means an exhaustive list.

*A. Ensuring Space for Accessible Food Banks, Testing Centers, and Vaccination Sites*

The demands for nutritious food and affordable health care were already acute in lower- and moderate-income communities before 2020.<sup>198</sup> Moreover, climate-related disasters heightened the need for these basic necessities, while thousands of residents were periodically dislocated by floods, storms, and fires, sometimes temporarily and other times permanently. Beginning in the spring of 2020, television news programs and internet sites often featured reports and videos showing lines of cars waiting for hours at food banks and COVID-19 testing centers; a year later, the videos showed the same conditions at vaccination sites.

The pandemic has heightened Americans' awareness of emergency uses of land and buildings that demand a place in our planning and zoning documents and maps. The virus has exposed what were already shortcomings in comprehensive planning for many municipalities and rural areas alike, when too many Americans go to bed hungry and are in dire need of free, accessible health care. If, as many predict, the economy remains in the doldrums even after herd immunity is obtained, and

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Equity-Policy-Guide-rev.pdf [https://perma.cc/2Y9Y-T2JP] (“Utilize existing planning tools such as comprehensive plans, transportation plans, zoning ordinances, resolutions, statutes, site plans, and budget appropriations to create equitable communities in consideration of the need to design land-use and transportation facilities to provide access and connections to jobs, schools, health care, goods, and services. Essential to accessibility is the implementation of inclusionary zoning, provision of affordable housing, and preservation of existing affordable housing in areas proximal to all modes of transportation.”); *Eliminate Disparities*, MINNEAPOLIS 2040, <https://minneapolis2040.com/goals/eliminate-disparities/> [https://perma.cc/V5EU-ZA5G] (last visited Oct. 7, 2021) (“To achieve the goal of eliminating disparities, the City of Minneapolis will work to undo the legacy that remains from racially discriminatory housing policies by increasing access to opportunity through a greater diversity of housing types, especially in areas that lack housing options as a result of discriminatory housing policy. The City will invest in education, skills training, small business support and other support systems to help residents access opportunities to gain and retain well-paying employment that allows them to grow as individuals. Additionally, the City will lead by example, hiring and training a diverse workforce, as well as promoting these practices through its contracts, vendors and other procurement and partnership opportunities.”).

198. See, e.g., Gaby Galvin, *Food Insecurity in America Tied to Prices, Poverty*, U.S. NEWS (May 1, 2019, 10:34 AM), <https://www.usnews.com/news/healthiest-communities/articles/2019-05-01/food-insecurity-in-america-tied-to-food-prices-poverty> (“According to the U.S. Department of Agriculture, some 40 million people in the U.S. were food-insecure in 2017, meaning they lacked consistent access to enough food for an active and healthy life. And although the national food-insecurity rate among individuals fell between 2016 and 2017—from 12.9% to 12.5%—it remained above what it was before the Great Recession that began in 2007.”).

millions of workers remain unemployed, these needs will become even more acute. Moreover, there is every expectation that climate change-related natural disasters will continue to create temporary and permanent refugees here and throughout the planet in the foreseeable future. Now is the time for state and local governments to identify locations for pop-up and permanent food banks and medical testing and treatment centers in order to maximize efficiency and accessibility. Repurposing abandoned shopping malls and big-box stores, with their expansive parking lots and open indoor spaces, would be an optimal choice for some communities.

*B. Preserving and Creating Neighborhood Parks and Other Social-Distance-Ready Recreation and Educational Areas*

For several decades, local governments have employed exactions of property or in lieu fees as conditions for development in order to fund infrastructure such as roads, water, and sewer systems, and to secure land for public schools and parks. In a series of cases stretching back to 1987, conservative Supreme Court Justices have issued rulings designed to rein in exaction abuses, that is, situations in which private landowners are unfairly burdened by exactions of fee title, easements, and cash.<sup>199</sup> It appears that from a constitutional perspective government regulators are more at risk when they make individual determinations regarding one landowner than when they implement a legislative program that is applicable to a wide range of property owners. Because of the costs involved in litigation, and the risks of losing in Trump-stacked federal courts that are now open to takings challenges after the Supreme Court's 2019 decision in *Knick v. Township of Scott*,<sup>200</sup> local governments should impose individual exactions only as a last resort. The more circumspect and less risky option is to study infrastructure and other public amenity

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199. *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 599, 619 (2013) (“Our decisions in *Nollan v. California Coastal Comm’n*, 483 U.S. 825 . . . (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 . . . (1994), provide important protection against the misuse of the power of land-use regulation. In those cases, we held that a unit of government may not condition the approval of a land-use permit on the owner’s relinquishment of a portion of his property unless there is a ‘nexus’ and ‘rough proportionality’ between the government’s demand and the effects of the proposed land use. . . . We hold that the government’s demand for property from a land-use permit applicant must satisfy the requirements of *Nollan* and *Dolan* even when the government denies the permit and even when its demand is for money.”).

200. 139 S. Ct. 2162, 2167–68 (2019) (“A property owner has an actionable Fifth Amendment takings claim when the government takes his property without paying for it. . . . [T]he property owner has suffered a violation of his Fifth Amendment rights when the government takes his property without just compensation, and therefore may bring his claim in federal court under [42 U.S.C.] §1983 at that time.”).

needs that are generated by certain forms and scales of development and to enact and publish a schedule of the types and amounts of reasonable cash exactions.

From 2021 on, comprehensive plans need to (1) ensure that there are adequate open spaces for safe, outdoor recreation as an important element of a healthy and safe community, and (2) include social distancing elements in determining the shape of new and renovated public educational and recreational buildings and spaces. Whether paid for by property taxes and other traditional revenue sources,<sup>201</sup> by user fees, or by impact fees and exaction programs, these indoor and outdoor spaces that are provided for the public's enjoyment or in which students and teachers engage in in-person learning, must be adapted to the new normal of pandemic readiness.

### *C. Improving Living Conditions for Essential Workers*

When housing values rose steeply in many American cities and suburbs beginning at the end of the twentieth century, essential workers such as police officers, firefighters, teachers, nurses, and others were priced out of the communities whose populations they served.<sup>202</sup> Complementing efforts to raise the minimum wage at the state and municipal levels are a variety of workforce housing programs.<sup>203</sup> A set of researchers from Florida International University, for example, prepared a study in 2008 entitled *South Florida Workforce Housing Best Practices*<sup>204</sup> that included details on projects involving funding from community redevelopment agencies, tax increment financing, block grants, and funds from foundations; the creation of land trusts; and the preservation of rental housing.<sup>205</sup> Despite some incremental successes, the researchers proposed

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201. For a discussion of the variety of revenue sources available to modern local governments, see Michael Allan Wolf, *Check State: Avoiding Preemption by Using Incentives*, 36 J. LAND USE & ENV'T L. 121 (2021) [hereinafter Wolf, *Check State*].

202. Matthew J. Parlow, *Whither Workforce Housing?*, 40 FORDHAM URB. L.J. 1645, 1657–58 (2013) (footnote omitted) (“In the late 1990s and early 2000s, the lack of affordable housing for middle-income workers in some major metropolitan areas became acute. Simply put, middle-income workers like police officers, firefighters, teachers, health care workers, retail clerks, and others could not afford to buy or rent housing in the high-priced metropolitan regions in which they worked.”).

203. See *id.* at 1659–63 (discussing tools such as inclusionary zoning, land trusts, housing trusts, tax credits and other incentives, and owner assistance).

204. METRO. CTR. FLA. INT'L UNIV., *SOUTH FLORIDA WORKFORCE HOUSING BEST PRACTICES*, (2008), [https://metropolitan.fiu.edu/research/services/economic-and-housing-market-analysis/s\\_fl\\_housing\\_practice.pdf](https://metropolitan.fiu.edu/research/services/economic-and-housing-market-analysis/s_fl_housing_practice.pdf) [https://perma.cc/39PG-AXNX].

205. *Id.* at 5–9.

a set of policy recommendations, including “provid[ing] policies and objectives in the Future Land Use Element of their Comprehensive Plans and amendments to the Unified Land Development Regulations that encourage and enable workforce/affordable housing development opportunities including: density relief, expansion of multi-family residential districts and reductions in parking requirements.”<sup>206</sup> While this movement lost some momentum during the real estate bust of the Great Recession, the pandemic has seen a resurgence in real estate prices (and the attendant shortages in affordable housing)<sup>207</sup> that started during the recovery beginning in Barack Obama’s second term.

The pandemic has exposed this weak link in the planning and zoning chain, as society has expanded the categories of essential workers, many of whom are not able to afford housing near their workplaces. For example, the CDC lists the following as examples of “critical infrastructure workers”:

- Federal, state, & local law enforcement
- 911 call center employees
- Fusion Center employees
- Hazardous material responders from government and the private sector
- Janitorial staff and other custodial staff
- Workers—including contracted vendors—in food and agriculture, critical manufacturing, informational technology, transportation, energy and government facilities.<sup>208</sup>

It would not be difficult to find examples of each of these types of workers in nearly every American city who would be unable to afford housing at

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206. *Id.* at 10.

207. *See, e.g.*, Greg Rosalsky, *Parts of America See Housing Boom during the COVID-19 Pandemic*, NPR, (Sept. 11, 2020, 4:57 AM), <https://www.npr.org/2020/09/11/911828398/parts-of-america-see-housing-boom-during-the-covid-19-pandemic> [<https://perma.cc/6BDW-FP5N>] (“And so it’s a housing market for two Americas—renters hit hard by the recession, living on the brink of eviction, relying on family or the government for help, and homebuyers bidding up prices, some literally headed for the hills, destination Zoom town.”).

208. *Interim Guidance for Implementing Safety Practices for Critical Infrastructure Workers Who May Have Had Exposure to a Person with Suspected or Confirmed COVID-19*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.bop.gov/foia/docs/CDCInterimGuidanceImplementingSafetyforCriticalWorkers.pdf> [<https://perma.cc/7GL5-HPGC>] (last visited Oct. 9, 2021).

the median level for the municipality.

The pandemic has added a new and dangerous dimension to this reality, as many essential workers had no alternative to crowded buses, subways, and other forms of public transportation, thus exposing themselves, their fellow workers, patients, customers, and family members to the virus. Because of health concerns with riding crowded elevators, the height component of multi-family and commercial zones has relevance and salience that Americans have not experienced since the early 1900s. As noted previously, Pedestrian Oriented Development should be explored so that the physical distance between work and home can be reduced for those who cannot afford to commute by automobile.<sup>209</sup> Indeed, because abandoned shopping malls and big-box stores were typically constructed close to other businesses, their abandoned shells can be converted into affordable housing units from which residents can walk to hospitals, offices, nursing homes, and other workplaces. Those responsible for preparing and updating comprehensive plans must address the new reality of workforce housing, for the price all members of society pay for inaction, especially those particularly vulnerable to a virus, is much too high to ignore.

*D. Shifting the Density Management Focus from the Urban Fringe to the Central City*

Since the 1990s, planners, land use regulators, and commentators have focused much of their attention on designing and implementing growth management devices such as urban growth boundaries designed to rein in costly and environmentally harmful suburban and exurban sprawl.<sup>210</sup> Somehow, however, these professionals, politicians, and experts lost sight of the equally important need to regulate density *within* urban residential units. Sadly, the pandemic has taught us the high price that all members of society pay in neglecting these crowded central city housing conditions. During the pandemic, members of racial minority groups, many of whom are crowded into substandard housing stock, have experienced higher infection and death rates, and lower vaccination rates than the general population. Their vulnerability to the worst the virus has to offer overstressed hospitals in New York and other central cities.

With building and sanitary codes, as well as occupancy limits, as their

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209. See *supra* notes 99–101 and accompanying text.

210. See, e.g., 2 BRONIN & MERRIAM, *supra* note 49, § 21.73; MANDELKER & WOLF, *supra* note 49, § 10.07; SALKIN, *supra* note 49, § 34:5.

initial focus, government officials need to pledge to work closely with public health and design experts, and to devote the same energy and innovation to this project of improving the living conditions of those *inside* of the metropolis that they have devoted to preserving the environment on the outside. Substantial indoor and outdoor spaces where residents and their guests can gather safely, wide hallways, and modern HVAC systems are just the start.<sup>211</sup> Lawyers, judges, planners, and responsible citizens need to make sure that, for all of our sakes, those officials follow up on those promises.

#### V. ADDRESSING GOVERNMENTAL AUTHORITY AND PROCEDURAL GAPS

Even before COVID-19, local governments in many states were burned by overzealous state lawmakers who flex their preemptive muscles in order to bring in line cities, counties, and towns who legislate in politically sensitive areas such as gun control, energy extraction, marijuana dispensaries, and environmental protection.<sup>212</sup> Governors issuing stay-at-home orders in some states have allowed for more protective local measures, while in other states chief executives have imposed uniform measures despite concerns voiced by local citizens and their duly elected officials.<sup>213</sup> With lives and livelihoods literally in the balance, it is time to consider constitutional adjustments to the state-local relationship, to give real meaning to the concept of home rule.

The work of the planner and the planning attorney does not end at 5:00 p.m., not with meetings and public hearings before zoning and planning boards and local legislatures, and not with strategy sessions with neighborhood associations and other clients. But asking what would happen if those in-person hearings and meetings could not take place is no

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211. See, e.g., *COVID-19 Cases in New York City, a Neighborhood-Level Analysis*, N.Y.U. FURMAN CTR. (Apr. 10, 2020), <https://furmancenter.org/thestoop/entry/covid-19-cases-in-new-york-city-a-neighborhood-level-analysis> [<https://perma.cc/NPQ4-DDNC>] (“[W]e find that areas with higher numbers of confirmed COVID-19 cases have lower population density, yet they do have higher rates of overcrowding at the household level.”).

212. Nicole DuPuls, Trevor Langan, Christiana McFarland, Angelina Panettieri & Brooks Rainwater, *City Rights in an Era of Preemption: A State-by-State Analysis*, NAT’L LEAGUE CITIES 3 (2018), <https://www.nlc.org/wp-content/uploads/2017/02/NLC-SML-Preemption-Report-2017-pages.pdf> [<https://perma.cc/8HHD-AJYD>]; Richard Briffault, *The Challenge of the New Preemption*, 70 STAN. L. REV. 1995, 1997 (2018).

213. See, e.g., Joshua Jamerson, *Georgia Gov. Kemp Drops Lawsuit against Atlanta Mayor over Coronavirus Restrictions*, WALL ST. J. (Aug. 13, 2020, 6:57 PM), <https://www.wsj.com/articles/georgia-gov-kemp-drops-lawsuit-against-atlanta-mayor-over-coronavirus-restrictions-11597347685> [<https://perma.cc/Y56E-R79K>] (“Georgia Gov. Brian Kemp dropped a lawsuit against Atlanta Mayor Keisha Lance Bottoms and other city officials over a mask mandate and other coronavirus restrictions.”).

longer a hypothetical question. Americans have awakened to the realization that state and local lawmakers have not made adequate provisions for conducting business online and through video chat. And, of course, the problem is only exacerbated when courts themselves are not in session.

*A. Clarifying Preemption by Constitutional Amendment*

Those like the author whose work lies at the intersection of land use and environmental law have been increasingly frustrated by state legislators who via preemption are imposing their science skepticism (which may or may not be politically driven) on localities that have decided to implement sustainability, resiliency, and environmental protection ordinances.<sup>214</sup> Unfortunately, we are currently witnessing the effects of governors who use executive orders to preempt local stay-at-home orders and other protective devices that depart from the governor's open-for-business agenda. The fight between the governor of Georgia and the mayor of Atlanta over a local mask mandate is the perfectly sad example of this phenomenon.<sup>215</sup>

It is time to consider a state constitutional fix for preemption on steroids, perhaps by exempting certain local laws from preemption if the state legislature (or, for executive orders, the governor) cannot articulate a health and safety justification for its heavy-handedness, or by requiring a supermajority vote of the state legislature to negate local measures that are demonstrably designed to protect health and safety. One painful lesson learned in 2020 is that, like storms and fires supercharged by climate change, a pandemic is color blind, unable to distinguish between its blue and red victims.

*B. Conducting Online Meetings, Enhancing Administrative Flexibility, and Conducting Virtual Planning Charrettes*

Lightning did not strike the figure of blindfolded Justice near the entrance of the U.S. Supreme Court building, nor were there signs of ice in Hades when the Justices departed from centuries of precedent by conducting oral arguments online. Following a hiatus during the early weeks of the pandemic, lower courts conducted proceedings, even jury

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214. See, e.g., Wolf, *Check State*, *supra* note 201.

215. Jamerson, *supra* note 213.

trials, online.<sup>216</sup> Similarly, the necessities of the pandemic have birthed virtual meetings of local legislatures and zoning boards, including participation by the public. While there are technical challenges—screen freezing and Zoombombing, to mention the most prominent—on balance, virtual proceedings are becoming more sophisticated and functional. There remains one important constitutional issue: if a developer is denied a zoning change or subdivision or plat approval, and there was only a virtual public hearing and meeting, have the developer’s due process right to an opportunity to be heard been violated? Until courts have given their blessing to these substitutions for in-person proceedings, however, landowners should be asked to waive their right to challenge on procedural due process grounds. In the event they choose not to waive, their hearings will be postponed until such time as the local legislature or board goes back to “normal” (or courts render a ruling in favor of the government).

While it may be necessary, or at least practical, for landowners, as well as neighbors who object to development, to plead their positions online, there is no reason why those making development proposals should be hurt by the suspension of meetings, hearings, and other proceedings. Therefore, executive orders or state legislation need to make clear that any statutory periods will be tolled during the pandemic hiatus. For example, a developer who is given two years from the issuance of a building permit to begin construction should not be penalized for a virus that is beyond its control.

Once the emergency phase of the pandemic ends for good, local legislators should enhance administrative flexibility by assigning responsibilities for certain zoning and land use regulatory decisions to one or a few officials, such as a zoning administrator, either permanently or on a temporary basis during emergencies that last more than a few weeks. For example, one official should be able to grant an emergency variance or permit to enable a restaurant to install a drive-through window, or to allow business owners to park work-related vehicles or to erect storage sheds on their residential lots. In addition, zoning provisions describing permitted uses in commercial zones should be updated to allow restaurants

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216. See, e.g., Aila Slisco, *America’s First Jury Trial via Zoom Begins, Complete with Virtual Jurors*, NEWSWEEK (Aug. 10, 2020, 10:20 PM), <https://www.newsweek.com/americas-first-jury-trial-via-zoom-begins-complete-virtual-jurors-1524154> [<https://perma.cc/J9V4-JL2K>] (“The trial is taking place in Jacksonville’s Fourth Circuit Court, one of five Florida courts that were selected for a virtual trial pilot program launched in June. The program’s first jury selection over Zoom happened on July 13, although it involved a case with a non-binding verdict and the trial itself was conducted in person. Thousands of hearings for non-jury trials have been conducted, according to *The Miami Herald*.”).



and other retail businesses to submit provisional plans for drive-through windows and curb service that will be implemented during pandemics and other extended emergency situations such as a superstorm, fire, or flood.

The comprehensive planning process also comes with its own set of public meetings and hearings. Many communities use charrettes, collaborative sessions bringing together members of the community and experts to share ideas and draft language,<sup>217</sup> and not surprisingly the pandemic has driven these meetings into the virtual world.<sup>218</sup> Should this process work, it creates new possibilities for the comprehensive planning process, as well as for public participation in charrettes regarding education, transportation, social service, and any number of other government-related issues. As with online education, organizers must find ways to include those members of the community who do not have ready access to Zoom and similar technology. Still, the elimination of the need for community members to take the time and the expense of traveling across town and finding caregivers for those left at home are advantages that should not be overlooked once “normalcy” returns.

#### CONCLUSION: A CHECKLIST FOR ZONING’S SECOND CENTURY

The year 2020—featuring the COVID-19 pandemic, an invigorated social justice movement, and heightened concerns about government failures to address climate change—served as a stress test of the nation’s zoning and planning infrastructure, much like a cardiac stress test exposes weaknesses in the patient’s heart functions and a financial stress test analyzes how well individual banks react to hypothetical situations such as recessions and market crashes. In reality, many of the weaknesses exposed by the pandemic were already apparent to many of those

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217. See, e.g., *Public Participation Guide: Charrettes*, U.S. ENV’T PROT. AGENCY, <https://www.epa.gov/international-cooperation/public-participation-guide-charrettes> [https://perma.cc/SS66-MXZG] (last visited Oct. 7, 2021) (“A charrette is an intensive, multi-disciplinary workshop with the aim of developing a design or vision for a project or planning activity. Charrettes are often conducted to design such things as parks and buildings, or to plan communities or transportation systems. A team of design experts meets with community groups, developers, and neighbors over a period lasting from one day to a couple of weeks, gathering information on the issues that face the community. Charrette participants then work together to find design solutions that will address the issues that stakeholders have identified as priorities and result in a clear, detailed, realistic vision for future development.”).

218. Harmony Fierke-Gmazel & Holly Madill, *Charrettes Go Virtual: A State-of-the-Art Process Helps a Community Stay-the-Course during COVID-19*, MICH. STATE UNIV. (Apr. 14, 2020), <https://www.canr.msu.edu/news/charrettes-go-virtual-a-state-of-the-art-process-helps-a-community-stay-the-course-during-covid-20> [https://perma.cc/AW45-GTWA] (“A state-of-the-art example of a recent charrette that is now 100% virtual: the Mullan Area Master Plan Charrette in Missoula, Montana brought city and county residents together in late March 2020.”).

concerned with the efficient and equitable operation of land use regulation. However, there should be a new sense of urgency to strengthen the weakest links in the zoning and land use regulatory chain, now that we are witnessing the serious health-related, social, and financial effects of inattention and apathy.

The discussions above yield a checklist of changes (organized under the same headings included in this Article) that state and local officials and judges, assisted by the planners, lawyers, developers, researchers, and others who shape our system of land regulation, should adopt and implement. This is neither an exhaustive list nor an all-or-nothing proposition. Instead, because the already high stakes are higher still, the items that follow should be a starting point for serious discussion leading to action.

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### ***Zoning and Planning Checklist***<sup>219</sup>

#### ADAPTING EUCLIDEAN BASICS TO NEW REALITIES: HEIGHT, AREA, AND USE REGULATION

- Update or eliminate zoning ordinance provisions defining and listing home occupations and professions allowable in residential districts (SL, LO).
- Redefine and expand accessory uses in residential and commercial districts (CL, LO).
- Allow a meaningful range of accessory dwelling units (ADUs) in single-family residential zones (CL, LO).
- Institute common-sense descriptions of permitted accessory uses (LO).
- Amend the zoning ordinance to allow commercial users to submit plans ahead of time for alternate configurations to allow for contact-free or -reduced customer contact (LO).

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219. Abbreviations appear for each item on the checklist to identify whether state legislators (SL), local officials (LO), or courts (CT) (or a combination) will be responsible for enacting or implementing the proposed changes.

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- Allow “missing middle” and other forms of affordable housing in erstwhile single-family zones, preempting covenants where they constitute a barrier (SL, LO).
- Augment attempts to eliminate exclusive single-family residential zones by preempting covenants and height and area restrictions that frustrate good-faith efforts to address segregation by class and race and to augment the supply of affordable housing in desirable communities (SL).
- Drastically curtail or eliminate noncumulative zoning in industrial, commercial, and residential districts (SL, LO).
- Eliminate vestigial provisions banning urban agriculture from residential districts (SL, LO).
- Incorporate pandemic-related health and safety requirements in approvals for vertical mixed-use structures (LO).
- Plug loopholes in floor area ratio, transferable development rights, and other regulations to eliminate pencil towers that look down on neighboring skyscrapers (LO).

#### ACCOMMODATING AND FACILITATING CHANGE

- Eliminate use variances in all zoning ordinances and enabling legislation (SL, LO).
- Allow emergency and medical hardships for area and height variances (SL, LO).
- Permit owners of nonconforming businesses closed for emergency and public health purposes to reopen notwithstanding discontinuance or abandonment language found in state enabling acts or zoning ordinances (SL, LO, CT).

- Apply “the doctrine of natural expansion” to shield businesses that make substantial changes and improvements in order to stay open during an extended public health emergency (CT).
- Stop the amortization clock for nonconformities during the period between the declaration of a state of emergency and the end of that emergency (SL, LO).
- Create an inventory of buildings and campuses that were COVID-19 hot spots and that have been in operation for more than a few years and pass legislation to phase out use of the structures unless owners agree to implement improvements within a relative short time-frame or convert the buildings to a use in compliance with existing land use regulations (LO).
- Rethink inclusionary zoning by enhancing the zoning-related amenities offered to developers and builders of affordable housing units (SL, LO).
- Reinvigorate and reshape inclusionary zoning, making it economically feasible for developers to include meaningful percentages of affordable units in their construction plans for the expanded categories of essential workers and their families (SL, LO).
- Eliminate ballot-box zoning measures that target affordable housing developments.
- Offer owners proposing new (or newly renovated and expanded) factories and warehouses who seek approval in the form of a rezoning, special use permit, or building permit, the option of receiving private benefits (such as taller or bulkier structures than permitted under the current zoning envelope, thereby “freeing” trapped development rights) in exchange for enforceable agreements to produce or store pandemic-related necessities (SL, LO).

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- Require owners of new and renovated buildings with large open spaces that are seeking rezonings, variances, planned unit development or subdivision approval, or special use permits to provide alternative social-distancing blueprints (LO).
- Put on hold adoption of form-based codes and other land use regulatory programs that require precious time, energy, and money to implement, unless there is a direct and tangible connection to climate change adaptation and resiliency, social justice and structural racism, or pandemic prevention and response (SL, LO).
- Eliminate open-ended special use permit provisions and instead craft detailed elements to match the externalities associated with specific, listed uses (LO).
- Update special use permitting for assisted living and senior living facilities to include modifications gleaned from the COVID-19 pandemic experience (LO).
- Use floating zones to process large-scale development proposals for uses such as sports stadiums and arenas, casinos, and theme parks (SL, LO).
- Implement legislative changes to encourage and incentivize retrofitting of existing large structures so that they can be used during quarantine and climate change-related emergencies for the storage of PPE and medical equipment and conversion to medical treatment, testing, and other health-related functions (LO).
- Institute conditional permitting for new large structures that cannot be used during quarantine periods and climate change-related emergencies in order to achieve additional space for the storage of PPE and medical equipment and conversion to medical treatment, testing, and other health-related functions (LO).

UPDATING COMPREHENSIVE PLANS BY INCORPORATING PANDEMIC  
RESILIENCY AND SOCIAL JUSTICE

- Ensure that *all* localities that use zoning (except single-zone communities) have a freestanding comprehensive or master plan with which that zoning will, by law, comply (SL, LO).
- Include pandemic prevention, response, and resiliency into comprehensive plans, ideally by an amendment to state planning legislation (SL, LO).
- Ensure space for accessible pop-up and permanent food banks and testing centers (LO).
- Study infrastructure and other public amenity needs that are generated by certain forms and scales of development and enact and publish a schedule of the types and amounts of reasonable cash exactions (SL, LO).
- Include social-distancing concerns in comprehensive plans in determining the shape of new and renovated public educational and recreational buildings and spaces (LO).
- Explore Pedestrian Oriented Development so that the physical distance between work and home can be reduced for essential workers and others who cannot afford to commute by automobile and who are at risk taking public transportation during a pandemic (LO).
- Convert abandoned large retail spaces in commercial districts into affordable housing units from which residents can walk to hospitals, offices, nursing homes, and other workplaces (LO).
- Redirect energy and expertise away from growth management, with its focus on the external, toward the reduction of crowding and density inside housing and

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other structures using housing and sanitary codes as well as occupancy limits (SL, LO).

#### ADDRESSING GOVERNMENTAL AUTHORITY AND PROCEDURAL GAPS

- Study and implement state constitutional fixes for preemption, such as exempting certain local laws from preemption if the state legislature cannot articulate a health and safety justification for its heavy-handedness, or requiring a supermajority vote of the state legislature to negate local measures that are demonstrably designed to protect health and safety (SL).
- Give landowners seeking zoning changes and permits the choice of waiving their rights to in-person hearings or delaying their applications until courts resolve procedural due process issues regarding online proceedings or until live proceedings are reinstated (LO).
- Clarify that any statutory periods for acting on a building permit will be tolled during the course of a pandemic or climate emergency (LO).
- Allow retail and restaurant users to submit provisional plans for drive-through windows and curb service that will be implemented during pandemic and other emergency situations (LO).
- Use virtual charrettes for comprehensive planning engagement with the public (LO).

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Zoning and planning are intricately connected in an interdependent web of private and public programs for shaping the urban, suburban, and rural landscape. For example, planning boards would not even be considering subdivision proposals if there were not adequate access to roads, highways, public transportation, construction and residential mortgage loan funding, and a local labor force with the proper skills for all phases of residential construction; if the public school system were

failing; if there were not an ample supply of developable land that is not environmentally sensitive; and if there were not potential employers for incoming residents. The pandemic has had a profound impact on all of these areas, as have severe weather events associated with climate change, such as floods, wildfires, droughts, unprecedented winter storms, and hurricanes and tropical storms. Moreover, caste and race discrimination and income disparity in many ways shape development patterns, transportation and education options, and lending and employment practices.

In too many ways Americans' vulnerability to widespread harm from pandemics and other health emergencies, from natural disasters attributable to climate change, and from the place-based aspects of structural racism are attributable to the shortcomings in zoning and planning, many of which were exposed during the course of the twentieth century. The weaknesses of zoning exposed by COVID-19, the storms and fires, and the social justice movement of 2020 should not cause us to discard sensible, comprehensive land use regulation, abandoning us to the vagaries and inequities of the developer-dominated market. Instead, we should be inspired and driven to fine-tune our unique and imperfect system so that, in its second century, zoning can help communities achieve a healthier, more sustainable, and more just future.