

## ***Zoning Reformed: A Conversation with Professor Michael Allan Wolf***

*Patricia E. Salkin\**

### I. INTRODUCTION

Kudos to Professor Michael Allan Wolf for writing what has needed to be said for a long time—local land use controls and zoning regulations are important components of sustainable community development, but modernization is necessary for zoning to continue to more fully realize its potential of protecting the public health, safety, and welfare.<sup>1</sup> In the well-written piece, *Zoning Reformed*,<sup>2</sup> Professor Wolf frames his arguments understandably within the context of the chaotic events of 2020—a global pandemic that tested the resiliency of humanity, and a call to action to address structural racism not experienced in intensity since the Civil Rights movement in the 1950s and 1960s. All of the resulting actions and inactions against the backdrop of a younger generation whose opinions and attitudes about everything from social justice to housing and to quality of life may differ from those of decisionmakers who have “aged into” their roles.

While there is little to disagree with in Professor Wolf’s passionate appeal for zoning reform, we should also consider reforms needed and supported by other potential threats that ought to be factored into future legislative, policy, and land use planning decisions. For example, the process of land use decision making (used broadly here to include adopting and amending zoning and the process of decision making) must also be nimble to address the chaos that could also result from major cyber attacks (that could impact so many things including drinking water, public transportation, elevator controls, etc.), a nuclear attack, and other large scale domestic or international acts of terrorism on American

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1. See generally Michael Allan Wolf, *Zoning Reformed*, 70 U. KAN. L. REV. 171 (2021).

2. *Id.*

soil, any one of which threaten our community infrastructure and basic life necessities such as clean air and clean water, and all of which demand the ability to quickly repurpose the built environment.

While many of the justifications for flexibility overlap to meet critical public health demands, housing and shelter, food and supply production, and breathable air and drinkable water when considering the unthinkable, now is the time to be comprehensive in re-imagining the needed responses to these real threats that too many prefer to ignore as far-fetched or unlikely. The recent events in Ukraine speak volumes as to why the United States cannot take freedom and safety for granted, and Professor Wolf reminds us of our Country's response to the Cold War and the Cuban Missile crisis.

In this brief response to Professor Wolf's advocacy for reform and explanation of the types of reforms that are warranted, I will address some of his forty-one recommendations, add another to his list, and elaborate on some reforms but in a broader frame. I have intentionally avoided discussing housing since Professor Mandelker has focused on that in his discussion of *Zoning Reformed*.<sup>3</sup> Further, I have resisted going into many of the reasonable creative modifications to local zoning laws that could go a long way to meeting some of the pandemic related challenges in the last couple of years as these are touched upon in a review by Professor Gregory Stein.<sup>4</sup> Having written on the need to better address home-based businesses pre-pandemic,<sup>5</sup> I could not agree more that the new-normal suggests that since we will be living with COVID-19 for years to come,<sup>6</sup> and the workforce prefers options to work remotely, new regulatory approaches will be necessary to enable people to both accomplish work-life balances and to sustain the economy at the grass-roots level.<sup>7</sup> Lastly, the intersection of land use planning and

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3. Daniel R. Mandelker, *A Comment on Professor Wolf's Zoning Reformed*, 71 U. KAN. L. REV. 277 (2022).

4. Gregory M. Stein, *Reforming Zoning for its Second Century*, JOTWELL (Aug. 9, 2022), <https://property.jotwell.com/reforming-zoning-for-its-second-century/> [https://perma.cc/D48X-DLYC] (reviewing Michael Alan Wolf, *Zoning Reformed*, 70 U. KAN. L. REV. 171 (2021)).

5. Patricia E. Salkin, *Zoning for Home Occupations: Modernizing Zoning Codes to Accommodate Growth in Home-Based Businesses*, 35 REAL EST. L.J. 181 (2006); Patricia E. Salkin, *Modernizing Zoning for Home Occupations*, in 9 AM. PLAN. ASS'N (Sept. 2006), <https://planning-org-uploaded-media.s3.amazonaws.com/document/Zoning-Practice-2006-09.pdf> [https://perma.cc/64DX-SWSS].

6. Ezekiel J. Emanuel, Michael Osterholm & Celine R. Gounder, *A National Strategy for the "New Normal" of Life with COVID*, JAMA NETWORK (Jan. 6, 2022), <https://jamanetwork.com/journals/jama/article-abstract/2787944> [https://perma.cc/QZV7-2Q8E].

7. See also David S. Steinmetz, Daniel R. Richmond & Maximilian R. Mahalek, *From Euclid*

natural disaster mitigation, including climate change is comprehensively discussed in the published literature that it suffices to say I agree with Professor Wolf's comments.

This conversation begins with a short review of prior efforts to modernize zoning reforms that have been met with varying degrees of success. This discussion is important to understand the significant challenges reformers face in accomplishing needed change. The second topic of discussion is how the opportunities made possible by technology can be embraced. Professor Wolf touches on some of this but a more robust argument can and should be made. Third, more conversation is warranted to truly address the human disparities in communities resulting from racial, religious, and socio-economic status. Addressing systemic racism is just one part, albeit critical, of the discrimination that has been faced by many non-majority groups. In my opinion, as set forth below, more impact assessment and environmental justice considerations are warranted. Fourth, I posit that nothing significant can be accomplished in theory or practice without a concentrated effort to organize education and training around these topics. The last part discusses a variety of specific zoning tools and land uses raised by Professor Wolf that I consider within the frame of what is acceptable because it is a temporary response and where the line should be drawn in making decisions under an emergency landscape more permanent simply because the emergency happened once.

## II. PRIOR MODERNIZATION EFFORTS FALL SHORT

Dating back to the 1900s when the U.S. Department of Commerce published the Standard City Planning<sup>8</sup> and Zoning Enabling Acts,<sup>9</sup> state and local governments across the country have been influenced by these early constructs of land use regulation.<sup>10</sup> Attempts at reform during various times in history have had marginal success. For example, in

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*to Darwin: The Unavoidable Evolution of Zoning in the Post-COVID-19 World*, 92 N.Y. ST. B.J. 54, 57 (2020).

8. ADVISORY COMM. ON CITY PLAN. & ZONING, A STANDARD CITY PLANNING ENABLING ACT (1928).

9. ADVISORY COMM. ON CITY PLAN. & ZONING, A STANDARD STATE ZONING ENABLING ACT (rev. ed. 1926).

10. Patricia E. Salkin, *From Euclid to Growing Smart: The Transformation of the American Local Land Use Ethic into Land Use and Environmental Controls*, 20 PACE ENVTL. L. REV. 109, 113 (2002).

1970, a proposed National Land Use Act was introduced,<sup>11</sup> and, in 1971, the American Law Institute published the Model Land Development Code, which is most widely touted for its effort to address regional development.<sup>12</sup> The landscape was then quiet until the American Planning Association's Growing Smart Legislative Handbook in 2002.<sup>13</sup> In addition, during the 1990s one federal government effort to address the lack of affordable housing resulted in what was referred to as the Kemp Commission Report on NIMBY: Regulatory Barriers to Affordable Housing.<sup>14</sup> Most recently the American Law Institute, as part of its Restatement of the Law of Property, 4th ed., adopted a tentative draft report on zoning.<sup>15</sup>

I am a believer in cooperative federalism in the land use regulatory process. More precisely, I believe we best accommodate community challenges at the local level, however every so often a particular "thorny issue" arises that requires either authority or directives from higher levels of government to ensure that these challenges can be addressed. For example, without the Telecommunications Act of 1996,<sup>16</sup> our communications infrastructure needed most critically during disasters, would not nearly be as comprehensive due to community fears and concerns. Likewise, without the federal Fair Housing Act Amendments of 1988<sup>17</sup> and similar state-level laws designed to preempt local control over the siting of group homes<sup>18</sup> we would not have enough of this

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11. S. 3354, 91st Cong. (1970) (introduced by Sen. Henry Jackson); see Jayne E. Daly, *A Glimpse of the Past—A Vision for the Future: Senator Henry M. Jackson and National Land-Use Legislation*, 28 URB. LAW. 7, 9 (1996).

12. A MODEL LAND DEVELOPMENT CODE: COMPLETE TEXT AND COMMENTARY (AM. L. INST. 1976); see JULIAN CONRAD JUERGENSMEYER & THOMAS E. ROBERTS, LAND USE PLANNING AND CONTROL LAW § 3.23 (WestGroup 1998).

13. AM. PLAN. ASS'N, GROWING SMART LEGISLATIVE GUIDEBOOK: MODEL STATUTES FOR PLANNING AND THE MANAGEMENT OF CHANGE XXVIII–XXX (Stuart Meck ed., 2002); see also Stuart Meck, *Present at the Creation: A Personal Account of the APA Growing Smart Project*, 3 LAND USE L. & ZONING DIG. 4 (2002).

14. ADVISORY COMM'N ON REGULATORY BARRIERS TO AFFORDABLE HOUSING, "NOT IN MY BACKYARD": REMOVING BARRIERS TO AFFORDABLE HOUSING 1 (1991), <https://www.huduser.gov/publications/pdf/NotInMyBackyard.pdf> [<https://perma.cc/R9XU-2YEU>].

15. *Restatement of the Law Fourth, Property*, AM. L. INST., <https://www.ali.org/projects/show/property/> [<https://perma.cc/KY5R-WJKC>].

16. Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified as amended at 47 U.S.C. §§ 151–163).

17. Pub. L. No. 100-430, 102 Stat. 1619 (1988) (codified as amended at 42 U.S.C. §§ 3601–3619).

18. See Lester D. Steinman, *The Effect of Land-Use Restrictions on the Establishment of Community Residences for the Disabled: A National Study*, 19 URB. LAW. 1, 25–37 (1987); see also Anna L. Georgiou, *NIMBY's Legacy—A Challenge to Local Autonomy: Regulating the Siting of Group Homes in New York*, 26 FORDHAM URB. L.J. 209 (1999).

needed housing to meet societal demand (and we probably still have unmet needs). And without the Religious Land Use and Institutionalized Persons Act,<sup>19</sup> we would have less protection when local governments discriminate against various religious groups who wish to site houses of worship, build housing, or operate uses that carry out the religious group's closely held religious beliefs.<sup>20</sup>

### III. TECHNOLOGY AS A POWERFUL FORCE FOR CHANGE

Reformers must not forget to address the power and role of technology in our ability to bring about change. Professor Wolf points to the lessons learned from COVID with respect to access to government<sup>21</sup> and I agree with his argument that public hearings and meetings can and should going forward offer members of the public the ability to actively or passively participate remotely. Much has been written in the literature about public participation in the land use planning and decision making process<sup>22</sup> addressing issues such as appropriate notice (do we really believe that a state law mandating "publication" of the notice in a newspaper in general circulation in the community is truly the best way to provide notice today?), time of day and day of the week when meetings are held, where meetings are held and the proximity to public transportation and/or parking. Notice might better be accomplished through monthly community e-news alerts, and announcements posted on social media sites that can be accessed both actively and passively.

In addition, in the spirit of transparency, local governments should be required to post on their websites important information about the land use planning and zoning including: A current comprehensive plan; the current zoning law/code; other land use regulations; information about land use permit applications and their outcomes; minutes and even recordings of meetings. This will all foster greater public participation and engagement in the land use process. In communities where English

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19. Pub. L. No. 106-274, 114 Stat. 803 (2000) (codified as amended at 42 U.S.C. § 2000cc).

20. See DEP'T OF JUST., REPORT ON THE TWENTIETH ANNIVERSARY OF THE RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT, 6 (2020), <https://www.justice.gov/crt/case-document/file/1319186/download> [<https://perma.cc/2WVY-D6VW>].

21. See Wolf, *supra* note 1, at 232–35.

22. See, e.g., Douglas A. Jorden & Michele A. Hentrich, *Public Participation is on the Rise: A Review of the Changes in the Notice and Hearing Requirements for the Adoption and Amendment of General Plans and Rezoning Nationwide and in Recent Arizona Land Use Legislation*, 43 NAT. RES. J. 865, 879–881 (2003). Specifically with respect to COVID-19 see, JOHN J. DELANEY, STANLEY D. ABRAMS, FRANK SCHNIDMAN, PATRICIA E. SALKIN & JULIE A. TAPPENDORF, 1 HANDLING THE LAND USE CASE § 5:77 (3d ed. 2021).

is not the primary language easily read and understood by a substantial portion of the population, extra outreach efforts should include information in another language more commonly understood by members of the community.

Further, we should think strategically about using data better in the land use decision making process. Everyone was excited more than a decade ago as geographic information systems gave us the ability to collect, record, and analyze various points of information.<sup>23</sup> Today, we can collect information using other forms of technology such as drones.<sup>24</sup> We can communicate with community members more efficiently and perhaps through tax bills and other records for renters, government should communicate electronically on different platforms (without, of course, losing traditional formats for those either not tech savvy or disadvantaged due to lack of access).

We also need to prepare for autonomous vehicles,<sup>25</sup> smart buildings and cities,<sup>26</sup> drones,<sup>27</sup> and other technological advances that will require us to design and permit roads, pedestrian, air rights, and buildings differently. For example, more than a dozen states have task forces hard at work devising plans and regulations for autonomous vehicles,<sup>28</sup> and with Amazon's use of the unmanned drone to deliver packages,<sup>29</sup> flying cars, like what George Jetson<sup>30</sup> drove, are sure to be here in the next

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23. See, e.g., Patricia E. Salkin, *From Bricks and Mortar to Mega-Bytes and Mega-Pixels: The Changing Landscape of The Impact of Technology and Innovation on Urban Development*, 42/43 URB. LAW. 11–12 (Fall 2010/Winter 2011).

24. See, e.g., *Balancing New Technology and Privacy When Using Drones in Land Use and Construction*, NAT'L L. REV. (May 26, 2020), <https://www.natlawreview.com/article/balancing-new-technology-and-privacy-when-using-drones-land-use-and-construction> [https://perma.cc/SC3T-FXVU].

25. See, e.g., Anthony Petruzzi, *Automotive Autonomy: Considerations for Planning and Zoning Authorities in Transitioning to a Driverless World*, 51 URB. LAW. 265 (2021).

26. See, e.g., *The Rise of Smart Cities*, 2 MD. B.J., 23, 23–24 (2021) [https://issuu.com/marylandstatebarassociation/docs/issue\\_3\\_volume\\_2\\_maryland\\_bar\\_journal\\_magazine\\_\\_m/s/11881403](https://issuu.com/marylandstatebarassociation/docs/issue_3_volume_2_maryland_bar_journal_magazine__m/s/11881403) [https://perma.cc/QDX5-N8DL].

27. See, e.g., Michelle Bolos, *A Highway in the Sky: A Look at Land Use Issues that Will Arise with the Integration of Drone Technology*, 2015 U. ILL. J.L. TECH. & POL'Y 411 (2015).

28. Petruzzi, *supra* note 25, at 267–71.

29. Annie Palmer, *Amazon Plans to Start Delivering Packages by Drone in Texas Later this Year*, CNBC (July 15, 2022, 7:21 PM), <https://www.cnbc.com/2022/07/15/amazon-to-start-delivering-packages-by-drone-in-texas-later-this-year.html> [https://perma.cc/8D6U-MQUV].

30. See generally Matt Novak, *50 Years of the Jetsons: Why the Show Still Matters*, SMITHSONIAN MAG. (Sept. 19, 2012), <https://www.smithsonianmag.com/history/50-years-of-the-jetsons-why-the-show-still-matters-43459669/> [https://perma.cc/DX8F-ZDCW]; see Merri Palmer, *Times the Jetsons Were Eerily Correct About the Future*, MSN (Aug. 31, 2022), <https://www.msn.com/en-us/news/technology/times-the-jetsons-were-eerily-correct-about-the-future/ar-AA11k02b> [https://perma.cc/5FT8-5PB8].

decade,<sup>31</sup> necessitating personal landing pads on apartment terraces<sup>32</sup> and a whole new way of regulating the public thoroughfare.

#### IV. ADDRESSING DISPARITIES IN OUTCOMES—INTENDED OR NOT

Professor Wolf introduces the historical context of some of the early adopter's use of zoning which included goals that might have been accepted by many in the early 1900s but today we know that racist, discriminatory, and exclusionary motivations are both constitutionally and statutorily illegal (and morally wrong). However, the frustrating reality is that we need not look far to realize that we have not done enough to remedy the wrongs of the past that have produced multi-generational impacts on many non-majority groups of people, nor have we completely eradicated attitudes and behaviors that continue to propagate communities divided between “haves” and “have-nots.”

Resorting to courts to resolve issues of discrimination in land use decision making represents a failure in the local system. A myriad of tools exist to enable all players in the decision-making process (staff, elected and appointed officials, consultants, and the public) to address contemplated actions that could have deleterious effects before such action takes place. Twenty states have “little-NEPAs” or a form of state and local environmental review when it comes to certain land use decision making.<sup>33</sup> These local environmental review/assessment processes can be used to address the potential impacts of proposed plans on housing and health disparities as well as issues related to disaster mitigation. These and other potentially disparate outcomes should be incorporated into a broad definition of the term “environment.”

Likely because most states do not have a formal required

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31. Katherine McLaughlin, *Step Aboard the First Flying Car Available in the U.S. Market*, ARCHITECTURAL DIG. (Aug. 29, 2022), <https://www.architecturaldigest.com/story/step-aboard-the-first-flying-car-available-in-the-us-market> [<https://perma.cc/NT73-M9UH>]; Robert North, Radina Gigova & Sana Noor Haq, *Flying Car Cleared for Takeoff, But You'll Need a Pilot's License*, CNN (Jan. 25, 2022, 1:47 PM) <https://www.cnn.com/2022/01/25/business/flying-car-aircar-dual-mode-vehicle-intl-scli/index.html> [<https://perma.cc/5SG3-B63W>].

32. *Some Luxury Condo Developers Add Landing Pads for Flying Cars*, REAL DEAL (Dec. 8, 2018, 12:00 PM), <https://therealdeal.com/miami/2018/12/08/luxury-condo-developers-in-miami-add-landing-pads-for-flying-cars/> [<https://perma.cc/WEL6-JWYC>]; Amy Rose Dobson, *Flying-Car Landing Pads Are Just One of the Latest Trends in Luxury Amenities*, FORBES (Oct. 23, 2018, 12:16 PM), <https://www.forbes.com/sites/amydobson/2018/10/23/flying-car-landing-pads-are-just-one-of-the-latest-trends-in-luxury-amenities/?sh=321ac320182d> [<https://perma.cc/ECV7-MHNN>].

33. *States and Local Jurisdictions with NEPA-like Environmental Planning Requirements*, NEPA.GOV., <https://ceq.doc.gov/laws-regulations/states.html> [<https://perma.cc/T99T-4JUV>].

environmental review and/or because those who do may not take as broad a view of what should be incorporated in such reviews, a growing number of municipalities are beginning to adopt racial impact assessment as part of their land use decision making process.<sup>34</sup> Relatedly, in August 2022 the American Bar Association House of Delegates approved Resolution 503 which among other things encourages local governments to fund offices of equity to:

- (a) Conduct periodic evaluations of the effects of government programs, services, and policy to assess whether they discriminate against or adversely affect individuals based on race, color, religion, sex, sexual orientation, gender identity, gender expression, national origin, age, disability or other basis protected by law (collectively, “Protected Classes”);
- (b) Develop plans to reduce or eliminate discrimination against Protected Classes;
- (c) Perform equity impact assessments of proposed legislative, regulatory and budgetary actions to determine their effect on Protected Classes; and
- (d) Consult with, and solicit input from, organizations whose mission is to serve and represent Protected Classes and other stakeholders, in performing the above functions.<sup>35</sup>

Another potential method for addressing neighborhood inequities is the voluntary use of community benefits agreements by project sponsors and local stakeholders in the neighborhood, although this approach has met with varying success and is also little tested in court.<sup>36</sup>

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34. William West, *Racial Impact Assessment in Land Use Planning and Zoning Comes to New York*, 22 N.Y. ZONING L. & PRAC. REP. 1 (2022).

35. AM. BAR ASS'N, ADOPTED BY THE HOUSE OF DELEGATES (2022), <https://www.americanbar.org/content/dam/aba/directories/policy/annual-2022/503-annual-2022.pdf> [<https://perma.cc/ETP6-62TC>].

36. See generally Patricia E. Salkin & Amy Lavine, *Community Benefits Agreements and Comprehensive Planning: Balancing Community Empowerment and the Police Power*, 18 J.L. & POL'Y 157 (2009); Patricia E. Salkin & Amy Lavine, *Negotiating for Social Justice and the Promise of Community Benefit Agreements: Case Studies of Current and Developing Agreements*, 17 J. AFFORDABLE HOUS. & CMTY. DEV. L. 113 (2008); Patricia E. Salkin & Amy Lavine, *Understanding Community Benefit Agreements: Equitable Development, Social Justice and Other Considerations for Developers, Municipalities and Community Organizations*, 26 UCLA J. ENVTL. L. & POL'Y 291 (2008).

## V. EDUCATION AND TRAINING

Law professors and planners can lament about challenges and pontificate about reforms, but the words on these pages will not change anything without a concerted effort to educate and train key stakeholders in the land use planning and regulatory processes.

For example, at the local government level, where turnover is anecdotally high (given elections for legislative body seats and appointments for planning and zoning board members) training must be routine and sometimes a repetitive occurrence.<sup>37</sup> A handful of states mandate training—but only for planning and zoning board members.<sup>38</sup> This training is often prescribed and has more to do with ensuring due process rights and compliance with state and federal laws. The training has little to do with using discretionary powers to make needed decisions considering time and circumstance (and compliance with the law) as needed and suggested by Professor Wolf.

For example, in 2004, the National Academy for Public Administration worked with the Government Law Center of Albany Law School to develop curriculum and pilot training programs for members of the planning and zoning board on how to integrate environmental justice (EJ) considerations into local land use planning.<sup>39</sup> The program was offered in four states to raise the consciousness of board members about EJ goals and discuss ways in which they could factor EJ concerns into their discretionary decision-making processes. This is a good model, albeit potentially costly, to go beyond the traditional “nuts-and-bolts” training and create a paradigm for more thoughtful social justice considerations on the part of those making final decisions.

Other players in the land use game would benefit as well from focused training. For example, to better address issues of diversity and inclusion, in February 2016 the American Bar Association adopted Resolution 107 that asked states with mandatory continuing education requirements to take one or two of the required credit hours and mandate that they address diversity and inclusion.<sup>40</sup> For land use lawyers, this

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37. See, e.g., Anthony Samson, Comment, *A Proposal to Implement Mandatory Training Requirements for Home Rule Zoning Officials*, 2008 MICH. ST. L. REV. 879, 903–05 (2008).

38. See, e.g., Patricia E. Salkin, *New York Adopts Mandatory Training Law for Members of the Planning and Zoning Boards: Implementing the New Law*, 7 N.Y. ZONING L. & PRAC. REP. 1 (2006).

39. *GLC Partners with National Academy for Public Administration on Environmental Justice Initiative*, GOV'T L. CTR. NEWSL. (Gov't L. Ctr. at Albany L. Sch., Albany, N.Y.) Winter 2005, at 7.

40. Lorelei Laird, *Encourage Continuing Legal Education on Diversity and Inclusion*, House

could easily focus on strategies and techniques to address and eliminate discrimination in land use regulation. In addition to lawyers, professional land use planners who work daily on community planning and provide advice on the development and implementation of regulatory regimes should also be required to undergo training. While planners are not required to be members of the American Institute of Certified Planners (AICP), all AICP certified planners are required to complete ongoing continuing education or certification maintenance. Effective January 1, 2022, AICP members must earn at least one credit in the area of equity.<sup>41</sup> Further, a second new required credit is to be offered in topic areas that will change at the discretion of the AICP Commission. Also effective January 1, 2022, this targeted credit is to be earned in the area of, “Sustainability and Resilience, recognizing the growing need for planners to help their communities prepare for issues like climate change, sustainable development, and hazard resilience.”<sup>42</sup> It is as though the AICP Commission heard Professor Wolf’s plea to better use the tested tools that planners have to address significant challenges testing the resiliency of our land planning and regulatory systems.

Often left out of the mix when it comes to education are the lawmakers themselves. Elected to represent the people of their district at particular levels of government (local, state, or federal), these individuals in our representative democracy come from varied backgrounds, geographic areas, education levels, and knowledge bases. The ability to coalesce larger legislative bodies at the state and federal levels around issues in land use planning and regulation presents a great challenge. However, some states, such as New York, were able to accomplish this throughout the 1990s through the leadership of the Legislative Commission on Rural Resources that used a statewide Land Use Advisory Committee to help shepherd close to three dozen reforms to planning and zoning enabling acts through the State Legislature.<sup>43</sup> Among the statutory changes was a new law to address affordable housing such as authorization for local governments to use incentive zoning to advance housing affordability goals, and in a new statute

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*Urges*, A.B.A. J. (Feb. 8, 2016, 6:05 PM), [https://www.abajournal.com/news/article/encourage\\_continuing\\_legal\\_education\\_on\\_diversity\\_and\\_inclusion\\_house\\_urgues](https://www.abajournal.com/news/article/encourage_continuing_legal_education_on_diversity_and_inclusion_house_urgues) [<https://perma.cc/Z6E5-LSSJ>].

41. *Updates to the Certification Maintenance Program*, AM. PLAN. ASS’N, <https://www.planning.org/cm/update/> [<https://perma.cc/Q25H-4JC8>].

42. *Id.*

43. Patricia E. Salkin & Jessica A. Bacher, *Modernization of New York’s Land Use Laws Continues to Meet Growing Challenges of Sustainability*, 29 PACE L. REV. 563, 564–65 (2009).

describing the content of a comprehensive plan, the suggestion that the plans should address among other things, affordable housing, plans for health facilities and facilities for emergency services. While it is true that state statutes cannot cover with specificity every detail of best practices, there is power in the persuasion of even the suggestive language in statutes and their public purpose clauses.

#### VI. TEMPORARY VERSUS PERMANENT FIXES

Professor Wolf points out numerous times that during the pandemic certain zoning rules and local ordinances were relaxed to make certain accommodations—such as outdoor dining. He suggests that in a post-pandemic order, owners should be able to submit plans ahead of time to allow for some of these uses to continue.<sup>44</sup> He also suggests that zoning barriers to home agriculture be more permanently relaxed<sup>45</sup> and that variances be granted more liberally in certain circumstances where there are emergency and medical hardships.<sup>46</sup>

While I concur that temporary permits should be issued in all the above scenarios, I am not prepared to agree that just because rules were relaxed in a crisis that when the crisis subsides the changes should simply be allowed to continue. For example, while outdoor dining has been a necessity during the pandemic both to keep the food service industry viable and to provide food to patrons and neighborhood residents, the nuisances that are created such as sidewalk, bike lane, and even motor vehicle traffic infringement have been substantial in urban areas. Furthermore, in cities where rodents, birds, and other unwanted animal life are a constant battle, more outside scraps and garbage may create additional public health concerns over longer periods of time.

In the section on home agriculture Professor Wolf suggests that if neighbors are unhappy with the uses, they could simply bring common-law nuisance claims.<sup>47</sup> However, private nuisance cases are both expensive and hard to win. In my opinion, the analysis of whether these uses should be able to continue on a more permanent basis should therefore go through the traditional land use decision-making processes.

With respect to the relaxation of variance standards, I can't help but recall the years of abuse in the variance decision-making processes.

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44. Wolf, *supra* note 1, at 191–92.

45. *Id.* at 198.

46. *Id.* at 202–03.

47. *Id.* at 198–99.

Professor Wolf provides an example of where he believes a variance could be warranted for property owners who have unanticipated financial and medical needs attributable to the pandemic.<sup>48</sup> This is not only such an individualized assessment, but it potentially forces community members to publicly disclose confidential and/or very private information. Since variances run with the land, despite the fact that the Professor offers a sympathetic scenario, it simply may go too far by opening the floodgates for requests. A large number of state legislatures have now codified tests that in general make it easier to obtain area variances and much more difficult to obtain a use variance, especially since some use variances may be more appropriately a legislative decision rather than a quasi-judicial one.

I also found myself agreeing and disagreeing with Professor Wolf's suggestions about addressing potential hardships and inequities with respect to nonconforming uses. In selecting compelling stories as a frame for permanently relaxing standards designed to ultimately eliminate the nonconforming use, I find myself again concluding as lawyers often do, with "it depends." Facts and circumstances may sometimes appeal to the common law concept of equity, which, in an emergency, I find easier to accept. However, in a post-pandemic or post-trauma environment, I am not certain the right answer is to allow temporary solutions to always become permanent.

I favor the ability of local governments to exercise emergency powers in the case of a public health and safety disaster, however, I believe these should be temporary. A form of emergency permit with a six or 12-month time limit, that is renewable if circumstances remain relatively constant, seems a more judicious manner to address the above examples. Further, just because warehouses, stadiums, and factories may need to be temporarily repurposed, the one certain thing is that no matter what we prepare for, there is always going to be something unexpected and the real call to action here is that we must find a way for zoning to be nimble enough to timely respond to whatever is thrown our way.

Finally, while I truly believe permanent reforms and temporary relaxations are both warranted at the present time, in the future we could face other types of pandemics, natural disasters, and acts of terrorism or war that may or may not require exactly the same response as COVID-19 demanded. For example, Professor Wolf suggests an expensive requirement that all new and renovated commercial, industrial and

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48. *Id.* at 203.

recreational buildings provide alternative social distancing blueprints.<sup>49</sup> I suggest that COVID has taught us that there are other less expensive approaches such as masking, temporary remote work and office hoteling, and even making upgrades to building ventilation systems (another place where zoning and building codes have to work together).

## VII. CONCLUSION

Zoning and land use regulations are important tools and require important processes to help ensure the protection of public health, safety, and welfare. Broadly defined welfare includes a place to sleep, bathe, and use a sanitary bathroom; it includes a space where health considerations are protected to the extent practicable, and it means that we facilitate a community that is sustainable in terms of food, air, and water. Zoning has held up well in the last century, but it has not been without its warts. It was nearly impossible to focus on meaningful, methodical, and systemic change over the last two years, but now that life and work are returning to a guarded sense of normalcy, it is a good time to once again bring together the luminaries including one of its leaders, Professor Michael Alan Wolf, to effectively advocate for the needed reforms to ensure the strength of zoning well into the next century. Thank you, Professor Wolf, for designing a wonderful roadmap and platform for that conversation to begin.

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49. *Id.* at 219–20.