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IN PRAISE OF NONCONFORMITY

Ira K. Lindsay*

Exemption of existing structures and land uses from new zoning regulations is a long-standing part of zoning practice but is often regarded as an unfortunate political concession that entrenches an irrational distinction between present uses and future use. This Article provides an unapologetic defense of statutory protection for these nonconforming existing uses. Existing use protection represents a principled position that balances the interests of property owners and the interests of the public. Far from being an unsavoury political compromise, protection of existing uses is a crucial component of modern land use regulation that balances the needs of landowners for legal certainty with the public imperative to regulate development. Existing use protection is a vital check on the excesses of fiscal zoning and an important protection for small businesses.

The special status of non-conforming uses is grounded both in the nature of zoning regulation and in the normative significance of property ownership. Existing use protection mitigates the unfairness inherent in comprehensive zoning of subjecting landowners in different zones to differing rules. It discourages disaffected neighbors from bypassing common law remedies in favor of regulatory fixes and reaffirms the function of zoning regulation as a tool to guide development to avoid future land use conflicts rather than a means to change to rules in response to ongoing disputes. Over time, comprehensive land use planning has given way to greater use of ad hoc bargaining with developers. In this context, weakening existing use protection would give the appearance of going back on a bargain and undermine the ability of local governments to bargain effectively. Property ownership provides a sphere of exclusive control in which an owner can develop her plans over time without outside interference. Existing use protection

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allows the property owner to make land use choices with confidence that they will be respected while still permitting local governments to control future development. In the context of onerous zoning regimes, real estate markets play a crucial role in allowing landowners to acquire property where they can be assured of their legal right to continue the present use of land.

Finally, abolishing existing use protection would have undesirable effects on property law in greatly increasing the number of takings and due process claims by landowners. The murky nature of takings and due process doctrine combined with the factual complexity of zoning cases would create great legal uncertainty without providing sufficient protection for the interests of landowners.

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I. INTRODUCTION

When the laws change, policymakers must decide how to treat decisions made in reliance on the old rule. One option is to require everyone to comply with the new rule immediately, regardless of whether they have relied upon the old one. Another option is to exempt those who have relied upon the old rule from the new rule.[1] The question of whether choices made under a prior legal regime should be exempted from new regulations is especially fraught because either option seems to involve a sort of unfairness. Uniform treatment under the new law may seem unfair to those who have relied on the old law. However, if those who have relied on the old rule are exempt from the new rule, similarly situated people will be subject to different rules in a way that may seem inequitable.

In zoning law, reliance on the old rule is usually treated as exempting a landowner from the new rule. Structures and uses of land that pre-exist a new zoning regulation are generally allowed to persist indefinitely, albeit subject to restrictions on alteration or expansion.[2] This rule is codified in the zoning enabling statutes of many states and is otherwise recognised in municipal zoning ordinances with few exceptions.[3] Although protection of existing nonconforming uses has been a part of zoning practice in most jurisdictions since its inception, it has always enjoyed an uneasy status. Scholarly commentators often express a begrudging attitude toward existing use protection treating it as, at best, a necessary concession to the political power of incumbent property owners or a pragmatic compromise to avoid legal controversy.[4]

1. A compromise is to require all to comply but to compensate those who have relied on the old rule.

2. *See* JULIAN CONRAD JUERGENSMEYER ET AL., LAND USE PLANNING AND DEVELOPMENT REGULATION LAW § 4.31 (3d ed. 2021).

3. *Id.* § 4.31 n.8 (citing N.H. STAT. ANN. § 674:19 (1983); N.J. STAT. ANN. 40:55D-68 (1985); OR. REV. STAT. § 215.130 (5) (1999)); Kenneth R. Kupchak et al., *Arrow of Time: Vested Rights, Zoning Estoppel, and Development Agreements in Hawai'i*, 27 U. HAW. L. REV. 17, 21 (2004).

4. *E.g.*, NORMAN WILLIAMS, JR. & JOHN M. TAYLOR, 6 AMERICAN LAND PLANNING LAW § 117 (rev. ed. 2020) ("With all the other problems in the early days of zoning, no one was particularly anxious to take on this kind of headache. If a policy were proposed to drastically limit such uses, the political difficulties of getting any zoning law passed would obviously be vastly increased; and no one knew how the courts would react."); DANIEL R. MANDELKER & MICHAEL ALLAN WOLF, LAND USE LAW § 5.74 (6th ed., LexisNexis Matthew Bender 2020) ("The nonconforming use is a difficult problem in zoning administration. The mixed land use pattern that exists in built-up cities means that some uses will not conform to newly adopted or amended zoning ordinances. A zoning ordinance cannot achieve its goal of separating incompatible uses in this situation unless it requires the elimination of nonconforming uses."); Richard Babcock, *What Should and Can be Done with Nonconforming Uses, Lecture Before the Institute on Planning, Zoning and Eminent Domain at the Southwestern Legal Foundation (Oct. 21-22, 1971)*, *in* PROCEEDINGS OF THE INSTITUTE

Despite the ubiquity of existing use protection,[5] the underlying rationale for the existing use exemption is rarely explored, let alone systematically defended.[6]

In the most systematic recent discussion of existing use protection, Christopher Serkin has argued that special protection for existing uses is not required by constitutional doctrine and is unwise as a matter of policy.[7] He argues that there is no policy rationale for treating zoning regulations that prohibit existing uses categorically differently from zoning regulations that rule out options for future uses.[8] Serkin also contends that existing uses are not entitled to any sort of blanket protection undertakings due process doctrine and should be subject to the same constitutional analysis as purely prospective uses.[9]

This Article will answer Serkin's challenge to the doctrine of existing uses and show that treating past and future land use choices asymmetrically is usually justified. Far from being a blot on otherwise orderly zoning regulation, protection of existing uses follows from both the original logic of zoning regulation as a planning instrument and the more recent model of creating zoning rules through a series of one-off agreements with developers. In the former case, existing use protection mitigates the unfairness of subjecting similarly situated landowners to starkly different rules. In the latter case, protecting existing uses by statute improves the bargaining position of local governments and prevents them from reneging on agreements with developers after reliance on the rezoning.

Under both models of zoning regulation, existing use protection vindicates values that are central to the normative function of property rights.[10] First, the protection of existing uses appropriately reflects the difference in the value of continuing ongoing projects and preserving options for future projects. Part of the normative function of property

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ON PLANNING, ZONING, AND EMINENT DOMAIN 23, 25-26 (Sw. Legal Found. ed. 1972) (discussing early attitudes toward existing uses).

5. For example, in Somerville, MA, which has a population of over 80,000, there are only twenty-two residential buildings that comply with the city's zoning code. Daniel Hertz, *The illegal city of Somerville*, CITY OBSERVATORY (June 15, 2016), https://cityobservatory.org/the-illegal-city-of-somerville/. The rest would be illegal to build today without a zoning variance and only persists because existing nonconforming uses are protected.

6. *See* Christopher Serkin, *Existing Uses and the Limits of Land Use Regulations*, 84 N.Y.U. L. REV. 1222, 1224 (2009).

7. *Id.* at 1222.

8. *Id.* at 1230.

9. *See id.* at 1281.

10. *See* Jeremy Waldron, *Property and Ownership*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Sept. 6, 2004 revised March 21, 2020), https://plato.stanford.edu/entries/property/#JustLibeCons.

ownership is the ability to develop one's plans without outside interference. Private property provides individuals with a sphere in which they can exercise exclusive control and carry out their plans and projects over time. From this point of view, frustration of an ongoing project is a different sort of harm than elimination of a future option. Protection of existing uses allows property owners to begin new projects with confidence that these projects will not be disrupted by most new land use regulations. Distinguishing between an owner's interest in pursuing ongoing projects and her interest in freedom to choose between various options provides a principled reason to prohibit certain future, but not existing, uses of land under some circumstances.

Whereas under the pre-zoning regime, each landowner was given broad discretion to do what they want on their property, the post-zoning legal regime shifts decisional authority over land use away from property owners but leaves the option of securing a right to engage in activities by purchasing property on which such activity is legal.[11] For example, insofar as I may not convert my home into a small restaurant because it is zoned exclusively for residential use, my options as a landowner are restricted. But the existence of an active market in real estate allows me to sell my home and purchase a building zoned appropriately for a restaurant, or, better yet, an existing restaurant. Existing use protection gives property owners security that so long as their land use activities comply with regulations in force at the time they begin, they will be allowed to continue even if regulations change.[12] Property owners, therefore, retain much of their prior freedom to choose between activities. The difference is that under zoning regimes, this freedom of choice is mediated by real estate markets that allow buyers to select properties on which their proposed activities are legally permissible. Zoning regulation in the context of a robust real estate market and a zoning code that permits every legal activity on at least some land preserves property owners' freedom of choice, albeit with significantly higher transaction costs given the expense of buying and selling real estate.

Second, zoning regulations, properly understood, are primarily a tool to prevent neighboring property owners from developing inconsistent plans rather than to regulate existing conflicts.[13] Using

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11. Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 691-93 (1973).

12. *Nonconforming Uses, Structures, and Lots*, MRSC, http://mrsc.org/Home/Explore-Topics/Planning/Development-Regulations/Nonconforming-Uses-Structures-and-Lots-Regulatio.aspx (last updated Apr. 2, 2021) (discussing Rhod-A-Zalea v. Snohomish, 136 Wn.2d 1, 7 (1998)).

13. WILLIAMS, JR. & TAYLOR, *supra* note 4, § 17.7.

zoning codes to outlaw existing uses undermines the function of property rights of dividing spheres of authority. Property rules codify a norm of the following sort: "I respect my neighbor's decisions with respect to her property, and she respects my decisions with respect to mine." Aggressive use of zoning law to countermand an owner's lawful land use choices upsets this equilibrium between neighbors and unsettles the allocation of decisional authority that property rules are meant to fix. This has several bad effects. Prohibition of existing land uses has a strong tendency to transfer wealth from one property owner to another.[14] By contrast, existing use protection prevents landowners from using zoning law to avoid other means of resolving existing land use disputes with their neighbors (private bargaining, nuisance law, etc.) that may be better suited for situations with current (as opposed to merely potential future) land use conflicts.[15]

Third, existing use protection reflects appropriate skepticism about the value of strict separation of uses for those uses that are not so harmful that they can plausibly be considered nuisances. The ability of local governments to prohibit land uses that burden neighbors to such an extent that they constitute nuisances means that the most problematic uses do not qualify for protection.

In light of these considerations, it is undesirable to abolish statutory protection of nonconforming uses and resolve conflicts between owners of nonconformities and zoning authorities at the level of constitutional law. The murky nature of takings and due process jurisprudence combined with the factual complexity of zoning cases is likely to generate a great deal of legal uncertainty in the absence of statutory protection for existing uses. Resolving hard cases involving existing uses through constitutional doctrine also may have a deleterious effect on the law as judges feel torn between a desire to protect property owners who have made important decisions in reliance on prior zoning law and the impulse to take a deferential approach to factually complex policy choices made by local governments. Given common intuitions that existing uses have a special status, there is some danger that adjudicating such cases under the takings clause might expand protection for regulatory takings in ways undesirable for other types of police power regulation.

Part I will provide an overview of the treatment of existing uses in zoning law and a brief account of the case against existing use protection. Part II will discuss two models of land use regulation: planning and

14. Ellickson, *supra* note 11 at 699; *see infra* Part III.B.
15. *See generally* Ellickson, *supra* note 11.

contract, and will show how protection of existing uses is consistent with each model. Part III explores the value of property ownership and how existing use protection plays a vital role in preserving a domain in which landowners can rely upon their land use choices being respected in the future at the same time as local governments are allowed scope for fairly extensive land use regulation. Part IV considers existing use protection in the context of theoretical work on "legal transitions" and shows how the literature on the advantages of disadvantages of various approaches to legal transitions supports the conclusion that grandfathering is the best response to non-conforming uses. Part V argues that judicial resolution of the existing use issues on constitutional grounds is undesirable. Courts tend to defer to local governments when faced with due process claims about land use cases and thus will not adequately protect owners of non-conforming properties. Takings claims in defense of non-conforming properties provide greater scope for relief, but subject property owners and local governments to a highly uncertain legal regime that will, at best, provide occasional and mostly inadequate compensation for landowners.

II. EXISTING USE PROTECTION IN ZONING LAW

A. Nonconforming Uses and Vested Rights

A nonconforming use is "a use of land, building or premises that lawfully existed prior to the enactment of a zoning ordinance and that is maintained after the effective date of such ordinance, even though it does not comply with the use restrictions applicable to the area in which it is situated."[16] For example, a factory producing cement is an existing use, whereas an empty parcel owned by a cement company that intends to build a cement factory at some point in the future but has taken no steps to do so is not an existing use. The rule in almost all U.S. jurisdictions is that existing uses are exempted from subsequent changes in zoning law unless they constitute a nuisance.[17] The cement factory, for

16. PATRICK J. ROHAN & ERIC DAMIAN KELLY, ZONING AND LAND USE CONTROLS § 41.01[1] (LexisNexis Matthew Bender 2021); *see also, e.g.*, Melody v. Zoning Bd. of Appeals of Glastonbury, 264 A.2d 572, 574 (Conn. 1969) ("A nonconforming use is merely an 'existing use' the continuance of which is authorized by the zoning regulations.").

17. *See* MANDELKER & WOLF, *supra* note 4, § 5.74 ("The courts now hold that a municipality may not zone retroactively to terminate a nonconforming use, some state zoning statutes impose this limitation."); JUERGENSMEYER ET AL., *supra* note 2, § 4.31 ("Even where not mandated by state law, zoning ordinances almost universally permit nonconforming uses to continue. Where not so allowed, some courts have held retroactive application invalid as having no substantial relation to the public health, safety and welfare, or as not authorized by enabling acts.")

example, would be permitted to continue operation even if the zoning designation of the land on which it stands was changed to residential. Such a zoning change, by contrast, would quash any attempt to purchase a vacant lot and build a factory on it. The prevailing view is that courts will not uphold zoning laws that require immediate termination of an existing use absent some special circumstance such as where the existing use constitutes a nuisance.[18] For the most part, zoning codes stipulate the zoning regulations are to be applied only prospectively so as not to inference with existing land uses. As a result, although zoning law aspires to separate conflicting land uses, it functions primarily to prevent the future development of such conflicts rather than to mediate already existing conflicts.

Nonconforming uses should not be confused with exemptions from an otherwise applicable zoning regulation made *after* the enactment of the regulation, such as variances, special permits and conditional uses.[19] Nonconforming uses, by contrast with all of these, pre-exist the regulation that proscribes them. A property may be nonconforming in one of several ways. It may be a nonconforming lot, have a nonconforming structure, host a nonconforming activity, or some combination of these.[20] Unless otherwise indicated, I will follow customary usage by referring to any of these nonconformities as nonconforming uses. This Article will be primarily concerned, however, with existing uses in the narrow sense: that which refers to *activities* rather than structures or lots. However, many of the same arguments also apply to non-conforming lots and non-conforming structures particularly because the viability of certain activities may depend on the permissibility of continued use of a non-conforming lot or structure. Existing uses and structures are usually grandfathered into the new regulatory regime for at least a significant amortization period and often in perpetuity.[21]

Although the source of constitutional protection for nonconforming uses is somewhat unclear, courts have long suggested that termination of existing uses raises special concerns.[22] Some decisions suggest that

18. *E.g.*, MANDELKER & WOLF, *supra* note 4, § 2.04 ("Courts today will not uphold a zoning ordinance that immediately terminates an existing, otherwise legal, nonconforming use . . . . They continue to uphold ordinances that terminate public nuisances.").

19. ROHAN & KELLY, *supra* note 16, § 41.01[1].

20. *See* Ellickson, *supra* note 11.

21. *See e.g.*, Christopher Serkin, *Existing Uses and the Limits of Land Use Regulations*, 84 N.Y.U. L. REV. 1222, 1232 (2009).

22. *See, e.g.*, Bettendorf v. St. Croix Cty., 631 F.3d 421, 432-34 (7th Cir. 2011) (Hamilton, J., dissenting) (explaining that Wisconsin law protects owners of non-conforming uses whose rights have vested).

protection of existing users is required to protect an owner's due process rights.[23] Others find the primary source of protection for existing uses to be the takings clause.[24] Either theory is premised on the notion that existing uses are entitled to stronger property rights protections than the analogous right to use one's hitherto undeveloped property for the same purpose in the future. In *Penn Central Transp. Co. v. City of New York*, for example, the Court explicitly noted that the new historical landmark regulation did not interfere with the owner's longstanding existing use of the property and contrasted this with cases in which regulations prohibited the present use of a property.[25] The Court has refined regulatory takings doctrine in a number of respects since *Penn Central*, but the principle that restricting a previously permissible use of property may constitute a taking is well settled.[26]

In many states, the zoning enabling act provides that zoning codes must not be applied to existing uses.[27] Even when not required by a state's zoning enabling act, most municipal zoning codes treat nonconformities as having a special status.[28] A few zoning codes do require outright termination of non-conforming uses within a short period of time. However, these are usually limited to "the termination of nonconforming uses of open land, of nonconforming signs, of nonconforming open storage uses such as junkyards and lumberyards, and or other nonconforming uses involving relatively small investments."[29] Because existing uses are usually exempted from subsequent zoning regulations, legal disputes usually center not on

23. McMilian v. King Cty., 255 P.3d 739, 749 (Wash. Ct. App. 2011) (citing State *ex rel.* Miller v. Cain, 40 Wash. 2d 216, 218, 242 P.2d 505 (1952)) ("[T]he purpose underlying the continuance of nonconforming uses . . . is to avoid potential constitutional due process challenges to zoning legislation arising from deprivations of property rights . . . ."); Nettleton v. Zoning Bd. of Adjustment of City of Pittsburgh, 828 A.2d 1033, 1036 (Pa. 2003) ("This Court has said that the protection evolved as a conceived element of due process.") (citing Molnar v. George B. Henne & Co., 105 A.2d 325, 329-30 (Pa. 1954)).

24. Mo. Rock, Inc. v. Winholtz, 614 S.W.2d 734, 739 (Mo. Ct. App. 1981) (citing State *ex rel.* Nealy v. Cole, 442 S.W.2d 128, 131 (Mo. Ct. App. 1969) ("Zoning ordinances must permit continuation of non-conforming uses in existence at the time of enactment to avoid violation of constitutional provisions preventing the taking of private property without compensation.").

25. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 136 (1978) ("Its designation as a landmark not only permits but contemplates that appellants may continue to use the property precisely as it has been used for the past 65 years: as a railroad terminal containing office space and concessions. So the law does not interfere with what must be regarded as Penn Central's primary expectation concerning the use of the parcel.").

26. *Bettendorf*, 631 F.3d at 433-34 (Hamilton, J., dissenting).

27. *See* JUERGENSMEYER ET AL., *supra* note 2, § 4.31 n.8 (citing N.H. Stat. Ann. § 674:19 (1983); N.J. Stat. Ann. 40:55D-68 (1985); Or. Rev. Stat. § 215.130 (5) (1999)).

28. *See* Kupchak et al., *supra* note 3, at 21.

29. WILLIAMS, JR. & TAYLOR, *supra* note 4, § 124.8.

whether non-conforming uses may be prohibited under new zoning regulations, but rather over whether a use was legal prior to the enactment of the regulation,[30] whether such uses can be eliminated after a period of amortization,[31] whether the use was abandoned by the owner,[32] whether a change from one nonconforming use to another is permissible,[33] whether a change made by an owner is a permissible continuation of an existing use or an impermissible expansion of that use,[34] whether a new use is a permissible accessory to a legally permissible nonconforming use or a new principal use forbidden by zoning regulations,[35] whether an owner may transfer the right to continue to non-conforming use to a subsequent owner,[36] or whether a non-conforming structure may be rebuilt after a fire or similar incident.[37]

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30. *See, e.g.*, Eggert v. Bd. of Appeals of the City of Chicago, 195 N.E.2d 164 (Ill. 1964) (considering whether the seven-apartment building was in violation of the zoning ordinance); Bd. of Zoning Appeals v. Leisz, 702 N.E.2d 1026 (Ind. 1998) (centering on zoning ordinance that limited the number of unrelated adults that could live together to three); Balough v. Fairbanks N. Star Borough, 995 P.2d 245 (Alaska 2000) (involving a junkyard owner seeking nonconforming use status following a rezoning); Relihan v. Woodbridge Zoning Bd. of Appeals, 2010 Conn. Super. LEXIS 545 (Conn. Super. Ct. 2010) (involving a landscaping business on property that was later re-zoned and prohibited); Rollison v. City of Key W., 875 So. 2d 659 (Fla. App. 2004) (involving property that was lawfully used as a short-term rental before the city changed the zoning laws); Gavlak v. Town of Somers, 267 F. Supp. 2d 214 (D. Conn. 2003) (involving a dispute over whether the operation of a water business was within the zoning regulations); First Pioneer Trading Co. v. Pierce Cty., 191 P.3d 928 (Wash. App. 2008) (considering whether a steel fabrication business could establish a legal nonconforming use of the property).

31. Art Neon Co. v. City & Cty. of Denver, 488 F.2d 118 (10th Cir. 1973); Cioppa v. Apostol, 755 N.Y.S.2d 458 (N.Y. App. Div. 2003).

32. *See, e.g.*, Dorman v. Mayor & City Council of Balt., 51 A.2d 658 (Md. 1947); Vill. of Plainfield v. Am. Cedar Designs, Inc., 775 N.E. 2d 1002 (Ill. App. 2000); Pike Indus., Inc. v. Woodward, 999 A.2d 257 (N.H. 2010); Heichel v. Springfield Twp. Zoning Hearing Bd., 830 A.2d 1081 (Pa. Commw. Ct. 2003).

33. *See, e.g.*, Bd. of Zoning Appeals v. McCalley, 300 S.E.2d 790 (Va. 1983).

34. *See, e.g.*, State *ex rel.* Dierberg v. Bd. of Zoning Adjustment, 869 S.W.2d 865 (Mo. Ct. App. 1994); San Remo Hotel v. City & Cty. of San Francisco, 41 P.3d 87 (Cal. 2002) (holding that conversion of building from mix of long-term residential and tourist short-term rental to entirely short-term tourist rentals was a change or expansion of existing use that required owner to secure a conditional use permit); Nettleton v. Zoning Bd. of Adjustment of City of Pittsburgh, 828 A.2d 1033 (Pa. 2003) (permitting expansion of a non-conforming structure from one story to three stories on the grounds that the nonconforming commercial use would remain the same); Munroe v. Zoning Bd. of Appeals of Branford, 818 A.2d 72 (Conn. App. Ct. 2003) (holding that addition on second story on non-conforming garage was impermissible expansion of nonconformity); Cleveland MHC, LLC v. City of Richland, 163 So. 3d 284 (Miss. 2015) (holding that existing nonconforming use status applies to a mobile home park as a whole and that replacement of one mobile home with another on a lot in the park is a continuation of this non-conforming use and does not terminate it).

35. *See, e.g.*, City of Okoboji v. Okoboji Barz, Inc., 746 N.W.2d 56 (Iowa 2008) (holding that a restaurant owner was not barred from selling alcohol by the zoning ordinance).

36. *See, e.g.*, Vill. of Valatie v. Smith, 632 N.E.2d 1264 (N.Y. 1994).

37. Buss v. Johnson, 624 N.W.2d 781 (Minn. Ct. App. 2001); Goyonaga v. Bd. of Zoning Appeals, 657 S.E.2d 153 (Va. 2008) (holding that demolition of nonconforming structure due

Nonconforming use privileges generally run with the land. Owners are typically permitted to transfer ownership of their property without losing the right to continue a nonconforming use.[38] Unless subject to amortization, nonconforming uses usually may be continued indefinitely, but not expanded or changed substantially in character.[39] Governments may impose various limitations on nonconformities, including limitations on changes in use, enlargement, alteration of structures, and repairs and replacement of structures.[40] Some zoning codes allow property owners to shift from one nonconforming use to another, provided the second is less burdensome than the first.[41] Owners of non-conforming properties are typically permitted to make ordinary repairs need to keep the property in a condition similar to that it was in when it became nonconforming.[42] However, it is usually permissible for a local government to terminate the right to continue a non-conforming use if the property is destroyed by fire or natural disaster.[43]

The scope of protection of existing uses is generally determined by the nature of the activity. Thus, expansion of a nonconforming convenience store to occupy a greater proportion of the owner's lot may be prevented without injury to the owner's rights, a non-conforming surface mine may be permitted to expand across the owner's lot under the "diminishing asset doctrine, which permits expansion of non-conforming extractive activities to new portions of the same property owned by the owner at the time of the enactment of the regulation."[44] The activity of operating a convenience store does not require expansion to new territory, whereas exploiting exhaustible resources requires, by its very nature, the use of new land.[45] The scope of existing use

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to unforeseen difficulties in construction of addition terminates nonconforming use privileges such that City may forbid construction of new home with same footprint as demolished home).

38. *See, e.g.*, Town of Lyons v. Bashor, 867 P.2d 159 (Colo. App. 1993) (nonconforming use runs with the land); Budget Inn of Daphne, Inc. v. City of Daphne, 789 So. 2d 154 (Ala. 2000) (holding that statute, which terminates nonconforming use protection of sign upon transfer of ownership, is unconstitutional taking without compensation). *Cf.* Palazzolo v. Rhode Island, 533 U.S. 606 (2001) (holding that a transferee who acquired title to a property after the enactment of the regulation in question may bring a takings claim).

39. *See, e.g.*, State *ex rel.* Dauphin Stor-All, Inc. v. City of Mobile, 503 So. 2d 1224 (Ala. 1987) (holding that because the business of an automobile-parts wholesaler was not substantially the same kind of business as a bakery, the tenant's loss of "legal-nonconforming" status was appropriate, regardless of the relative intensity of the use of the property).

40. ROHAN & KELLY, *supra* note 16, § 41.03[1].

41. *Id.* § 41.03[2][b].

42. *See id.* § 41.03[3][a].

43. *See, e.g.*, Baird v. Bradley, 240 P.2d 1016, 1017 (Cal. Dist. Ct. App. 1952).

44. *See* Hansen Bros. Enters., Inc. v. Bd. of Supervisors, 907 P.2d 1324, 1328 (Cal. 1996).

45. Pennsylvania, however, permits the expansion of nonconforming stores and the like under the theory that nonconforming uses have a right to "natural expansion." *See* WILLIAMS,

protection, therefore, extends beyond protection of physical structures but to particular sorts of economic activity—in some cases even when the activity requires expansion that may be more burdensome to neighbors.

Although flat prohibition of existing uses is rare, some local governments require that certain nonconforming uses be discontinued after an "amortization" period that allows a property owner to recoup their investment in the property. Amortization is permissible in most states but forbidden in others.[46] Amortization is intended to enable regulations that otherwise would qualify as takings by permitting owners to realize much of their "investment backed expectations" and give them fair warning that future investments in their nonconforming use will not be legally protected.[47] The permissible length of amortization period is the crux of much litigation.[48] The general rule is that the greater the investment in the nonconforming use, the longer the amortization period required.[49] A few states prohibit amortization schemes altogether either by statute[50] or as a matter of state constitutional law.[51]

A long-standing exception to the principle that zoning regulations ought to respect existing uses is that local governments retain the right to terminate nonconforming nuisances without compensation.[52] The

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JR. & TAYLOR, *supra* note 4, § 121.11. This leads Pennsylvania courts to sanction changes of nonconforming uses that might be prohibited in other states. *E.g.*, Nettleton v. Zoning Bd. of Adjustment of City of Pittsburgh, 828 A.2d 1033, 1033 (Pa. 2003) (allowing expansion of building housing nonconforming commercial use from one story to three stories); *see* Smalley v. Zoning Hearing Bd., 834 A.2d 535, 544 (Pa. 2003) (holding that town failed to present evidence that expansion of plaintiff's tax accounting practice operated out of his home was anything other than "natural expansion" of his business).

46. WILLIAMS, JR. & TAYLOR, *supra* note 4, § 124 (rev. ed. 2020); Osborne M. Reynolds Jr., *The Reasonableness of Amortization Periods for Nonconforming Uses—Balancing the Private Interest and the Public Welfare*, 34 WASH. U. J. URB. & CONTEMP. L. 99, 107 (1988); ROBERT C. ELLICKSON & VICKI L. BEEN, LAND USE CONTROLS 199-200 (3d. ed. 2005).

47. Serkin, *supra* note 6, at 1236, 1250.

48. *See, e.g.*, Cioppa v. Apostol, 755 N.Y.S.2d 458, 458 (N.Y. App. Div. 2003) (remanding case involving nonconforming tavern found to be a public nuisance so that owner could provide evidence concerning reasonableness of thirty day amortization period).

49. *See, e.g.*, Town of Islip v. Caviglia, 540 N.E.2d 215, 224 (N.Y. 1989).

50. MINN. STAT. § 394.21 subd. 1a (2011); COLO. REV. STAT. 38-1-101(3)(a) (2006); VA. CODE ANN. § 15.2-2307 (2017); WIS. STAT. § 59.69(10)(e)(2) (2020).

51. *E.g.*, PA Nw. Distrib., Inc. v. Zoning Hearing Bd., 584 A.2d 1372 (Pa. 1991); Lamar Advert. of S. Ga., Inc. v. City of Albany, 389 S.E.2d 216 (Ga. 1990); Hoffmann v. Kinealy, 389 S.W.2d 745 (Mo. 1965); *see* ELLICKSON & BEEN, *supra* note 46, at 200-01.

52. Brown v. Grant, 2 S.W.2d 285, 287 (Tex. Civ. App. 1928) ("No one gainsays that a municipal government within its police power has the right to prescribe rules regulating the character of buildings to be erected and the material to be used within certain prescribed boundaries, and also requiring permits to be first obtained before entering on their construction. But such ordinances must be and [sic] relate to the future. Of course, that does not prevent cities from moving to abate nuisances whenever occurring."); Jones v. City of Los Angeles, 295 P. 14, 17 (Cal. 1930); Comment, *Retroactive Zoning Ordinances*, 39 YALE L.J.

underlying notion is that since there is no right under common law to create or operate a nuisance, a local government may use zoning law to accomplish what could be legally done by other means.[53] In practice, this means that uses that pose a threat to the health, safety, or peace of the community are not necessarily protected from subsequent zoning regulation, whereas zoning regulation enacted for aesthetic or more inchoate economic purposes cannot be used to eliminate existing uses.[54] Nonconforming uses are likewise vulnerable to ordinary (i.e., non-zoning) police power regulation. A local government may enact regulations that have the effect of making an existing use impossible or impractical if such regulations are reasonably related to the health,

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735, 739 (1930) ("A restriction imposed to prohibit an offensive use is not a taking of property for which compensation must be made and in the abatement of nuisances retroactive measures are valid."); J. P. Chamberlain & Sterling Pierson, *Current Legislation: Zoning Laws and Ordinances*, 10 A.B.A. J. 185, 185 (1924) ("Zoning looks to the future, not the past, and it is customary to allow buildings and businesses already in the district to remain, although of a class which cannot be established. If such a business constitutes a nuisance it can still be removed under the police power, but the zoning acts in themselves do not customarily interfere with existing conditions.").

53. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1029-30 (1992) (noting that the status of a prohibited activity as a common law nuisance is a defense against regulatory takings claims).

54. *E.g.*, Conrad v. City of Beebe, 388 S.W.3d 465, 469 (Ark. Ct. App. 2012) (holding that keeping of non-domestic animals and non-operating vehicles did not qualify as a nonconforming use because the regulation prohibiting it was enacted in response to "an imminent threat to the public peace, health, safety, and welfare."); City of Fayetteville v. S. & H. Inc., 547 S.W.2d 94, 98 (1977) ("When our prior decisions are considered in connection with the City's finding that the existence of signs throughout the City were detrimental to its scenic resources and therefore to its economic base, we must conclude that the seven year provisions of the ordinance amortizing non-conforming onsite signs used in connection with a going business, that are not inimical to the health, safety or morals of the City, amounts to a taking of the appellees' properties without just compensation therefor in violation of Art. 2 § 22, supra. However, the prohibition against flashing or blinking signs falls within that area of police regulation that is exercised for the protection of the health and morals of the people."); Williams v. Dep't of Bldg. Dev. Servs., 192 S.W.3d 545, 546 (Mo. App. S.D. 2006) (permitting termination of non-conforming salvage yard on grounds that it is a nuisance); David M. Roberts, *Zoning—Abatement of Prior Nonconforming Uses: Nuisance Regulations and Amortization Provisions*, 31 MO. L. REV. 280, 289 (1966) ("Most courts probably are not willing to attach the nuisance label to a nonconforming use unless its deleterious effects are fairly clear and substantial. Nuisance has always been associated with uses which cause relatively concrete harm to the enjoyment of surrounding property. In the cases applying an expanded concept of nuisance the damage which the offending uses threatened was much more serious than most zoning regulations are intended to cure."); Dix W. Noel, *Retroactive Zoning and Nuisances*, 41 COLUM. L. REV. 457, 473 (1941) ("If only an aesthetic annoyance is involved, a retroactive prohibition is unlikely to be sustained, although in an extreme case, such as that of a large gas container or mausoleum in a residential area, mere unsightliness might be found sufficiently detrimental to warrant removal. If harm of a more tangible character is involved, such as that caused by noise, odor, soot or smoke, the likelihood that retroactive restrictions will be sustained is much greater . . . .").

safety, and welfare of the community[55] as long as such regulations do not preclude any valuable use of the property[56] or constitute a physical invasion of the property.[57] In many cases, therefore, a nonconforming use is protected from a local government's zoning regulations, but may be eliminated by the enactment of some other regulation by the same governmental entity.[58] A crucial difference between these forms of regulation is that zoning regulations are, by design, non-uniform across different zones and may cover only a few properties, whereas other police power regulations are applicable to the jurisdiction as a whole.

Because of the significant value of existing use protection, many nonconforming use cases turn on whether a property owner has obtained a "vested right" to a particular use prior to the enactment of a new regulation. In order to obtain a vested right in an existing use, a property owner must do more than form a mere plan or bare expectation, but usually something far less than actual commencement of the use ultimately contemplated suffices for vesting.[59] A typical fact pattern involves a developer who has acquired land and made some investment toward developing it for a particular purpose that was legal when the investment was made. Whether the developer acquires a vested right to continue to develop in the face of subsequent zoning regulations depends on the precise extent of the developer's progress. Courts must balance the significant investments that have typically been made before construction begins with concern that granting vested rights at too early a stage encourages developers to rush projects to pre-empt public scrutiny.[60]

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55. Goldblatt v. Town of Hempstead, 369 U.S. 590, 592 (1962) ("Concededly the ordinance completely prohibits a beneficial use to which the property has previously been devoted. However, such a characterization does not tell us whether or not the ordinance is unconstitutional. It is an oft-repeated truism that every regulation necessarily speaks as a prohibition. If this ordinance is otherwise a valid exercise of the town's police powers, the fact that it deprives the property of its most beneficial use does not render it unconstitutional.").

56. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1003-04 (1992).

57. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 419 (1982).

58. *See* Rhod-A-Zalea & 35th, Inc. v. Snohomish Cty., 959 P.2d 1024, 1024 (Wash. 1998) (holding that although a peat mine was protected under zoning laws as an existing nonconforming use, the County could require the mine owner to obtain a "grading permit" in order to continue operations); *see* Star Nw. Inc. v. City of Kenmore, 280 Fed. Appx. 654, 654 (9th Cir. 2008) (holding that the City of Kenmore's prohibition of card rooms applied to card rooms operating at the time of the enactment of the ordinance despite statutory protection for existing uses in Kenmore's zoning code).

59. *See* WILLIAMS, JR. & TAYLOR, *supra* note 4, § 119:2.

60. MANDELKER & WOLF, *supra* note 4, § 6.11 ("The law of vested rights and estoppel must strike a fine balance between the competing interests of the developer and the municipality. A developer needs some protection from changes in land use requirements that prevent it from completing the project or that make completion more expensive.

B. The Anomaly of Existing Use Protection

Protection of nonconforming uses appears well entrenched and, with the exception of various amortization schemes, has been little threatened over the past half-century. Although nonconforming use protection is a fundamental aspect of American land use law, its justification is not obvious. In this section, I will explore the case against existing use protection. Criticism of the prevalence of nonconforming uses is not a new phenomenon.[61] Early advocates of zoning often favored the application of zoning codes to both existing as well as new uses and structures.[62] Although some early zoning codes did not grandfather existing uses, existing use protection was already customary by the mid-1920's.[63] Juergensmeyer and Roberts suggest four reasons for this change. First, zoning was regarded as a tool to influence future development rather than regulate prior development.[64] Second, it does not seem that the presence of "a few nonconforming uses [are] totally contrary to the public health, safety and welfare."[65] Third, grandfathering existing uses reduced political opposition to zoning regulations by exempting the parties most likely to lobby against the new regulation.[66] Fourth, although courts sometimes showed a willingness to permit the termination of existing uses,[67] grandfathering existing uses removed a significant legal vulnerability.[68] In some instances, courts explicitly refused to enforce zoning provisions that did not grandfather existing uses.[69] William Fischel points to a fifth factor, namely that popular sentiment often ran in favor of owners of properties that did not conform to new zoning codes and against local governments that targeted existing uses.[70] This, he claims, tipped the balance in favor of

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Municipalities need the freedom to revise their land use requirements to meet new land use problems or to implement new land use policies.")

61. Complaints about the persistence of non-conforming uses are almost as old as American zoning law. WILLIAM A. FISCHEL, ZONING RULES! 186 (2015).

62. *See id.*

63. *See* Chamberlain & Pierson, *supra* note 52, at 185 ("Zoning looks to the future, not the past, and it is customary to allow buildings and businesses already in the district to remain, although of a class which cannot be established. If such a business constitutes a nuisance it can still be removed under the police power, but the zoning acts in themselves do not customarily interfere with existing conditions.").

64. JUERGENSMEYER ET AL., *supra* note 2, § 4.31.

65. *Id.*

66. *Id.*

67. *See, e.g.*, Hadacheck v. Sebastin, 239 U.S. 394, 414 (1915).

68. JUERGENSMEYER ET AL., *supra* note 2, at § 4.31.

69. *E.g.*, W. Theological Seminary v. City of Evanston, 156 N.E. 778, 784-85 (Ill. 1927) (holding that zoning regulations may not be applied to existing uses); *see* JUERGENSMEYER ET AL., *supra* note 2, § 4.31.

70. *See* FISCHEL, *supra* note 61, at 192.

existing uses despite skepticism from planning experts and acquiescence by many courts.[71]

Zoning experts, however, continue to be ambivalent about non-conformities.[72] A leading scholar of land use law noted in the 1950's that the tenacity of nonconforming uses despite expectations that they would fade away over time has been "one of the great disappointments of the zoning movement."[73] Christopher Serkin is only the latest of many commentators to propose more vigorous measures against non-conformities.[74] In addition to more aggressive use of amortization provisions, Serkin countenances immediate termination as well.[75]

The most fundamental objection to existing use protection is straightforward: it seems to impose a sharp and arbitrary distinction between the rights of similarly situated owners. This seems problematic for four reasons. First, existing use protection may appear to benefit owners of non-conforming properties unfairly at the expense of neighbors who are burdened not only by the persistence of the non-conforming use, but also by the restrictions imposed by the new zoning code.[76] Protection of non-conformities entrenches current uses even as it prohibits precisely analogous future uses.[77] If Al owns a nonconforming property, a junkyard, for example, he may perpetuate this nonconforming use indefinitely regardless of the burden on his neighbors. His neighbor Ben, however, may not operate a junkyard regardless of the relative value of junkyards on Al's and Ben's properties and the relative burdens on their neighbors. Ben may not operate a junkyard even if his land is next to Al's and Al's junkyard compromises

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71. *Id.* ("This seems to be a case in which the leaders of zoning called for a practice that the public was unwilling to accept, even though the courts either endorsed the practice or tolerated it.").

72. *E.g.*, Babcock, *supra* note 4, at 25 ("The landowner's expectation that he will be able to build a factory on his vacant land is not fundamentally different from his expectation that he can continue to operate his existing factory, and both expectations should be subject to the same constitutional standards."); C. McKim Norton, *Elimination of Incompatible Uses and Structures*, 20 L. & CONTEMP. PROBS. 305, 305 (1955); Harland Bartholomew, *Non-Conforming Uses Destroy the Neighborhood*, 15 J. LAND & PUB. UTIL. ECON. 96, 96-97 (1939).

73. Daniel R. Mandelker, *Prolonging the Nonconforming Use: Judicial Restriction of the Power to Zone in Iowa*, 8 DRAKE L. REV. 23, 23 (1958) [hereinafter Mandelker, *Prolonging the Nonconforming Use*].

74. *See generally* Serkin, *supra* note 6; *see also* Osborne M. Reynolds Jr., *The Reasonableness of Amortization Periods for Nonconforming Uses – Balancing the Private Interest and the Public Welfare*, 34 J. OF URB. & CONTEMP. L. 99 (1988); *see also* Mandelker, *Prolonging the Nonconforming Use*, *supra*, at 73.

75. *See generally* Serkin, supra note 6.

76. PATRICK J. ROHAN & ERIC DAMIAN KELLY, ZONING AND LAND USE CONTROLS § 41.01[1] (LexisNexis Matthew Bender 2021).

77. *See id.*

Ben's enjoyment of his land and reduces its market value. Existing use protection thus seems like an arbitrary benefit for Al and a burden on Ben that stems from an irrational distinction between past and future land use choices. Indeed, grandfathering of existing uses under non-zoning police power regulations sometimes invites judicial disapproval on the grounds that such exemptions are presumptively unfair.[78]

Second, allowing nonconforming uses to persist undermines the effectiveness of zoning law in separating conflicting uses.[79] Requiring that zoning regulations take effect only prospectively means that zoning changes will have little immediate effect in developed areas.[80] Serkin notes that "[w]orking around existing uses can severely limit the efficacy of zoning and other comprehensive land use planning, potentially transforming prospective planning into a mere description and codification of existing conditions."[81]

Third, existing use protection gives landowners questionable incentives.[82] Rather than trying to anticipate whether a contemplated land use will be consistent with the future development of the neighborhood, existing use protection encourages speedy development of potentially controversial uses so as to gain vested rights.[83] Existing use protection can thus lead to inefficient races between developers and local governments in which the developer tries to develop a lot before a property is rezoned so as to receive nonconforming use protection.[84] Developers would have less incentive to race to secure vested rights if local governments retained the right to apply subsequent zoning changes to the property.[85] Existing use protection likewise encourages property owners to make excessive, socially inefficient investments in burdensome uses, knowing that existing use protection will shield them from reasonable, cost-justified land use regulations.[86] If landowners knew that burdensome uses risked triggering zoning changes, they would be more careful to balance their own interests with those of neighbors who might be adversely affected by new development.

78. *See* Katt v. Vill. of Sturtevant, 70 N.W.2d 188, 188-89 (Wis. 1955) (invalidating an exemption for existing mink farms from a regulation prohibiting their operation); *see* WILLIAMS, JR. & TAYLOR, *supra* note 4, § 117.5.

79. *See* Serkin, *supra* note 6, at 1225.

80. *See id.*

81. *Id.*

82. *Id.* at 1283.

83. *Id.*

84. *Id.*

85. *See* Serkin, *supra* note 6, at 1283.

86. *Id.* at 1283-85.

Finally, nonconforming use protection sometimes has the unintended consequence of creating a local monopoly.[87] For example, a nonconforming store in a residential district has a local monopoly of indefinite, and in principle perpetual, duration.[88] This may have the perverse effect of entrenching conforming uses that would otherwise be uneconomical. It seems unfair to give owners of nonconforming businesses a windfall for operating a business in a location deemed inappropriate by the zoning code. Moreover, the prospect of a local monopoly may encourage existing businesses to lobby for more restrictive zoning so as to gain a competitive advantage.[89]

Serkin rebuts a number of common arguments for categorical protection of existing uses. First, he notes that application of zoning regulation to existing uses is only retroactive in the weak sense that is considered unobjectionable in most other contexts.[90] A new zoning regulation does not make the existence of a nonconforming use illegal *prior* to its enactment, but merely makes any *future* continuation of the nonconformity illegal. To use terminology introduced by Stephen Munzer, a law that is weakly prospective,[91] such as a new health regulation prohibiting use of a newly discovered carcinogen in manufacturing, would sanction manufacturers only for future use of the carcinogen. It would not, however, provide any safe harbor for manufacturers who made costly investments in reliance on the old legal regime in which the carcinogen could be used freely. By contrast, a strongly prospective application of the regulation would exempt from the force of the regulation equipment already in use, which could only be operated using the carcinogen, but forbid the use of any subsequently purchased equipment.[92] Zoning regulations are typically strongly prospective insofar as they apply only to new structures and new activities and preserve the legal status of uses that reflect past decisions made by landowners so long as such choices were legal at the time they

87. *See id.* at 1235 n.61.

88. *E.g.*, Wickham v. Becker, 274 P. 397 (Cal. Ct. App. 1929) (invalidating zoning regulation that prohibited commercial development everywhere in a jurisdiction except in two small districts entirely occupied by existing businesses on grounds that this created local monopoly prohibiting competition with existing businesses).

89. *E.g.*, Lippow v. City of Miami Beach, 68 So. 2d 827 (Fla. 1953) (invalidating a zoning change on the grounds there the government could articulate no rationale other than protection of the economic interests of neighboring businesses); Charnofree Corp. v. City of Miami Beach, 76 So. 2d 665 (Fla. 1954) (invalidating a zoning regulation on the grounds that it had no discernible role in protecting the health, safety or morals of the community, but appeared instead designed to protect existing businesses from new competition). *See generally* James Dabney, *Antitrust Aspects of Anticompetitive Zoning*, 24 ANTITRUST BULL. 435 (1979).

90. Serkin, supra note 6, at 1262-65.

91. Stephen R. Munzer, *Retroactive Law*, 6 J. LEGAL STUD. 373, 383 (1977).

92. *See id.* at 383.

were made.[93] Regulation of existing uses, Serkin claims, is not inherently any more objectionable than all manner of other health, safety, and environmental regulations that impose costs on regulated parties as a result of choices made under the pre-existing legal regime.[94] Abandoning existing use protection would make zoning law weakly prospective rather than strongly prospective. Rather than reflecting a general policy against retroactive legislation, existing use protection represents a sort of grandfathering that is at least mildly atypical in regulatory policy.

Second, Serkin argues that existing uses are not categorically different from legal rights to build a structure or engage in an activity in the future.[95] According to Serkin, categorical protection of existing uses reflects a sort of irrational preference for foregone losses as opposed to out-of-pocket expenses.[96] Prohibition of existing uses does not necessarily impose greater losses on property owners than does the prohibition of future uses.[97] For example, downzoning a vacant lot in a fast-growing urban area to prohibit any sort of dense development may reduce the lot's value by a huge percentage. If, on the other hand, the lot contained a junkyard, changing zoning regulations to prohibit this use might have virtually no effect on the lot's market value. Application of the latter, but not the former, zoning regulation might be blocked by the status of the junkyard as an existing use.[98] People may be prone to overvalue out-of-pocket losses as compared with foregone future gains.[99] This sort of cognitive bias might explain why existing uses have special status, but it does not justify it. Similarly, though an existing use may be good evidence of the subjective expectations of a property owner, it is not clear why these expectations should receive any more protection than subjective expectations of future planned uses.[100] In most areas, the law is not especially solicitous of the latter sort of expectations.[101] More generally, appealing to subjective expectations in this context is problematic. Since these expectations are shaped by the fact that existing uses receive legal protection, appeal to such

93. Serkin, *supra* note 6, at 1224-25.
94. *Id.* at 1289.
95. *See id.* at 1268.
96. *See id.* at 1267.
97. *Id.* at 1267-68.
98. This result is not certain since it is conceivable that the junk yard could be regulated as a nuisance.
99. *See* Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision under Risk*, 47 ECONOMETRICA 263, 263 (1979) (introducing prospect theory, which suggests that people tend to value losses more than they value exactly equivalent gains).
100. Serkin, *supra* note 6, at 1275-77.
101. *See id.* at 1276-77.

expectations to justify legal protection is circular. If existing uses were not exempt from most zoning laws, landowners would revise their expectations in light of the new legal rule.

Third, in response to those who argue that existing use protection is necessary because of the vulnerability of property owners to abusive regulation, Serkin argues that the interests of those who seek to protect existing uses usually receive adequate consideration in ordinary democratic political processes.[102] Property owners who benefit from existing use protection are readily identifiable, likely to have a significant personal stake in the issue, and likely to be able to coordinate with one another.[103] By contrast, the beneficiaries of zoning changes are usually more numerous, each have lower personal stakes in the outcome and in many cases, are as yet unknown future owners of neighboring properties.[104] Basic principles of public choice theory suggest that owners of non-conformities who have a significant individual stake in zoning laws and know when they will be personally affected are likely to defend their interests effectively through the political process.[105] Serkin concludes that blanket protection of existing uses is unjustified.[106] Although grandfathering existing uses and structures might be advisable in cases in which the balance of interests tips in favor of existing use protection, local governments should be given the power to terminate nonconformities and, may exercise it without violating generally applicable takings and due process standards.[107]

III. TWO MODELS OF ZONING REGULATION

My defense of existing use protection will proceed in two stages. First, I discuss the place of existing use protection in the context of two distinct models of zoning regulation. Second, I show why treating past and future land use choices asymmetrically makes sense given the normative function of property rights. In this section I will explore two basic models for zoning regulation—comprehensive planning and bargaining—and show that the logic of each model supports existing use protection. Both models are ideal types. Zoning practice includes

102. *See id.* at 1279.

103. *Id.* at 1278-80. Serkin notes, however, that since owners of nonconformities are unlikely to be able to exit a hostile jurisdiction at low cost, they may be particularly vulnerable to exploitation by local governments. *Id.* at 1280. The political economy of land use regulation does not, therefore, provide decisive reasons to favor or oppose special treatment of existing uses. *Id.*

104. Serkin, *supra* note 6, at 1278-80.

105. *See id.*

106. *Id.* at 1290-91.

107. *See id.* at 1288-89.

elements of both. Zoning regulation was originally conceived of as a planning regulation and has evolved over the course of the twentieth century to incorporate aspects of the bargaining model.[108] Prohibition of existing uses is in tension with both models of zoning. It is disfavored under the comprehensive planning model because plans are primarily guides for future development rather than tools to pre-existing land use conflicts.[109] To the extent that an existing use is a product of a bargain between a developer and the local government, allowing the government to prohibit existing uses gives at least the appearance of the government going back on its word. Moreover, the inability of the government to commit to protecting a developer from subsequent zoning changes could significantly undermine the credibility in negotiations and thus be an impediment to reaching agreements advantageous for local government.

A. Zoning and Planning

As a historical matter, zoning regulations are closely connected to the idea of comprehensive land use planning. Zoning, as originally conceived, involved the creation of comprehensive zoning maps that divide all territory in a given jurisdiction into separate zones for different types of uses.[110] The zoning map was to guide development throughout a jurisdiction and put landowners on notice about which general sorts of development would be permitted on their land.[111] Zoning codes were seen as vehicles to implement land use plans and comprehensive planning as a means to constrain arbitrary or haphazard application of zoning regulations.[112] Although early zoning codes did contain a process for variances and amendments, these were intended for use in exceptional cases.[113] Rezonings are permissible under the Standard State

108. Philip L. Fraietta, *Contract and Conditional Zoning Without Romance: A Public Choice Analysis*, 81 Fordham L. Rev. 1923, 1926-30 (2013).

109. Charles M. Haar, *In Accordance with a Comprehensive Plan*, 68 HARV. L. REV. 1154, 1155 (1955).

110. *Zoning and Conditional Use Permits*, INST. FOR LOC. GOV'T, https://www.ca-ilg.org/hn-online-guide/zoning-and-conditional-use-permits (last visited Apr. 2, 2021).

111. WILLIAMS, JR. & TAYLOR, *supra* note 4, § 17.6.

112. Charles M. Haar, *In Accordance with a Comprehensive Plan*, 68 HARV. L. REV. 1154, 1154 (1955) ("For to the extent that zoning is properly to be conceived of as the partial implementation of a plan of broader scope, zoning without planning lacks coherence and discipline in the pursuit of goals of public welfare which the whole municipal regulatory process is supposed to serve."); Chamberlain & Pierson, *supra* note 52, at 187 ("So, even though a court approves of the principle of zoning as embodied in the statute, it will not sustain an ordinance which is not enacted in accordance with any 'well-considered plan,' but is arbitrary and unreasonable in its requirements.").

113. Alejandro Esteban Camacho, *Mustering the Missing Voices: A Collaborative Model for Fostering Equality, Community Involvement and Adaptive Planning in Land Use Decisions: Installment One*, 24 STAN. ENVTL. L.J. 3, 11-12 (2005); Shelby D. Green,

Zoning Enabling Act (SZEA) but procedurally cumbersome as befitting a tool to be used only in rare circumstances.[114] An extreme version of this position is reflected in the "change or mistake" rule in several states, which require a showing of changed circumstances or a mistake in the original zoning code in order to revise any existing zoning designation.[115] The expectation, however, was that in the vast majority of cases, landowners seeking to develop their land would apply for a building permit, which would be granted or denied depending on whether the proposed development complied with the pre-existing zoning regulations.[116] The original conception of zoning thus was that most important questions would be settled by a comprehensive code and that zoning determinations specific to particular parcels of land—variances, and special permits—would play a secondary role and be employed only to address exceptional, unforeseen circumstances.[117]

Although most courts were apparently willing to uphold zoning codes that were prospective, comprehensive, and included procedural protections for landowners, codes that did not fit the comprehensive planning model were vulnerable to legal challenge. Early decisions striking down zoning regulations occurred in instances in which there was no zoning enabling act,[118] there was no comprehensive map or plan,[119] or zoning was piecemeal.[120] A leading early zoning proponent argued that these deficiencies, as well as the lack of provision for zoning appeals, explained the leading cases invalidating zoning regulations.[121] Partially in response to such concerns, the Standard Zoning Enabling Act, upon which many of the early zoning codes were modeled,[122] stated that zoning "regulations shall be made in accordance with a comprehensive plan."[123] There is a long running controversy over how

Development Agreements: Bargained-For Zoning That Is Neither Illegal Contract Nor Conditional Zoning, 33 CAP. U. L. REV. 383, 387 (2004).

114. Green, *supra* note 113, at 386-88.

115. WILLIAMS, JR. & TAYLOR, *supra* note 4, § 7.6.

116. *Id.*

117. Camacho, *supra* note 113, at 11-12; Green, *supra* note 113, at 387.

118. *See, e.g.*, City of St. Louis v. Evraiff, 256 S.W. 489, 489-90 (Mo. 1923); State *ex rel.* Better Built Home & Mortgage Co. v. McKelvey, 256 S. W. 495, 495 (Mo. 1923); State *ex rel.* Penrose Inv. Co. v. McKelvey, 256 S.W. 474, 474 (Mo. 1923).

119. *See, e.g.*, Spann v. City of Dallas, 235 S.W. 513, 517 (Tex. 1921).

120. Miller v. Bd. of Pub. Works, 195 Cal. 477 (1925).

121. Edward M. Bassett, *Constitutionality of Zoning in Light of Recent Court Decisions*, 13 NAT'L MUN. REV. 492, 494 (1924).

122. Green, *supra* note 113, at 385.

123. U.S. DEPARTMENT OF COMMERCE, A STANDARD STATE ZONING ENABLING ACT § 3, at 6 n.22 (rev. ed. 1926).

to understand the comprehensive plan requirement.[124] In the early years of zoning, local governments were not required to enact separate plans and many created zoning codes in the absence of a comprehensive plan.[125] This lead courts to find that in such cases, the zoning map was itself a comprehensive plan.[126] In the mid-twentieth century, a number of states, including California and Florida, adopted laws that required local governments to adopt a comprehensive plan before issuing zoning regulations.[127] Most states still do not require a locality to create a comprehensive plan in order to zone,[128] but even in these states, courts usually require that the zoning code itself be comprehensive rather than piecemeal.[129] At a minimum, a plan should cover the entire territory over which the planning agency has jurisdiction.[130] Zoning decisions that appear arbitrary in light of the larger code are vulnerable to invalidation as illegal "spot zoning."[131] By contrast, conformity to a comprehensive plan is sometimes treated as evidence against a regulatory taking claim.[132]

The requirement of conformity to a comprehensive plan is in part motivated by concern to justify particular zoning regulations as serving important public ends and not merely as a means to resolve private conflicts between neighbors.[133] A comprehensive scheme to channel development in any particular jurisdiction is thought to benefit the community as a whole. Courts upholding land use regulation typically

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124. *See* Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 CAL. L. REV. 837, 860-63 (1983) (discussing the evolution of "plan jurisprudence" in the mid-twentieth century).

125. Haar, *supra* note 109, at 1157.

126. Edward J. Sullivan, *Answered Prayers: The Dilemma of Binding Plans*, *in* PLANNING REFORM IN THE NEW CENTURY 138 (Daniel R. Mandelker ed., 2004).

127. *Id.*

128. MANDELKER & WOLF, *supra* note 4, § 3.14.

129. *Id.*; WILLIAMS, JR. & TAYLOR, *supra* note 4, § 7.5.

130. ROHAN & KELLY, *supra* note 16, § 37.01[1][b].

131. JUERGENSMEYER ET AL., *supra* note 2, § 5.10 ("A rezoning that looks like a spot on the zoning map raises a 'red flag' of suspicion that the rezoning may have been done to serve private, not public, interests. If the rezoning is shown to be in accord with the plan, that concern is dispelled."); 2 EDWARD H. ZIEGLER, J. RATHKOPF'S THE LAW OF ZONING AND PLANNING § 28.01 (4th ed. 2020) ("No one particular characteristic associated with spot zoning, except a failure to comply with at least the spirit of a comprehensive plan, is necessarily fatal to the amendment.").

132. *See* Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 336-40 (2002); Norbeck Vill. Joint Venture v. Montgomery Cty. Council, 254 A.2d 700, 700 (Md. 1969); MANDELKER & WOLF, *supra* note 4, § 3.18.

133. Haar, *supra* note 109, at 1157-58 ("With the heavy presumption of constitutional validity that attaches to legislation purportedly under the police power, and the difficulty in judicially applying a 'reasonableness' standard, there is danger that zoning, considered as a self-contained activity rather than as a means to a broader end, may tyrannize individual property owners.").

point out the systemic nature of these benefits.[134] The plan imposes a system of restrictions on property owners so that each owner is restricted somewhat in her use of her property but benefits from the restrictions imposed on neighboring property owners.[135] From the early days of zoning, courts have suggested that state authority to regulate non-nuisance land uses through zoning law is connected to the status of zoning regulation as a planning instrument. For instance, *Jones v. City of Los Angeles*, which held that Los Angeles could not use zoning law to prohibit an existing business that was not a nuisance, noted that courts "have recognized that the right to use private property may be restricted by an ordinance which follows a reasonable plan, even though the use is neither a nuisance *per se*, nor a menace to the health, safety or morals in the particular district from which it is excluded."[136] More recently, the Court in *Kelo* suggested that conformity with a comprehensive plan is evidence of a public use even when the ultimate recipient of the land taken by eminent domain is a private party.[137]

B. The Role of Existing Use Protection in Comprehensive Zoning

As will be explained presently, the comprehensive planning model of zoning is today, at best, a gross oversimplification of the nature of zoning. Nevertheless, the roots of zoning regulation in comprehensive land use planning helps to explain the ambiguous status of nonconformities. Commitment to comprehensive planning lead early zoning advocates to regard nonconformities unfavorably. Non-conforming uses undermine the uniformity of well-designed plans. Insofar as the aim of a comprehensive planning is strict separation of uses, the persistence of nonconforming uses perpetuates industrial or commercial activities in an undesirable proximity to residential areas. Insofar as the aims are aesthetic, nonconforming uses are eyesores on an otherwise well-ordered landscape.

Despite the obvious tension between comprehensive zoning and the protection of existing uses, the logic of comprehensive planning on

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134. *E.g.*, Village of Euclid v. Amber Realty Co., 272 U.S. 365, 391-94 (1926); Golden v. Planning Bd., 30 N.Y.2d 359, 376-78 (N.Y. 1972).

135. Alfred Bettman, *Constitutionality of Zoning*, 37 HARV. L. REV. 834, 839 (1924) ("In the case of a zone plan, each piece of property pays, in the form of reasonable regulation of its use, for the protection which the plan gives to all property lying within the boundaries of the plan.").

136. Jones v. City of Los Angeles, 295 P. 14, 17 (Cal. 1930).

137. Kelo v. City of New London, 545 U.S. 469, 483-84 (2005); Nicole Stelle Garnett, *Planning as Public Use?*, 34 ECOLOGY L.Q. 443, 444 (2007). *But see* Gideon Kanner, *We Don't Have to Follow Any Stinkin' Planning – Sorry About That, Justice Stevens*, 39 URB. L. 529, 530 (2007) (arguing the *Kelo* wildly overstates that legal force of comprehensive plans and adopts a naïve view of their purposes and legal significance).

balance supports protection of existing uses. Zoning regulations that implement comprehensive *plans* are oriented toward guiding future development rather than rearranging existing uses and structures.[138] The comprehensive planning model of zoning suggests that these regulations should not be applied to existing non-nuisance land uses for at least five reasons.

First, existing use protection mitigates the potential unfairness in regulations that treat similarly situated landowners differently. Zoning regulations differ from most other police power regulations in that they impose a non-uniform set of rules. The function of a zoning code is to establish different rules in different sectors so as to separate conflicting uses. Zoning laws, therefore, permit activities in one area that they prohibit in another. By contrast, ordinary police power regulations are general in nature.[139] They apply uniform rules across a given jurisdiction.[140] A checkerboard statute—a statute that imposes different rules according to some entirely arbitrary pattern—is a stock example of an unjust law.[141] For example, a health regulation that applied to restaurants located in even-numbered streets, but not odd-numbered streets, would seem obviously unjust. A court would likely invalidate it as arbitrary and capricious or as a violation of equal protection. Zoning codes, however, are checkerboard statutes *by design*: the point of the code is to apply different rules to different neighborhoods. Two highly similar plots of land with identical uses may be treated very differently depending on where lines are drawn on a map. Euclidian zoners try, of course, to separate uses so that a use will be permitted where it fits with its neighbors but prohibited where it does not.[142] However, the need to

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138. JUERGENSMEYER ET AL., *supra* note 2, § 2.10 ("The rational, comprehensive planning process has four principal characteristics. First, it is future-oriented, establishing goals and objectives for future land use and development approval or disapproval, and municipal expenditures for capital improvements such as road construction and the installation of municipal utilities.").

139. *See* Brown v. Maryland, 25 U.S. (12 Wheat.) 419, 442-43 (1827).

140. *E.g.*, Federal Food, Drug, and Cosmetic Act, Pub. L. 75-717, 52 Stat. 1040 (1938); Occupational Safety and Health Act of 1970 Pub. L. No. 91-596, 84 Stat. 1590 (1970).

141. RONALD DWORKIN, LAW'S EMPIRE 179 (1986). Dworkin believes that zoning laws are unobjectionable despite their checkerboard nature because they are not "matters of principle." This seems to miss an important feature of zoning regulation that differentiates it from most other forms of regulation. The checkerboard nature of zoning regulations is permissible because it is required for the regulation to fulfill its purpose. Application of other police power regulations to property owners on every other street would usually be regarded as unfair, even if the regulation did not concern a "matter of principle" by Dworkin's lights, so long as it allocated non-trivial benefits or burdens.

142. Rachael Watsky, *The Problems With Euclidean Zoning*, BOS. U. SCH. L. (July 19, 2018), http://sites.bu.edu/dome/2018/07/19/the-problems-with-euclidean-zoning/ (explaining that the term comes from the Supreme Court case *Village of Euclid v. Ambler Realty*, and

draw sharp boundaries means that some decisions will necessarily be somewhat arbitrary: for a given unzoned area, there is not likely to be a single unique map dictated by basic principles of zoning. Insofar as a zoning code attempts to do more than merely formalize existing distinctions between neighborhoods, it will impose rules that treat similar parcels of land differently. The contrast with ordinary police power regulations is stark: checkerboard regulations concerning health, safety, personal liberty, or any other matter serious enough to justify the imposition of significant sanctions are inherently suspicious.[143] A checkerboard zoning map, on the other hand, is an entirely unexceptionable outcome that serves the underlying purpose of separating incompatible uses.[144] Permitting continuation of existing uses protects landowners to a considerable extent from ending up on the wrong side of necessarily somewhat arbitrary lines.

Second, the requirement of comprehensiveness and prospective nature of zoning are both serve to spread the benefits and burdens of zoning regulation as widely as possible. Commentators often present conforming use protection as a means of reducing political opposition by "grandfathering" those property owners most likely to object.[145] But this is the flip side of a more principled rationale: existing use protection reduces the risk that burdens of zoning will be highly concentrated among a small number of landowners who suffer large losses.[146] Meanwhile, the requirement that zoning codes are comprehensive increases the probability that all landowners in the jurisdiction will benefit in the long run. A well-conceived zoning code will tend to produce widely dispersed benefits by reducing the chances that neighbors will develop inconsistent land uses, protecting the character and aesthetics of neighborhoods, expanding the tax base by increasing property values, and channeling future development in ways that benefit existing property owners. As already noted, comprehensive land use planning was originally touted as having benefits for all landowners, including those who were burdened by costly new restrictions on how they could use their land.[147] The extent to which zoning actually delivers on these promises is controversial. Proponents, however, generally argue that well-designed zoning codes benefit an entire community and

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describes zoning which "divides towns into districts based on permitted uses, and in so doing, creates specific zones where certain land uses are permitted or prohibited").

143. *See* DWORKIN, *supra* note 141, at 179.

144. *See id.*

145. *E.g.*, JUERGENSMEYER ET AL., *supra* note 2, § 4.31.

146. *See* Serkin, *supra* note 6, at 1267.

147. *See* Haar, *supra* note 109, at 1154; Chamberlain & Pierson, *supra* note 52, at 187.

not only those landowners who wish to block development by their immediate neighbors.[148]

The wide dispersal of benefits and burdens of comprehensive zoning is often cited by both the Supreme Court[149] and by lower courts[150] as a factor in upholding zoning regulations. Property owners who are burdened by zoning restrictions receive at least partial compensation in the form of valuable restrictions on the land use choices of their neighbors.[151] Reciprocal advantage is a long-running theme in regulatory takings jurisprudence dating back to Justice Holmes opinion in *Pennsylvania Coal Co. v. Mahon*.[152] Defenders of land use regulations tend to present them as an exchange of benefits and burdens (perhaps not perfectly equal) rather than as a one-way imposition of

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148. *See, e.g.*, Peter Barnes, *How Zoning Regulations Benefit Communities*, YAHOO! FIN. (Feb. 4, 2016), https://finance.yahoo.com/news/zoning-regulations-benefit-communities-050508613.html.

149. *E.g.*, Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1072-73 (1992) (Stevens J., dissenting) ("We have, therefore, in our takings law frequently looked to the *generality* of a regulation of property. For example, in the case of so-called 'developmental exactions,' we have paid special attention to the risk that particular landowners might 'b[e] singled out to bear the burden' of a broader problem not of his own making. Nollan, 483 U.S., at 835, n.4; see also *Pennell v. San Jose*, 485 U.S. 1, 23 (1988) . . . Perhaps the most familiar application of this principle of generality arise in zoning cases. A diminution in value caused by a zoning regulation is far less likely to constitute a taking if it is part of a general and comprehensive land-use plan, see *Euclid v. Ambler Realty Co*., 272 U.S. 365 (1926); conversely, 'spot zoning' is far more likely to constitute a taking, see *Penn Central*, 438 U.S., at 132, and n. 28."); Agins v. City of Tiburon, 447 U.S. 255, 262 (1980), *abrogated by* Lingle v. Chevron U.S.A. Inc., 544 U.S. 528 (2005) ("The zoning ordinances benefit the appellants as well as the public by serving the city's interest in assuring careful and orderly development of residential property with provision for open-space areas. There is no indication that the appellants' 5-acre tract is the only property affected by the ordinances. Appellants therefore will share with other owners the benefits and burdens of the city's exercise of its police power.").

150. San Remo Hotel v. City & Cty. of San Francisco., 41 P.3d 87, 98 (Cal. 2002) ("The breadth or narrowness of the class burdened by the regulation, the extent to which a regulation defeats the owner's reasonable investment-backed expectations, and the extent to which the affected property is also benefited by the regulation are certainly pertinent to whether a regulation works a taking."); Haas v. City & Cty. of San Francisco, 605 F.2d 1117, 1121 (9th Cir. 1979) (citing Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 133-34 n.30 (1978) ("The record contains not the slightest suggestion that the land use regulations at issue involved 'reverse spot' zoning. On the contrary, the land use controls were part of a comprehensive plan for the development of the City to preserve aesthetic values and other general welfare interests of the inhabitants. The land use restrictions 'were reasonably related to the implementation of a policy . . . expected to produce a widespread public benefit and applicable to all similarly situated property.' All of Haas' neighbors are subject to the same restrictions upon the future development of their property as those imposed upon Haas. To be sure, at the moment, Haas appears to have suffered a disproportionate impact because no other affected landowner has as large a parcel of undeveloped land as does Haas. Nevertheless, all of the landowners in the Russian Hill area are no more able than is Haas to redevelop their property, either alone, or in combination with other landowners, for high-rise apartments.").

151. *See Haas*, 605 F.2d at 1121.

152. Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922); *see generally* Thomas W. Merrill, *The Character of the Governmental Action*, 36 VT. L. REV. 649 (2012).

restrictions in a property owner. In *Penn Central*, part of the disagreement between Justice Brennan's majority opinion and Justice Rehnquist's dissent hinged on whether the historic landmark designation of Grand Central Station should be seen as part of a system of regulation of historically significant buildings with broad advantages accruing to all property owners or as an isolated imposition on the owners of Grand Central Station for the benefit of others.[153] Justice Brennan contrasted New York City's policy of historical preservation with illegal spot zoning:

> In contrast to discriminatory zoning, which is the antithesis of land-use control as part of some comprehensive plan, the New York City law embodies a comprehensive plan to preserve structures of historic or aesthetic interests wherever they might be found in the city, and as noted, over 400 landmarks and 31 historic districts have been designated pursuant to this plan.[154]

Rehnquist agreed that zoning regulations were constitutionally permissible because although they "at times reduce[] individual property values, the burden is shared relatively evenly and it is reasonable to conclude that on the whole an individual who is harmed by one aspect of the zoning will be benefited by another."[155] But he argued that the "multimillion dollar loss . . . imposed . . . is uniquely felt and is not offset by any benefits flowing from the preservation of some 400 other 'landmarks' in New York City."[156]

Existing use protection serves to balance the burdens and benefits of regulation somewhat more equally. Even well-designed zoning codes pose a risk that the burdens of zoning regulation will be concentrated among only a few property owners. Although whether a use is an existing use or a future use does not perfectly track the burden imposed by new zoning regulations, owners of nonconforming properties are one of the two groups (along with owners of undeveloped property) that would be most likely to suffer large losses as a result of new zoning regulations.[157] Protection of existing uses mitigates the burdens on those property owners whose hitherto legal activities are proscribed by the new code.[158] It thereby decreases the odds that zoning regulation will function primarily to transfer wealth from one group of property owners (the nonconformers) to another (the conformers). A new zoning law that

153. *See Penn Central Transp. Co*., 438 U.S. at 152-53 (Rehnquist, J., dissenting).
154. *Id.* at 132.
155. *Id.* at 147 (Rehnquist, J., dissenting).
156. *Id.*
157. Ellickson, *supra* note 11, at 699-701.
158. *See* Serkin, *supra* note 6, at 1224-25.

applied equally to existing and future uses would have quite different effects on landowners depending on their present activities. Owners of land devoted to uses prohibited by the new code would be disproportionately burdened while other landowners would disproportionately benefit. Strongly prospective zoning regulations, by contrast, have more similar implications for all landowners in a given zone. Owners of both conforming and nonconforming properties are forbidden from commencing any future use inconsistent with the new zoning regulation.[159] Although owners of nonconforming properties may gain some special advantage from being allowed to continue nonconforming activities, this advantage is limited by the prohibition on expanding nonconforming uses or switching to another type of use.[160] Nonconforming houses cannot be expanded and sometimes cannot be rebuilt. Businesses are not permitted to expand, and commercial and industrial properties cannot be converted to a new use.[161] Owners of nonconformities are, therefore, burdened by new regulations, usually to a greater extent than their neighbors. And because existing use protection does not immunize landowners who operate nuisances, land uses that impose particularly heavy burdens on their neighbors are not protected.[162]

Concern that losses from zoning regulation are not excessively concentrated is especially pressing in light of a third feature of comprehensive land use planning: zoning serves many purposes that are far less urgent than the removal of nuisances. This factor seems to be central to the reasoning in *Jones v. City of Los Angeles*, which blocked Los Angeles' attempt to require removal of existing facilities for the mentally ill:

> Zoning is not so limited in its purposes. It may take into consideration factors which bear no relation to the public health, safety or morals, but which come within the meaning of the broader term "general welfare". It deals with many uses of property which are in no way harmful. If its objects are so much broader than those of nuisance regulation; if its invasion of private property interests is more extensive; and if the public necessity to justify its exercise need not be so pressing, then does it not follow that its means of regulation

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159. *E.g.*, CITY OF SAN JOSE, DEP'T OF PLANNING, BLDG. & CODE ENF'T, WHAT IS A LEGAL NONCONFORMING USE? (2003), https://www.sanjoseca.gov/home/showpublisheddocument?id=15487.

160. *See supra* Part II.A.

161. *See id.*

162. *See* Dix W. Noel, *Retroactive Zoning and Nuisances*, 41 COLUM. L. REV. 457, 473 (1941).

> must be more reasonable and less destructive of established interests?[163]

Zoning codes prohibit structures and uses that are not, in the vast majority of cases, socially undesirable.[164] The objectives of zoning are extremely varied and include prevention of conflicting uses, protection of the tax base, environmental protection, aesthetic appeal and uniformity, prevention of overcrowding, regulation of access to locally provided public goods, public health and safety, enhancement of property values, etc.[165] In order to serve these ends, zoning regulations are applied selectively so that extremely similar parcels of land with identical uses may be subject to differing legal regimes depending on where they are located. And the rules within a given zone are likely to render some properties nonconforming even if they are devoted to the right general sort of activity: residential property, for example, may be subject to regulations regarding occupancy, lot size, frontage, appearance, height, and so on.[166] As a consequence, even a well-designed zoning code will render nonconforming a variety of uses that cause, at most, only very marginal social harm. Land uses that present serious threats to the peace, health, or safety of neighbors may be terminated as nuisances; it is not uncommon for courts to refuse to grant existing use protection on these grounds.[167] This means that existing use protection only attaches to uses that cause small, more attenuated, or more abstract harms, including those of an aesthetic or more inchoate economic nature. The social benefit of eliminating many nonconforming uses is often fairly attenuated. It is possible that current limitations on nonconforming properties already go too far in many cases. Nicole Garnett has recently argued that restrictions on altering or

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163. Jones v. City of Los Angeles, 295 P. 14, 17 (Cal. 1930)

164. *See*, *e.g.*, Vill. of Euclid v. Amber Realty, 272 U.S. 365, 388 ("A nuisance may be merely a right thing in the wrong place, like a pig in the parlor instead of the barnyard."); Roberts, *supra* note 54, at 289 ("Most courts probably are not willing to attach the nuisance label to a nonconforming use unless its deleterious effects are fairly clear and substantial. Nuisance has always been associated with uses which cause relatively concrete harm to the enjoyment of surrounding property. In the cases applying an expanded concept of nuisance the damage which the offending uses threatened was much more serious than most zoning regulations are intended to cure.").

165. ROHAN & KELLY, *supra* note 16, § 37.01[5] ("There is very little doubt, however, that state enabling laws and current community plans extend beyond the prevention of neighborhood nuisances and the adoption of fair procedures.").

166. *See, e.g.*, CTY. OF SAN MATEO, PLANNING & BLDG. DEPT., ZONING REGULATIONS (2020), https://planning.smcgov.org/sites/planning.smcgov.org/files/SMC_Zoning_Regulations.pdf.

167. *See, e.g.*, Brown v. Grant, 2 S.W.2d 285, 287 (Tex. Civ. App. 1928).

expanding non-conforming uses contribute to urban decay in aging cities.[168]

Interestingly, Kathy Kolnick found that even after the City of Los Angeles won a landmark legal victory in *Hadacheck,* allowing it to force commercial and industrial businesses out of newly designated residential districts, most of the now ostensibly illegal business continued on in their former locations.[169] It is hard not to see this as evidence against the need for strict separation of uses, at least when the commercial uses involve laundries and the like (as was often the case with the businesses in question) rather than heavy industry or other obviously burdensome uses.[170]

A fourth reason to favor existing use protection is that the use of zoning regulation to terminate existing structures and uses threaten to undermine the function of property rights of dividing spheres of authority. Property rights define the sphere of control and set a baseline for subsequent voluntary modification of these rights and duties by contract. They codify a norm of the following sort: "I respect my neighbor's decisions with respect to her property, and she respects my decisions with respect to mine." There are, of course, borderline cases in which an act has significant effects on both properties. A complete set of property rights will determine rights in such cases so that each property owner has a compatible set of rights and duties.[171] The value of each property will depend on its attributes and the rights of the owner. Neighbors unhappy with their allotment of rights and duties may try to negotiate exchanges.[172] For example, if I find it inconvenient that I am not allowed to drive over my neighbor's lot, I might try to negotiate an easement that would allow me to do so.

Rather than securing the voluntary agreements with neighbors, zoning regulation allows disaffected property owners to bypass common law remedies and voluntary negotiation in order to restrict the activities of their neighbors. Protection of existing uses converts zoning regulation which prevents zoning law from being used as a tool for the mediation of law disputes and restricts it largely to the domain of

168. NICOLE STELLE GARNETT, ORDERING THE CITY: LAND USE, POLICING, AND THE RESTORATION OF URBAN AMERICA 198-99 (2010).

169. Kathy A. Kolnick, Order Before Zoning: Land Use Regulation in Los Angeles, 1880–1915, at 245 (May 2008) (unpublished PhD dissertation, University of Southern California), https://digitallibrary.usc.edu/cdm/ref/collection/p15799coll127/id/61051.

170. *Id.* at 122.

171. Richard A. Epstein, *Bundle-of-Rights Theory as a Bulwark Against Statist Conceptions of Private Property*, 8 ECON J. WATCH 223, 230-32 (2011).

172. Ellickson, *supra* note 11, at 711-719.

prevention of land use conflicts and regulation of development.[173] Zoning regulation, in its present form, serves the dual function of preventing neighbors from developing inconsistent plans for their properties and assuring landowners that neighbors will not make undesirable changes.[174] Allowing local governments to use zoning regulations to terminate existing uses would encourage aggressive actions against one's neighbors' present activities and does not discourage consensual resolution of land use disputes. At worst, purchasing property next to nonconforming uses and then lobbying for zoning changes could be a business strategy.[175] Permitting aggressive use of zoning regulation could create land use conflicts in situations where the current neighbors are not especially bothered by a nonconformity.

The nuisance exception to existing use protection is consistent with the logic of zoning regulation being aimed at dispute avoidance rather than dispute resolution. Nuisances are activities that impose significant and non-reciprocal burdens on neighbors: noise, foul odors, dangerous conditions, etc.[176] Because there is no right to operate a nuisance under common law, eradication of such burdens is not an infringement of the property owner's pre-existing legal rights, but merely enforcement of the pre-existing common law rights of neighbors.[177] By contrast, regulation of lesser sorts of burdens does alter legal entitlements. Prohibition of multi-family housing on a parcel might raise the land value of its neighbors if would-be buyers prefer not to live next to apartment buildings. But because multi-family housing is not a nuisance, doing so alters the pre-existing distribution of legal rights.

A fifth consideration in favor of applying comprehensive zoning codes only to future uses is that better alignment of the interests of landowners in a particular zone increases the chances of well-designed regulation. Aside from any concern with the fairness of burdening the owners of non-conformities to benefit their neighbors, the prospect of terminating existing uses pits the interests of neighboring landowners against one another in regulatory policymaking. Although one might

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173. Or, perhaps, to regulate conflicts over development.

174. *See* Ellickson, *supra* note 11, at 699-701.

175. Under the current legal regime, entrepreneurs might purchase both a nonconforming property and adjacent parcels in order to capture economic gains from eliminating the nonconformity. Significantly, however, in this case the entrepreneur must bear that cost of buying out the owner of the nonconforming property and thus will only eliminating nonconforming uses in cases in which the economic gains outweigh the losses.

176. *See* RESTATEMENT 2D OF TORTS § 821D (AM. LAW INST. 1979) (defining a private nuisance as a "nontrespassory invasion of another's interest in the private use and enjoyment of land.").

177. *See, e.g.*, Conrad v. City of Beebe, 388 S.W.3d 465, 469 (Ark. Ct. App. 2012).

wish that property owners seeking to terminate their neighbors' existing uses will prevail in the zoning process only when the balance of policy considerations tilts in their favor, local zoning regulation depends on a host of local political dynamics aside from the merits of a proposed regulation. Sometimes local governments may be justified in terminating existing uses, but often they will not. By contrast, protection of existing uses sets up a regulatory context in which the interests of all landowners in a zone are better aligned. When only prospective uses are prohibited, all landowners share in the benefits of restrictions on their neighbors' activities, and all landowners, including owners of nonconforming properties, are burdened by the new restrictions. The principal exception is owners of undeveloped property who wish to develop, who tend to be disproportionately burdened by new zoning rules. Existing use protection, however, has no effect on this group.

Classical zoning codes are a sort of public plan that is designed so as to minimize potential conflicts in the plans developed by private landowners and provide for orderly future development according to the principles of rational land use.[178] The comprehensive nature of zoning codes produces widely dispersed benefits, but also subjects landowners to starkly different rules depending on where their property falls on the zoning map.[179] The protection of existing uses mitigates the danger of highly concentrated costs and the potential unfairness of subjecting different landowners to different rules that may be based on the planning boards' views of desirable future development rather than the present character of the neighborhood. A zoning regulation not made according to some general plan is a use of regulatory authority to resolve a particular law use conflict. Such a resolution, by its very nature, evades the common law principles that would have governed the conflict in its absence and thus should trigger concern land use law is being used for private ends. As will be discussed below, zoning practice has evolved away from the planning model in some respects. Nevertheless, the logic of comprehensive planning is one source of the intuition that existing uses should be treated differently than future uses.

C. Bargaining and Contemporary Zoning

Although the logic of comprehensive planning was central to the original understanding of zoning regulation, zoning practice in the United States has developed in ways that clearly are in tension with this model. The level of foresight needed to translate a general and

178. *See* WILLIAMS, JR. & TAYLOR, *supra* note 4, § 17.7.
179. *See* WILLIAMS, JR. & TAYLOR, *supra* note 4, § 17.8.

somewhat abstract master plan into a detailed zoning code has often proven unrealistic for several reasons. First, local governments find it difficult to project future conditions decades in advance.[180] Second, the impact of development on local public infrastructure and public services makes local governments hesitant to adopt a permissive approach to zoning undeveloped land even when future development is anticipated and desired.[181] Finally, the strict separation of uses contemplated by Euclidian zoning seems too restrictive in light of the advantages of mixed use neighborhoods.[182] As skepticism about the feasibility and desirability of detailed, long-term land use planning has grown, zoning practice has evolved toward an approach that I will refer to as the "bargaining model."[183] Unlike the planning model, which suggests that new development should generally conform to a pre-existing comprehensive plan and comprehensive zoning code, new development under the bargaining model is the result of protracted, project-specific negotiation between a developer and a local government.[184]

The perceived inadequacy of Euclidian zoning has changed zoning practice in a number of ways. Local governments often do not zone most undeveloped land for intensive development but instead use restrictive zoning designations so as to make case-by-case zoning determinations

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180. *See* Jenny Schuetz, *Is zoning a useful tool or a regulatory barrier?*, BROOKINGS (Oct. 31, 2019), https://www.brookings.edu/research/is-zoning-a-useful-tool-or-a-regulatory-barrier/.

181. *See* FISCHEL, *supra* note 61, at 129.

182. *See generally* Roderick M. Hills, Jr. & David Schleicher, *The Steep Costs of Using Noncumulative Zoning to Preserve Land for Urban Manufacturing*, 77 U. CHI. L. REV. 249 (2010) (arguing that residential development should be permitted in industrial zones).

183. Daniel P. Selmi, *The Contract Transformation in Land Use Regulation*, 63 STAN. L. REV. 591, 593 (2011) ("In recent years, however, the form of land use regulation has changed significantly to incorporate a contract model. Instead of the traditional, hierarchical permit process, land use approvals are now increasingly the subject of negotiations leading to binding contracts between local governments and development interests."); Alejandro Esteban Camacho, *Mustering the Missing Voices: A Collaborative Model for Fostering Equality, Community Involvement and Adaptive Planning in Land Use Decisions: Installment Two*, 24 STAN. ENVTL. L.J. 269, 270 (2005) ("The shift in land use regulation from a primarily command and control approach to an extemporized, negotiated mode has steadily gained momentum, despite initial criticism from many courts and commentators."); Green, *supra* note 113, at 389 ("It seems that nearly a century of zoning experience shows a very different practice than first contemplated by the standard act, such that current zoning practice little resembles the early notion of planned development . . . . Rather than rigid adherence to the zoning map, the current model for land use control is through bargaining, making particularized decisions regarding the suitability of a proposed use, and thus in effect administering land development on a case-by-case basis."); FISCHEL, *supra* note 61, at 363 ("Hostility to contract zoning seems to have abated considerably in the last quarter century. Communities seem willing to put dollar amounts on rezonings.").

184. *See* Erin Ryan, *Zoning, Taking, and Dealing: The Problems and Promise of Bargaining in Land Use Planning*, 7 HARV. NEGOT. L. REV. 337, 338 (2002).

and to retain leverage over developers.[185] Restrictive zoning of undeveloped land forces developers to win approval for measures that alter existing zoning rules such as zoning variances, special use permits, zoning amendments as well as, in many instances, a site plan.[186] The rise of negotiated zoning regulation has encouraged the use of "conditional zoning" arrangements.[187] Under conditional zoning, developers agree to impose certain restrictions of the use of their property in exchange for receiving the zoning treatment necessary for a proposed development.[188] Such conditions might either be attached administratively in a special permit or variance or be imposed as part of a rezoning.[189] In response to the perceived inflexibility of traditional Euclidian zoning, new zoning designations have been developed to facilitate a more flexible approach. "Floating zones" are defined in the zoning code, but not located on the zoning map until a developer submits a successful application to "land" the floating zone on a particular property.[190] Planned Unit Developments (PUDs) allow developers to pursue mixed use projects that do not fit within traditional zoning categories.[191] Because both floating zoning and PUDs are initiated by a developer and require individualized review, both types of zoning encourage increased bargaining and conditional zoning more generally.[192]

All of these developments have increased the importance of negotiations between local governments and developers. Courts have traditionally disapproved of "contract zoning" on the grounds that it is unconstitutional for a governmental body to contract away its police power.[193] Despite the long history of judicial disapproval of contract zoning, local governments now often conclude formal development

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185. Babcock, *supra* note 4, at 32 ("[M]ost communities with areas faced with development pressure have adopted a 'wait and see' regulatory approach. Large areas of vacant land are placed in zoning districts in which the development allowed under the regulations is not likely to prove economic.").

186. *See, e.g.*, Green, *supra* note 113, at 389.

187. *See* David L. Callies & Julie A. Tappendorf, *Unconstitutional Land Development Conditions and the Development Agreement Solution: Bargaining for Public Facilities after Nollan and Dolan*, 51 CASE W. RES. L. REV. 663, 665 (2001).

188. This practice is controversial. *See* MANDELKER & WOLF, *supra* note 4, § 6.59 ("Despite growing judicial approval of conditional zoning, its use by municipalities is often unwise.").

189. In general, the latter sort of conditional zoning is more legally fraught than the former. *See* JUERGENSMEYER ET AL., *supra* note 2, § 5.11.

190. Selmi, *supra* note 183, at 601.

191. *Id.*

192. *Id.* at 602.

193. *See* Vicki Been, *Community Benefits Agreements: A New Local Government Tool or Another Variation on the Exactions Theme?*, 77 U. CHI. L. REV. 5, 12 (2010).

agreements with developers.[194] And courts usually uphold such contracts so long as they do not go too far in freezing existing zoning regulations and thus abrogating the police power.[195] These "development agreements" allow local governments to secure support for infrastructure upgrades in exchange for giving developers legal certainty at an earlier stage than they would under standard vested rights doctrine.[196] More recently, some developers have negotiated Community Benefits Agreements with community groups representing neighbors and other interested parties under which the developer agrees to certain conditions in exchange for community groups agreeing not to oppose the development.[197] The cumulative effect of these changes is that rather than reflecting the logic of a comprehensive plan, zoning decisions are now often made on a case-by-case basis. As Vicki Been has observed, "zoning has moved from a set of rigid prescriptive rules about land use to a more flexible set of standards, which allow the specifics of the requirements imposed on each proposed development to vary with the threatened impacts of the project and the concerns of the various interest groups affected by the proposal."[198]

The rise of the bargaining model of land use regulation has several important implications for existing uses. First, insofar as developments result from protracted negotiations between local governments and property owners, a subsequent adverse change in zoning regulation may give the appearance of reneging on an implicit agreement. Although changing legal rules may appear unfair to those who have relied on the old rules, laws must sometimes change if we are to have a functional legal system. Going back on bargained agreements is another matter altogether. Because of constitutional limitations on abrogation of the police power, even bargained zoning designations are not legal contracts.[199] Nevertheless, it smacks of unfairness for local governments

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194. *See* Selmi, *supra* note 183, at 593.

195. MANDELKER & WOLF, *supra* note 4, § 6.23; JUERGENSMEYER ET AL., *supra* note 2, § 5.31 ("The idea of a 'development agreement ordinance' is oxymoronic under the view of early decisions that condemned contract zoning. Yet, times have changed, and, as with the trend to accept conditional zoning, legislatures and courts increasingly accept development agreements as legitimate planning tools."). *E.g.*, Giger v. City of Omaha, 442 N.W.2d 182, 192 (Neb. 1989) ("In fact, this agreement is in reality an enhancement of the city's police power. An examination of the development agreement and the evidence at trial establishes that the agreement provides more restrictive ceilings and development regulations than the current underlying zoning regulations.").

196. *See generally* Selmi, *supra* note 183.

197. *See generally* Been, *supra* note 193.

198. *Id.* at 12.

199. MANDELKER & WOLF, *supra* note 4, § 6.22 ("Though a developer's agreement is a contract, it is not an independent contractual source of obligation. A developer's agreement is

to revisit zoning decisions made at the conclusion of negations with a developer after the developer has made various concessions to secure a certain zoning designation. The unsavory character of such zoning changes makes it more likely that courts will find them to be takings or violations of due process even when standard doctrinal analysis is equivocal and even when there is a strong case that the concessions to the developer were unwise as a matter of public policy.

Second, bargaining between developers and local governments implicitly relies upon the grandfathering of existing uses to protect the interests of developers. Because local governments are not constitutionally permitted to alienate police power by contract,[200] development agreements and the like that commit local governments to maintain a particular zoning designation far beyond the completion of a development are vulnerable to legal challenge.[201] But because the developer obtains "vested rights" once building permits are granted, the developer can rely upon the zoning designation specified in the development agreement once the project is well underway.[202] The agreement, therefore, functions as a sort of a bridge between the initiation of the project and vesting of rights.[203] It relies on the background understanding that completed (and most partially completed) projects receive legal protection from subsequent zoning changes.[204] After bargaining for the right to begin construction, the developer need not worry about the risks of subsequent zoning changes.[205] This has value for local governments as well. Without protection for existing uses, governmental pledges not to change zoning rules until rights vest would be less valuable because developers and their transferees might worry that subsequent officials could go back on an agreement. For this reason, existing use protection probably increases local government's ability to exact concessions in exchange for building permits.

The importance of this consideration is difficult to assess. In many cases, developers may have little reason, even absent existing use protection, to worry that zoning changes will threaten the legal status of a development or frighten potential buyers. Local governments have a strong disincentive to choose zoning rules in ways that severely diminish

an ancillary instrument which exists as a tool for the implementation of the resolution establishing the conditions.").

200. *See* Bos. Beer Co. v. Massachusetts, 97 U.S. 25, 31 (1877).

201. Selmi, *supra* note 183, at 620-21.

202. *See* MANDELKER & WOLF, *supra* note 4, § 6.12.

203. Selmi, *supra* note 183, at 607-11.

204. MANDELKER & WOLF, *supra* note 4, §6.12.

205. *Id.*

property values and thus threaten the tax base.[206] On the other hand, legal certainty is appealing because it spares developers and those to whom they might sell property from having to assess the regulatory risk of rezoning in the distant future. This might increase resale value by facilitating transfer to outsiders who know little about the local government, even in those cases in which the true regulatory risk is quite modest. Developers' preference for zoning regulation provides some evidence that their buyers value legal certainty and thus would react unfavorably to a legal regime that did not include existing use protection.[207]

Third, to the extent that zoning regulation is done not according to a comprehensive plan, but rather on a case-by-case basis, the argument for terminating existing uses is much weaker. Much of the original concern about the persistence of non-conforming property was that they undermine the benefits of rational planning. But if zoning designations reflect a series of ad hoc deals with developers rather than a consistent policy to guide development, it is hard to see why this should be of special concern. As Richard Babcock observed in an insightful 1972 address,

> it is apparent that wait-and-see zoning makes traditional concepts of nonconforming use obsolete. The whole concept of nonconforming uses depends on the self-executing regulations that have long-term stability. The wait-and-see approach to zoning undercuts the very basis of the idea of 'nonconforming use' – the idea that there are meaningful regulations to which a use can 'conform.'[208]

Not only do case-by-case zoning decisions undercut the significance of nonconformity with zoning, they strengthen the case that elimination of nonconforming uses is unfair to their owners. Requiring that property owners give up some valuable opportunities for future development is much more palatable if this is done as part of a scheme that gives benefits to the landowners who bear the burdens of land use regulation. But if every zoning decision more or less stands on its own, then the benefits that a property owner receives from the restrictions on the rights of other landowners do not in any real sense depend on the same considerations that require restrictions on the property owner's land use choices.

Part of the reason for the rise of zoning by negotiation is the increasing importance of fiscal zoning. Much contemporary zoning

206. *See* FISCHEL, *supra* note 61, at 213-14.

207. *Id.* at 180 ("[D]eveloper support for zoning was founded on the need to induce homeowners to invest their savings in a large, undiversified asset.").

208. Babcock, *supra* note 4, at 34.

regulation is aimed at protecting taxpayers by restricting access to local public goods.[209] Minimum lot sizes, restrictions on multi-family dwellings, and other common regulations are centrally concerned with preventing residents from consuming far more in services than they contribute in tax dollars.[210] They do so, not directly by charging for public services, but indirectly by preventing construction of residences that contribute relatively little to the tax base on a per capita basis.[211] In such cases, the elimination of an existing use (assuming that the regulation is well designed to protect the local tax base) causes a transfer of wealth from the burdened landowner to other local residents.[212] The fairness of termination of existing uses in such cases is questionable. In many cases, the nonconformity will impose little non-fiscal burden on its neighbors since the reasons for (e.g., minimum lot sizes) have little or nothing to do with the impact on adjacent plots. Whatever the merits of fiscal zoning in the abstract, it is difficult to see how it can justify forcing incumbent landowners to make costly alterations or to move away entirely. When zoning is undertaken for fiscal reasons, it is likely that local governments would grandfather existing structures even if permitted to do otherwise by state government and the courts. But were local jurisdiction given free rein, at least a few would probably use this power to force conversion of multi-family rental property into single family homes or undertake other exclusionary measures. Existing use protection thus has value as a check on fiscal zoning.

IV. ZONING AND PROPERTY RIGHTS

A. Property and Plans: The Value of Ownership

Zoning regulation, both as originally conceived and as it has evolved over the twentieth century, has reshaped property rights in land. Early opponents perceived zoning regulation as a threat to the liberal conception of property.[213] In this section, I will discuss the normative significance of property ownership, explore how zoning regulation posed a threat to liberal property rights and show how existing use protection represents a compromise between the interests of property

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209. *See* FISCHEL, *supra* note 61, at 138-62.

210. *See generally* William A. Fischel, *Fiscal Zoning and Economists' Views of the Property Tax* (Lincoln Inst. of Land Policy, Working Paper, 2013), https://landuselaw.wustl.edu/Articles/Fischel%20Article.pdf.

211. *See* FISCHEL, *supra* note 61, at 131-32.

212. *See id.*

213. *E.g.*, Ambler Realty Co. v. Vill. of Euclid, 297 F. 307, 314 (N. D. Ohio 1924), *rev'd*, Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

owners in control over their property and the need for greater public control over land use choices.

The connection between property rights and freedom is central to the liberal tradition. Anglo-American liberals, both right- and left-leaning, have embraced this link, although they sometimes provided quite different analyses of the nature of freedom and its connection to property.[214] The importance of property rights for John Locke's account of liberal political order is well known.[215] In this tradition, the right to own private property is a natural liberty that pre-exists government and serves as a limitation on the authority of the state.[216] Sometimes less remembered, at least in the Anglo-American circles, is that German Idealists such as Kant, Hegel, and Fichte also saw a close connection between property ownership and freedom.[217] It is this Kantian tradition that is especially interesting for present purposes.[218] Kant, Hegel, and Fichte argued that property ownership is normatively important because it provides a sphere of exclusive control for property owners.[219] Unlike Locke, who argued that property could be acquired by mixing one's labor,[220] Hegel and Fichte believed that property rights could be acquired merely by incorporating an unowned object into one's plans.[221] According to this "will theory" of property, property rights are grounded in a person's interest in acting freely.[222] Incorporating an object into

214. *Compare* RICHARD PIPES, PROPERTY AND FREEDOM (2000), *with* Jedediah Purdy, *A Freedom-Promoting Approach to Property: A Renewed Tradition for New Debates*, 72 U. CHI. L. REV. 1237 (2005).

215. 2 JOHN LOCKE, THE TWO TREATISES OF CIVIL GOVERNMENT ch. 5 (Thomas Hollis ed., London 1764) (1689) (justifying first appropriation of property in the state of nature and explaining the legitimacy of government in terms of the protection of life, liberty and property).

216. *Id.*

217. Kant argued that property rights were necessary for people to live in a "relation of right" because they define a sphere of free action for each individual. IMMANUEL KANT, THE METAPHYSICS OF MORALS, 38-39 [6:248]-[6:250], 44-46 [6:255]-[6:257] (Mary Gregor trans., 1996); ARTHUR RIPSTEIN, FORCE AND FREEDOM: KANT'S LEGAL AND POLITICAL PHILOSOPHY 267-99 (2009). Hegel argued that property ownership provides a "sphere of freedom" which allows for the exercise of free will. G. W. F. HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT §41-52, §208, §217 (Allen W. Wood ed., T. M. Knox trans., 1952). Fichte held a similar view. JOHANN GOTTLIEB FICHTE, FOUNDATIONS OF NATURAL RIGHT §10 at 106 (Frederick Neuhouser ed., Michael Baur trans., 2005).

218. Appeal to this strain of Kantian political philosophy does *not* require acceptance of Kantian moral philosophy. Consequentialists and others who reject Kantian moral theory can embrace this analysis of the value of property rights without conceding ground to Kantians in their disagreements in moral philosophy.

219. *See supra* note 217 and accompanying text.

220. LOCKE, *supra* note 215, at ch. 5.

221. *See supra* note 217 and accompanying text.

222. For example, Fichte contended that "The part of the sensible world that is known to me and subjected to my ends—even if only in thought—is *originally* my property . . . . No

one's plans gives others a duty not to interfere with the object without permission because doing so interferes with the free choices of the property owner.

Whether or not the "will theory" is a compelling theory of property *acquisition*, it illuminates an important part of the value of property *ownership*. The normative function of private property, on the Kantian theory, is that it gives the property owner the right to use an object "set and pursue [her] own ends."[223] One's property holdings create a sphere of control in which one can determine, revise, and carry out one's freely chosen projects. Property rights violations infringe on the right of the owner to set and revise ends free from outside interference. The idea here is that once an object has been incorporated into a person's plans, interfering with that object disrupts that person's ability to make and carry out plans. A truly free person is one who not only makes choices, but one whose choices are efficacious in the world. Some choices are aimed at more or less immediate goals: I am thirsty and so drink the glass of water on the table. Other goals, however, can only be achieved by plans that unfold over time.[224] Complex plans may have a nested structure with many subplans that must be completed in order to achieve an overarching long-term goal. I might do A today so that I can do B tomorrow, or so that I have the option of doing B or C tomorrow, or so that I will be able to do E, F, and G in exactly that order over the coming years. Property ownership is important because property provides a material domain in which to make plans.

A sphere of exclusive control allows a person to develop her plans over time without outside interference. Because a property owner typically has the ultimate authority with respect to her property, property ownership allows a person to act in pursuit of long-range plans with confidence that her choices will be efficacious. I can build a house on my land without worrying that others will tear it down or occupy it. I may plant a garden, decorate my house how I please, build a workshop in it (or not), and so on. My personal property is likewise mine to use, store, exchange, give away or abandon as I please. Land, however, has a special relationship to property as a means to exercise free agency because land ownership provides a physical expanse in which the owner's decisions are, within broad limits, authoritative. Personal

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one can affect that part of the sensible world without restricting the freedom of my efficacy." FICHTE, *supra* note 217, §10 at 106; SCOTT SHAPIRO, LEGALITY ch. 5 (2011).

223. RIPSTEIN, *supra* note 217, at 67.

224. Plans have been the subject of much interesting recent work in moral and legal philosophy. *See generally* MICHAEL E. BRATMAN, INTENTION, PLANS AND PRACTICAL REASON (1999); SHAPIRO, *supra* note 222. I am concerned here primarily with planning by individuals, not the sort of collective plans considered by Shapiro.

property, however great its economic value or personal meaning, does not perform the same function because it does not provide a physical territory in which an owner's decisions have authority. Personal property is, moreover, likely to be insecure without territory where it can be safely stored. Land ownership allows a person to form complex plans that unfold over time *both* by providing material resources to support these plans and by providing a domain of exclusive control in which the person may act without permission from others. To take a mundane example, if I would like to construct and operate a car wash, I need both money to purchase building materials and equipment and a physical location suitable for building the car wash that is under my control. My plan will be frustrated without either of these elements—without financial resources, I cannot acquire materials, but materials alone are of little use without a space in which I am entitled to build and operate a cash wash if I so choose.

Although property rights are far from the only elements of a liberal society, property rights have a special relationship to this conception of what it is to be a free agent. In contrast to liability rules, which provide only for monetary compensation in the event of damage to property, property rules protect the property owner's ability to make decisions that have an effect over time without interference from others.[225] A property owner may pursue their own plans without permission from neighbors or government officials. A liability rule, by contrast, protects the financial interests of the right-holder, but does not give the right-holder the security of being able to make exclusive decisions.[226] An object protected by a liability rule may be taken, damaged, or destroyed, and so the owner's intentions with respect to the object are not legally protected, only her financial interest.[227] Liability rules have the virtue of permitting efficient transfers of resources that might not otherwise occur because of transaction costs.[228] Nevertheless, pure liability rules of this sort are not especially common. Preference for defined spheres of control is, perhaps, part of the reason why liability rules are commonly used to provide compensation for unintentional damages such as accidents and the like but relatively rare when it comes to intentional damages.

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225. On the nature of property rules, see generally Henry E. Smith, *Exclusion Versus Governance: Two Strategies for Delineating Property Rights*, 31 J. LEGAL STUD. 453 (2002); JAMES E. PENNER, THE IDEA OF PROPERTY IN LAW (1997); Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1105-15 (1972).

226. Calabresi & Melamed, *supra* note 225, at 1092.

227. *Id.*

228. *Id.* at 1109-10.

This analysis of the value of property ownership differs from the most prominent version of the will theory of property in contemporary legal theory. Unlike Margaret Radin's account of the role of property as constitutive of personhood, this strand of German Idealist thought does not reply on the property being constitutive of personhood and is not concerned with inalienability, sentimental value, or with the distinction between fungible and non-fungible property.[229] In general, the ability to alienate property makes it more rather than less valuable as a means for the exercise of free agency. And property can provide a sphere of decisional authority in which to pursue plans over time regardless of whether the owner identifies with it or believes it intrinsically important to personhood. Even if objects of property are fungible and valued entirely for their instrumental role in one's projects, violations of property rights may still pose a special threat to free agency. A small business owner may value a business at far above its fair market value not merely because of personal identification with the business, but of the centrality of running the business to her life. In Radin's terms, each of the business assets may be fungible property for the owner in the sense that they have only instrumental value and are fully replaceable with goods readily available on the market.[230] But the ability to conduct the business might be so central to the owner's life plans that the ability to continue operating the business has tremendous non-financial value to the owner. In this case, it is *not* some special personal relation to particular objects of property that is important but rather the ability to continue an activity that those objects enable. Conceptualizing non-economic interests primarily as "personhood" interests disregards important classes of normative concern.[231]

The role of property in providing a sphere in which to develop plans over time provides reason to think that termination of an existing use or structure is categorically different from the termination of a hitherto unexercised option for future use. Terminating an existing use frustrates

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229. Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 971-78 (1982). Serkin observes that the sort of value Radin is concerned with in "Property and Personhood" has few implication for existing use protection. Serkin, *supra* note 6, at 1273-74. This is correct, but seems to miss the more important point which is that property rights often have a special relationship to a person's interests even when the object of property rights are fungible objects of no particular sentimental value. Disrupting a small business might do grievous damage to the important personal projects of the owner even if the property at issue—the land and capital goods needed to operate the business—is of purely instrumental value.

230. Radin, *supra* note 229, at 960 (defining "personal property" and "fungible property").

231. Serkin addresses the non-pecuniary value of property largely in these terms and therefore misses the important connection between property and freedom. *See* Serkin, *supra* note 6, at 1269-70.

the ongoing projects of the property owner. Businesses must be closed or relocated, houses altered, tenants evicted. Frustration of an ongoing project compromises part of the point of property ownership. By contrast, protection of existing uses allows property owners to begin new projects with confidence that these projects will not be disrupted by most new land use regulations. Distinguishing between an owner's interest in pursuing ongoing projects and her interest in freedom to choose between various options provides a principled reason to prohibit certain future, but not existing, uses of land under most circumstances.[232] This is particularly the case when the existing use in question is a small business because in such cases, the owner and (and perhaps key employees) have a strong interest, both personal and financial, in not having their ongoing projects disrupted by new regulation.

Serkin discounts the idea that existing use protection protects the property owner's subjective expectations of future use, but his reasons for doing so are not compelling. Serkin seems to conflate interests protected by a property rights with the extent of compensation available if that right is "taken" within the meaning of the Fifth Amendment when he argues that an owner's subjective valuation does not justify special protection for existing uses because subjective value not compensable in takings cases.[233] He remarks, "[i]f, instead, the concern is genuinely with protecting subjective expectations—regardless of the impact on the property's fair market value—the result is simply inconsistent with core takings doctrine. When it comes to prospective future uses, the law does not even aspire to protect all genuine and reasonable expectations."[234] This is too cramped an understanding of property rights. As Henry Smith has emphasized in a slightly different context, there is a gap between the form of property rights and the values that they protect.[235] Property rules create boundaries that provide a sphere of individual control that may be valuable for any number of reasons. That only some such interests are compensated in takings cases is not an argument for ignoring such considerations when considering the value of existing use protection. Successful takings claims entitle a plaintiff to compensation

232. *See* Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165, 1233 (1967) (describing existing use protection as reflecting special concern for the "distinctly crystallized expectation" of the landowner).

233. *Id.* at 1269-70.

234. *Id.* at 1276.

235. Henry E. Smith, Response, *Mind the Gap: The Indirect Relation Between Ends and Means in American Property Law*, 94 CORNELL L. REV. 959, 962-63 (2009).

for the fair market value of the property taken.[236] But property rights protect a range of interests beyond the market value of the property. Among these are an owner's subjective, above market valuation (consumer surplus), personal autonomy, sentimental value, and business goodwill.[237] Just because these kinds of value are not compensable in takings cases does not mean that they can be set aside when evaluating the wisdom of existing uses protection. To the contrary, ignoring them is a particularly serious mistake when analyzing the value of existing use because a legal regime without existing use protection would not compensate property owners for these sort of damages even in cases where a zoning law is found to constitute a taking. As will be discussed below, the failure to compensate business owners for lost goodwill is particularly worrisome in light of the value of existing use protection for small businesses.

This account of the will theory of property is largely congruent with the scope of existing use protection. Rights vest in a non-conforming use only when property owner takes a tangible, substantial step toward development.[238] In much the same way, the will theory of property requires concrete action to establish ownership by communicating one's intention to incorporate an object into one's future plans. Owners of nonconforming properties are permitted to carry on their present activities as long as they wish and make repairs necessary to do so, but are generally not permitted to change to a new nonconforming use.[239] In most states, there is an exception for activities such as mining that, by their nature, expand under the diminishing asset doctrine.[240] The pattern seems to be that past plans are respected, but future plans must conform to the new code. Nonconforming use protection does not, however, protect plans that would be disrupted regardless of the new zoning code. Nonconforming structures destroyed by acts of god thus cannot be reconstructed even though normal maintenance is permissible.[241]

Amortization of nonconforming uses is controversial in part because it presents a difficult case under this theory of non-conforming uses. Amortization has the benefit of allowing the property owner to continue their present projects until they have recouped some or all of

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236. Christopher Serkin, *The Meaning of Value: Assessing Just Compensation for Regulatory Takings*, 99 NW. U. L. REV., 677, 678 (2005).

237. *Id.* at 679 n.4.

238. MANDELKER & WOLF, *supra* note 4, § 6.12.

239. ROHAN & KELLY, *supra* note 16, § 41.03[1].

240. *See, e.g.*, Hansen Bros. Enters. v. Bd. of Supervisors, 907 P.2d 1324, 1324 (Cal. 1996).

241. *See, e.g.*, Baird v. Bradley, 240 P.2d 1016, 1017 (Cal. Dist. Ct. App. 1952).

their investment.[242] It also puts owners on notice that their nonconforming uses will be terminated, giving them time to rearrange their plans.[243] Amortization is thus far more respectful of property owners' interests in developing their projects than is immediate termination. In general, amortization is appropriate in the case of discrete investments that are not embedded in some larger ongoing project or for uses of open land such as junkyards. In such cases, property owners will be able to recoup most of their investment and will have time to adjust to the new legal circumstances.[244] It is a less satisfactory response for nonconformities that require ongoing investments, including businesses and buildings. The problem with amortization in such cases is that it threatens to make new investment uneconomical such that owner's enjoyment of the property will be significantly compromised during the amortization period. A decaying building or a small business starved of investment may not be sufficient for the property owner to recoup prior investments. Amortization might be better than nothing at all, but for nonconforming uses involving complex commercial endeavors, amortization seems to seriously compromise the value of property ownership by threatening the viability of the owner's personal or commercial plans. In light of the obvious difficulties with amortizing whole businesses or residencies, it is probably not coincidental that disputes over amortization provisions have been disproportionately focused on nonconforming signs and billboards.[245]

In response to frequent use of amortization to terminate nonconforming signs and billboards, statutes have been enacted in many states that forbid this practice.[246] The foregoing argument provides limited support for such statutes. Signs and billboards do not implicate many of the interests at stake in other existing use cases. They are typically not essential to ongoing projects. They do not require large ongoing investments of the sort that makes amortization of business problematic. There is little reason to think, therefore, that signs should receive any special protection from land use regulation beyond an

242. Reynolds Jr., *supra* note 46, at 111 (1988).

243. *Id.* at 111.

244. *See id.*

245. *See, e.g.*, Battaglini, v. Town of Red River, 669 P.2d 1082, 1082 (N.M. 1983); City of Fort Collins v. Root Outdoor Advert., Inc., 788 P.2d 149, 149 (Colo. 1990); *see generally* WILLIAMS, JR. & TAYLOR, *supra* note 4, § 124.6 (collecting amortization cases, a large proportion of which involve junkyards or other open storage).

246. *See, e.g.*, FLA. STAT. § 70.20(2) (2005); *see* MANDELKER & WOLF, *supra* note 4, § 5.78, n.422.

amortization period to allow the owner to recover sunk costs.[247] This does not, however, justify broader use of amortization to terminate non-nuisance structures and uses.

B. Zoning and the New Logic of Property Rights

Under common law principles governing land use choices before the advent of zoning, property owners had broad discretion to determine what to build and what to do on their land so long as they did not interfere with their neighbors' use and enjoyment of their land. Property rules protect a property owner's freedom to choose between a range of options by allowing the property owner to forbid others from entering the property or interfering with it. Deference to landowners' choices about what to do with their property makes sense in light of this understanding of property as closely connected to freedom both from interference by the government and from one's neighbors. There have always, of course, been significant limitations on what property owners may do on their property. Activities that burden neighboring property owners pit the interests of property owners against one another and thus require trade-offs between the interests of different landowners. Nuisance law evolved to mediate these conflicts. For the most part, however, land use decisions were made by property owners or their tenants.[248]

The rise of zoning and other land use regulation has substantially changed the significance of property ownership. It is no longer true that landowners have broad discretion about the use to which their land is put. To the contrary, it is common in most developed areas for land use regulations to place rather strict limits on what property owners may or may not build or do. And local governments have broad powers to impose new regulations. Today, a landowner in a suburban residential

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247. Modjeska Sign Studios, Inc. v. Berle, 43 N.Y.2d 468, 478 (N.Y. 1977) ("In contrast to a safety-motivated exercise of the police power, a regulation enacted to enhance the aesthetics of a community generally does not provide a compelling reason for immediate implementation with respect to existing structures or uses. True, the public will benefit from a more aesthetically beautiful community, but absent the urgency present in a safety-motivated regulation, the immediate benefit gained does not outweigh the loss suffered by those individuals adversely affected.").

248. It is possible that highly concentrated land holdings have some utility in this context. One possible virtue of feudal modes of land tenure is that landlords where in a position to mediate land use conflicts between tenants and tenants between sub-tenants. Most cities have long had fragmented land ownership. *See* Derek Keene, *The property market in English towns, A.D. 1100-1600* in: D'UNE VILLE À L'AUTRE. STRUCTURES MATERIELLES ET ORGANISATION DE L'ESPACE DANS LES VILLES EUROPEENNES (XIIIe-XVIe siècle) 201, 221-25 (1989). But until recently, the tendency of people to live and work in close proximity (often in the same building) gave business owners incentive to mitigate the burdens that their businesses imposed on neighbors. *See generally* Louis Wirth, *Urbanism as a Way of Life*, 44 AM. J. OF SOC. (1938), https://www.jstor.org/stable/2768119.

neighborhood is typically free to do what they wish with their property so long as this does not involve commercial or industrial activity, does not include apartments or other multi-family dwellings, does not involve construction of buildings that are too high, too close to the property line, painted the wrong color, and so forth.[249] In other words, the property owners are now often required to use their property in the same narrow sort of way as their neighbors do and may construct only roughly the same sort of buildings as their neighbors have. Unlike nuisance law, which imposes a similar legal regime on all property owners in a jurisdiction,[250] zoning law creates a maze of highly local prohibitions and permissions. Clearly, something important has changed.

Commentators hostile to zoning regulation sometimes present these changes in a sinister light. Whereas before the introduction of zoning regulations, individual property owners were free to choose their own ends, today important decisions about uses of private lands are likely to be taken by public authorities. Zoning skeptics such as Richard Epstein argue that this turns private land into a sort of common resources subject to dysfunctional collective management.[251] The result, according to these skeptics, are overregulated suburbs that artificially inflate home prices for the benefit of incumbent owners and to the detriment of landowners who wish to develop their property and any would-be home buyers.[252] On a more mundane level, homeowners with unusual plans or tastes are at the mercy of the goodwill of their neighbors, in a context where busybodies and those opposed to change are likely to play an outsized role.

Whatever the force of this critique of zoning regulation as a general matter, existing use protection plays an important role in preserving the freedom of property owners to pursue projects of their choosing. Whereas the pre-zoning system of property law gave property owners broad discretion to choose what to do with their land, the present system allows property owners to select a property zoned appropriately for their intended use. Once they own a property with the right zoning for their

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249. *E.g.*, POINT ARENA, CAL., MUN. CODE § 18.20.020 (2001), https://qcode.us/codes/pointarena/view.php?topic=18-18_20-18_20_020.

250. *Nuisance*, CORNELL L. SCH., https://www.law.cornell.edu/wex/nuisance (last visited Aug. 20, 2021).

251. RICHARD EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 265 (1985) ("Land use regulation places the land back into a modified common pool, where many persons can limit the future use of the land, even though only one person, the owner, can actually use it.").

252. *See generally* Edward L. Glaeser & Bryce A. Ward, *The Causes and Consequences of Land Use Regulation: Evidence from Greater Boston*, 65 J. URB. ECON. 265 (2009); *see generally* Edward L. Glaeser et al., *Why Have Housing Prices Gone Up?*, 95 AM. ECON. REV. 329, 329 (2005).

intended use and begin using it, they need not worry about subsequent zoning changes and thus may, if they choose, pay little attention to local zoning measures.[253] Existing use protection thus assures property owners that their activities will not be disrupted by new zoning law so long as they are not especially noxious or burdensome. In return for giving up some options with respect to their current property, they gain far greater certainty about the activities of their neighbors as well as additional protection against particularly burdensome activities. Insofar as zoning rules are more or less efficient—a big if—higher property values should make most incumbent property owners better off even considering the inconveniences of being subject to voluminous zoning codes.[254]

This new system of regulated private ownership relies on a combination of markets in land and private property rights to achieve a similar range of options for private property owners that was afforded by the pre-zoning system of private ownership. If a property owner wishes to commence an activity prohibited by the applicable zoning rules (and she is not able to secure a variance or rezoning), she may purchase land that is zoned for this purpose and may sell her current landholdings to fund this purchase. The trade-off here is that property owners face increased transaction costs (since commencing a new activity may require buying a new parcel) in exchange for great certainty about the activities of their neighbors. Whether or not this trade-off is a good one, the new system does provide a similar range of options as well as legal protection for land use choices that do not greatly burden neighboring owners. This is because property owners know that if they acquire a property zoned for their planned activity, their projects will not be disrupted by new zoning regulations.

For property owners or would-be property owners, therefore, the present legal regime affords a similar range of options as the pre-zoning world, albeit with a different cost structure. For most landowners, the burden of zoning regulation is not especially great. Two groups of

253. This sort of simplicity is an underappreciated benefit of grandfathering. Even if homeowners and small business owners are likely to be able to defeat or be granted a variance from any zoning measures that would have truly catastrophic effects on their interests, having to pay attention to regulatory issues is itself a significant burden especially for those who are not politically or legally sophisticated. Small businesses, of course, are still subject to ordinary police power regulations and therefore face regulatory risk even when protected from subsequent zoning changes. *See, e.g.*, Elizabeth Joh, Opinion, *Yes, States and Local Governments Can Close Private Businesses and Restrict Your Movement*, POLITICO (Mar. 18, 2020, 6:16 PM), https://www.politico.com/news/magazine/2020/03/18/states-police-power-coronavirus-135826.

254. William Fischel explains the spread and persistence of zoning largely in terms of bottom-up demand from homeowners. FISCHEL, *supra* note 61, at 215-18.

landowners, however, are significantly burdened by zoning laws in a way that is not mitigated by existing use protection. First, property owners who wish to develop or redevelop land may find their options significantly constrained in ways that may greatly depress the value of undeveloped land. Because developers do not usually obtain vested rights in a project until they are have made considerable outlays, they are particularly vulnerable to regulatory changes that might be made in response to their planned developments. This is part of a pattern of anti-development legal changes over the course of the twentieth century.[255] Whereas under the pre-zoning regime, property owners had a standing right to develop their property subject to nuisance law and generally applicable health and safety regulations, no such general right exists today. Landowners today are protected from restrictions on development that are imposed through unfair or defective procedures or that deprive them of any valuable use for their land.[256] Local governments, however, have a general authority to regulate development on private land restrictively so long as they follow the correct legal procedures and permit at least one valuable land use for any given parcel.

This change is reflected not only in zoning law, but also in a host of other land use regulations that impede development or redevelopment, such as historical landmark designations,[257] wetlands protection laws,[258] the Endangered Species Act,[259] and a host of other environmental measures. Whatever the wisdom of these laws, it is clear that the right to develop has been severely curtailed in ways that go well beyond zoning regulation. As Joseph Sax observed in 1983,

> we are already so far along in diminishing developmental rights that owners are viewed, in important respects, as already on notice. Anyone today who holds, or wishes to buy, historical properties,

255. *See, e.g.*, ALEXANDER VON HOFFMAN, CREATING AN ANTI-GORWH REGULATORY REGIME: A CASE FROM GREATER BOSTON (2006), https://equitable-arlington.org/wp-content/uploads/2019/09/exclusionary_vonHoffman.pdf.

256. *See, e.g.*, Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1003 (1992) (holding that a regulation that deprived a landowner of all economically valuable uses was a per se taking); Dolan v. City of Tigard, 512 U.S. 374, 391 (1994) (requiring that there must be "rough proportionality" between proposed exaction and the impact of a proposed development); Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595, 596-97 (2013) (holding that landowners may sue for permit denials based on rejection of unreasonable demands by a local government).

257. *See, e.g.*, New York State Historic Preservation Act of 1980, 1980 N.Y. Laws ch. 354 (codified at scattered sections of N.Y. GEN. MUN. LAW, N.Y. PARKS, REC. & HIST. PRESERV. LAW, AND N.Y. PUB. BLDGS. LAW); *see, e.g.*, J. Langdon Marsh and Judith G. Simon, *The Protection of Historic Resources in New York State: An Overview of Federal, State and Local Laws*, 10 FORDHAM URB. L.J. 411 (1982).

258. California Coastal Act of 1976, CAL. PUB. RESOURCES CODE § 30255 (2020).

259. 16 U.S.C.A. §§ 1531-1544 (2020).

> wetlands or coastal lands, or who plans developments in developing suburbs (to take but the most obvious examples), knows or should know that his opportunities for old-fashioned development are far from clear.[260]

Since that time, the Supreme Court has taken a more active role in policing exactions,[261] and there is also a recent trend toward suspicion of restrictive, anti-development, zoning policies.[262] Nevertheless, the power of the state to prospectively limit intensive development has been largely untouched.

Second, the neighbors of non-conforming properties are burdened by the ability of their neighbors to contravene the applicable zoning code. Junkyards, liquor stores, dirty or noisy industries, high-rise apartments next to single family homes, busy retail businesses in quiet residential neighborhoods, and so on impose real burdens on their neighbors and are apt to lower property values. This is a cost of existing use protection and one that doubtless has undesirable consequences in the relatively small number of cases involving burdensome activities of marginal economic value that cannot be limited by other means. There are two reasons to think that this consideration should not be decisive. First, there are numerous other tools to deal with the most burdensome of nonconforming uses. Nuisances may be terminated outright by zoning or by other regulations. Generally applicable police power regulations can often be used to mitigate or prevent burdensome activities even when zoning regulation is unavailable.[263] In some cases, neighbors will simply buy out a landowner conducting an unwanted activity. Second, we should expect that neighbors of nonconforming properties object to them *less* than most prospective buyers. In many cases, neighbors bought property with knowledge of the presence of the nonconforming use.[264] Conversely, neighbors whose ownership pre-

260. Joseph L. Sax, *Some Thoughts on the Decline of Private Property*, 58 WASH. L. REV. 481, 494 (1983).

261. *See, e.g.*, Dolan v. City of Tigard, 512 U.S. 374 (1994).

262. *See, e.g.*, EDWARD L. GLAESER, JENNY SCHUETZ AND BRYCE WARD, REGULATION AND THE RISE OF HOUSING PRICES IN GREATER BOSTON (2006), https://www.hks.harvard.edu/sites/default/files/centers/rappaport/files/regulation_housingprices_1.pdf; EDWARD GLAESER, TRIUMPH OF THE CITY: HOW OUR GREATEST INVENTION MAKES US RICHER, SMARTER, GREENER, HEALTHIER, AND HAPPIER (2012); MATTHEW YGLESIAS, THE RENT IS TOO DAMN HIGH: WHAT TO DO ABOUT IT AND WHY IT MATTERS MORE THAN YOU THINK (2012).

263. *See, e.g.*, Black Earth Meat Mkt., LLC v. Vill. of Black Earth, 834 F.3d 841, 844 (7th Cir. 2016) (discussing a case in which local authorities successfully deployed police power ordinances against a non-conforming slaughter-house that had recently drawn the ire of its neighbors through significantly expanded operations).

264. *See, e.g.*, *id.*

exists the non-conformity will be more likely to sell and move if they are bothered by it more than the average person.

V. EXISTING USES AND INSURANCE

The previous section sought to establish that existing use protection is valuable because it preserves the right of property owners to build structures and commence activities with full confidence that their plans will not be disrupted by future changes in zoning laws. This protection, it was argued, is especially valuable because one of the functions of private ownership is to allow people to carry out projects over time. It might be objected, however, that no plans are ever entirely secure and that for most people most of the time, the risks of zoning changes would be relatively small even without existing use protection. Moreover, one might add, these risks might easily be outweighed by the potential benefits of zoning changes. This defense of existing use protection, the objection would continue, is just a long-winded way of expressing skepticism about the utility of zoning regulation. If future zoning regulation has a positive expected value, then it makes little sense to curtail its application simply because things *might* turn out poorly. Existing use protection, the argument concludes, is explained either by irrational focus on downside risk or by the political power of incumbent landowners with nonconforming uses who are able to insist on grandfathering their properties even when this is not in the public interest.

The question of whether to grant special protection to existing uses is one species of a large class of "legal transitions" problems.[265] When laws change, the government can mitigate the effect of these changes by providing "transition relief" for those adversely affected in the form of "grandfathering," delayed enforcement, or compensation.[266] Existing use protection is an example of the first, amortization an example of the second, and eminent domain an example of the third. The legal transitions literature has been centrally focused on tax policy and eminent domain.[267] Existing use protection has received less

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265. *See generally* Kyle D. Logue, *Legal Expectations, Rational Expectations and Legal Progress*, 13 J. CONTEMP. LEGAL ISSUES 211 (2003-04).

266. *See generally id.*

267. *See, e.g.*, Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 509, 517 (1986) [hereinafter Kaplow, *An Economic Analysis*]; Louis Kaplow, *Transition Policy: A Conceptual Framework*, 13 J. CONTEMP. LEGAL ISSUES 161, 202-03 (2003) [hereinafter Kaplow, *Transition Policy*]; *see* DANIEL SHAVIRO, WHEN RULES CHANGE: AN ECONOMIC AND POLITICAL ANALYSIS OF TRANSITION RELIEF AND RETROACTIVITY 36-43 (2000); Logue, *supra* note 265, at 226-27.

attention.[268] The wisdom of providing transition relief to those who relied on the old legal rule depends strongly on the relative value of deterrence and insurance.[269] Deterrence refers not only to the enforcement of the new rule but also to the desirability of encouraging regulated parties to anticipate future regulations and make choices that are efficient in light of their best estimate of the probability of future regulations.[270] One problem with transition relief is that it undermines the incentive to anticipate future regulations. For example, if a factory owner is confident that her factory will not be subject to subsequent pollution regulations because of a "grandfather" clause in the regulation, she will have less incentive to invest in pollution control technology. Insurance refers to the mitigation of the risk of legal change.[271] Like private insurance for natural disasters or for accidents, transition relief insures regulated parties against future regulation by reducing the costs of making choices today that run afoul of these regulations tomorrow. For example, the "takings" clause implicitly insures property owners against the risks of eminent domain by promising compensation if the government decides to exercise its eminent domain powers.[272] A final consideration is that transition policies differ in the incentives that they provide for government policy-makers. For example, compensation as a transition relief policy might deter the government from introducing socially inefficient regulation. Exempting certain parties from regulation changes political dynamics and thus influences which regulations are actually enacted.

The ex ante appeal of transition relief is that it mitigates risk. In this sense, it functions like insurance. A policy of grandfathering existing factories under environmental regulation reduces the regulatory risk associated with manufacturing. Of course, this does not come for free. Insofar as transition relief reduces risks for some parties, it undermines the efficacy of new regulation by, for example, allowing more pollution than would a regulation without a grandfather clause. And so, the efficiency costs of transition relief must be weighed against the risk mitigation value of insurance. Not surprisingly, this analysis often suggests skepticism about transition relief because there are sharp limits to the extent to which the benefits of risk spreading may outweigh

268. One exception is Steven Shavell, *On Optimal Change, Past Behavior, and Grandfathering*, 37 J. LEGAL STUD. 37, 74-76 (2008).
269. Logue, *supra* note 265, at 217-18.
270. *Id.*
271. *Id.* at 217-18.
272. U.S. CONST. amend. V.

the costs of regulatory inefficiencies.[273] Legal theorists critical of the dominant trend have identified a number of factors that militate in favor of transition relief. These include cases in which regulated parties are unlikely to anticipate future changes in regulatory policy,[274] cases in which new regulations are not overwhelmingly likely to be an improvement over the status quo,[275] cases in which parties complying with the old law would face high costs in changing their behavior to comply with the new law and the benefits of complying with the new rather than the old law are incremental.[276] Zoning regulation has *all* of these features.

The value of "insurance"—statutory protection for existing uses that assures property owners that their land use choices will be grandfathered under subsequent zoning regulations—is substantial. As argued above, the value of being able to make land use choices that will be respected in the future is an important part of the connection between property and freedom. The efficiency argument against grandfathering would be more compelling in the case of existing uses if all landowners were well-capitalized corporations with diverse business interests. The interest of public corporations in forming and carrying out plans over time can be reduced to purely financial interests. They are likely to be reasonably sophisticated in evaluating regulatory risk. And most large corporations can usually afford to "self-insure" (i.e., pay the full cost if it comes to that) for the sort of losses at issue here. This is one of the economies of scale enjoyed by large enterprises. Large corporations could, therefore, find it preferable to forgo existing use protection in the name of greater regulatory efficiency. The attitude of individual corporations is likely to depend overwhelmingly on their line of business. Corporate interests likely to be targeted by zoning laws (industrial concerns, real estate developers) are both more likely to favor grandfathering and more likely to take a strong interest in land use policy.

Land use regulations, however, are more likely to affect individual homeowners and small businesses as large corporations.[277] For

273. *See, e.g.*, Shavell, *supra* note 268, at 78 (discussing the skeptical view of grandfathering found in the legal transitions literature); Kaplow, *An Economic Analysis*, *supra* note 267, at 584-87; Michael Graetz, *Legal Transitions: The Case of Retroactivity in Income Tax Revision*, 126 U. PA. L. REV. 47, 68-73, 87 (1977).

274. *See* Logue, *supra* note 265, at 260.

275. *See id.*

276. *See* Shavell, *supra* note 268, at 78.

277. Retail locations selling the products of large corporations are often owned by franchisees. Small business owners in such cases bear much of the location-specific regulatory risk.

individual homeowners and small businesses, land and buildings are likely to be a significant proportion of their net worth. They are less well positioned to absorb significant losses from regulatory change and more likely to be deterred by even relatively small risks of rezoning. They, therefore, may be deterred from purchasing or expanding homes or businesses even when a less risk-sensitive actor would not be. And they are likely to care deeply when their plans for the homes and businesses are disrupted in a way that goes beyond their financial interests.[278] Public corporations do not care about personal autonomy as such, but natural persons, in both their private and professional lives, certainly do.

Individuals and small businesses also vary greatly in their sophistication about regulatory matters. Some homeowners and business owners pay a great deal of attention to local politics and may be positioned to assess regulatory risk. But others do not. Evolutionary dynamics will tend to eliminate large corporations that do not correctly evaluate regulatory risk.[279] But this is not true for individuals.[280] It is not appropriate, therefore, to assume a high degree of legal sophistication even for parties with an incentive to be concerned with future land use regulation. This means that the benefits of giving property owners greater incentive to anticipate future zoning changes may be quite modest in most cases. One virtue of existing use protection is that it lowers the stakes for most parties and makes it easier to run a small business without worrying much about zoning changes. Requiring small businesses to do so will tend to favor large, legally sophisticated commercial organizations and disfavor most small businesses.

Focusing regulatory changes on future, but not present uses, leaves developers highly vulnerable to changes in zoning law because zoning regulations may be changed in anticipation of unwanted developments. However, developers may, as a general matter, be well positioned to bear the risks of a somewhat unpredictable regulatory regime. They are likely to be well-capitalized. As specialists in, among other things, evaluating regulatory risk, they are relatively well-positioned to assess the likelihood that a development project will be foiled by imposition of land use regulations. Abolishing blanket protection for existing uses would tend to make developers more cautious about "racing" to beat imminent zoning changes. But insofar as this is the real problem, it could be

278. This is a part of what Michelman referred to as "demoralization costs" in his classic article on compensation for takings. Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1214 (1967).

279. Logue, *supra* note 265, at 213.

280. *Id.*

addressed by modifying vested rights doctrine without disrupting existing use protection in other contexts. The benefits of cancelling existing use protection for those who purchase properties from developers may be rather modest. Subsequent buyers may not be either well equipped to evaluate regulatory risk or able to self-insure. Unless subsequent buyers are able to accurately gauge regulatory risk, abolishing existing use protection might slightly lower the prices at which developers are able to sell across the board rather than disfavor specifically those projects likely to conflict with future zoning regulations. This would have the effect of discouraging development in general rather than discouraging development that is undesirable in light of future regulatory changes.

Other considerations also weigh in favor of grandfathering existing uses and structures. As Steven Shavell has argued, grandfathering is an attractive approach to legal transitions when choices made in reliance on the prior law reduce the efficiency gains under the new law.[281] What might be an inferior legal rule in the abstract is less unattractive to the extent that people have ordered their affairs so as to comply with it and reordering their affairs to comply with the new law would be expensive.[282] This is especially true when the efficiency gains from the new regulation are modest. Reliance on property law is extensive. Homes are built or modified, businesses opened, investments made, and so on. The web of reliance interests is complex and extends beyond owners and renters of property.[283] For example, employees may choose to work at a particular business because of its convenient location or purchase a home because it is near their place of employment. Even when zoning laws are excessively permissive, people can mitigate their effect in various ways. The presence of a noisy or otherwise disruptive business may influence the design and layout of buildings on nearby lots. People who are less sensitive to the burdensome use may choose to purchase nearby properties in the same way that those who do not mind airplane noise might save money on housing by living near an airport. Structures and uses that would be proscribed by an ideally efficient zoning code may therefore do less harm than might appear at first blush.

The flip side of this observation is that the gains from new zoning laws are often rather modest. The case against grandfathering is

281. *See* Shavell, *supra* note 268, at 68-70.

282. *Id.*

283. Eduardo M. Peñalver, *Land Virtues*, 94 CORNELL L. REV. 821, 830-31 (2009) ("The collective interdependence of individual land uses reinforces their inertial power. Once in place, land uses presuppose and reinforce one another in ways that make it difficult to undo one piece without affecting many others.").

strongest in areas such as product liability and health and safety regulation in which it is desirable to encourage regulated parties to anticipate harms to their customers and employees and take preventative measures before regulators act.[284] Zoning regulation, however, has a much more attenuated connection to health and safety.[285] Insofar as a land use poses the sort of direct hazard to health that would make it analogous to product liability torts, it almost certainly constitutes a nuisance and thus may be regulated even under existing doctrine. Local governments also have broad powers to regulate non-nuisances that pose threats to health or safety outside of the zoning code under their police powers health or safety. In any case, the vast majority of zoning regulation is not meant to deter threats to life or limb.[286]

A careful examination of the purposes of zoning regulation suggests that only some of the aims of zoning law would be served by the elimination of non-conformities. One of the noteworthy features of American zoning law is its sheer scope. As William Fischel remarked, "section 1 of the SZEA delegates to the municipality the power to control virtually every aspect of private development."[287] The objectives of zoning regulation are, not surprisingly, extremely varied. A non-exclusive list of the basic aims includes separation of conflicting land uses, restriction of demand for public services, aesthetic regulation, restriction of unwanted development, and environmental protection.[288] Serkin focuses on separation of conflicting land uses and on aesthetic regulation, which are areas in which the persistency of non-conformities does tend to undermine the purposes of zoning regulation.[289] The effect of existing use protection in other areas is more ambiguous.

VI. IMPLICATIONS FOR TAKINGS LAW

Even if one were to accept Serkin's diagnosis that existing uses are treated with too much deference,[290] his cure might be worse than the disease. Serkin points out that protection of existing uses "put enormous pressure on such amorphous tests such as vested rights, the harm exception for takings liability, and the minimum duration of

284. Logue, *supra* note 265, at 229-30.
285. *See* Jones v. City of Los Angeles, 295 P. 14, 17 (Cal. 1930)
286. *See id.* at 17.
287. FISCHEL, *supra* note 61, at 138.
288. *See, e.g.*, *Zoning and Land Use Planning*, WORLD BANK, https://urban-regeneration.worldbank.org/node/39#:~:text=The%20purpose%20of%20zoning%20is,down%20development%20in%20specific%20areas (last visited Apr. 2, 2021).
289. *See generally* Serkin, *supra* note 6.
290. Serkin, *supra* note 6, at 1228.

amortization provisions"[291] and complains that "[t]hese tests do nothing to advance the clarity of land use doctrine and actually obstruct a more direct inquiry into the character and magnitude of a regulation's effects on property rights."[292] Serkin concludes that existing uses should receive no special statutory or constitutional protection but instead should be subject to the same takings and due process analysis as other land use regulations.[293] In many cases, this analysis would suggest that the existing use should be protected, but in others, it would not.[294]

There is an internal tension in Serkin's position here. He objects to doctrines such as vested rights and minimum amortization periods on the grounds that they are unclear and do not track the interests actually at stake.[295] But his proposed solution is to repeal the existing uses exception to zoning codes and thus expose more properties to land use regulations that will trigger constitutional challenges. Encouraging courts to use takings and substantive due process analysis to scrutinize regulations that attack existing uses, in theory, might allow courts to grapple with the real normative considerations in each case. But, in practice, there is little reason to believe this would result from takings analysis and almost none for substantive due process. It is very doubtful that this change would bring greater order or predictability to land use jurisprudence. Neither federal nor state courts have, to this point, shown much interest in grappling with the nuances of the policy issues raised by zoning cases.

Without statutory protection for existing uses, courts must use constitutional protections for property rights to separate impermissible from impermissible regulations. Assuming that the zoning authority follows the appropriate process to enact new regulation, there are two types of constitutional claims that might be used to attack regulations targeting existing uses: takings claims and substance due process claims. The results might be far from salubrious for either area of law.

Regulatory takings are an intricate and, to almost everyone, unsettling body of law that is notorious for its unclarity.[296] There are two

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291. *Id.* at 1290.
292. *Id.*
293. *Id.*
294. *See id.*
295. *Id.*
296. Bradley C. Karkkainen, *The Police Power Revisited: Phantom Incorporation and the Roots of the Takings "Muddle"*, 90 MINN. L. REV. 826, 827 (2006) ("Regulatory takings law is by most accounts a 'muddle.' "); Holly Doremus, *Takings and Transitions*, 19 J. LAND USE & ENVTL. L. 1, 1 (2003) ("Regulatory takings doctrine is . . . famously incoherent."); *see generally* Jane B. Baron, *Winding Toward the Heart of the Takings Muddle: Kelo, Lingle, and Public Discourse About Private Property*, 34 FORDHAM URB. L.J. 613 (2007); Charles M. Haar & Michael Allan Wolf, *Euclid Lives: The Survival of Progressive Jurisprudence*, 115

categories of *per se* regulatory takings: cases involving physical invasion of the affected property[297] and cases involving deprivation of any economically valuable use of the property.[298] Most cases in which a nonconforming use is terminated will not fall into either category of *per se* taking because the regulation does not involve any physical invasion of property and will typically leave some economically productive use of the land even if one of less value. In such cases, a court must then turn to the *Penn Central* test, which directs it to consider (1) the "economic impact" of the regulation (2) the extent to which it "has interfered with distinct investment-backed expectations," and (3) "the character of the government action."[299] The majority opinion in *Penn Central* suggests that the fact that a regulation terminates an existing use is relevant on at least the second and third prongs of the analysis.[300] Existing uses are typically associated with some degree of investment-backed expectations. And interference with existing uses rather than options for future use might be thought to be relevant to the character of government action, although the extent to which this is the case will depend on how plausible a court finds the considerations adduced above in favour of existing use protection convincing. Even scholars who do not favour especially broad understandings of the takings clause suggest that imposition of transition costs on a small subset of similarly situated parties raise special concerns.[301]

HARV. L. REV. 2158, 2169-70 (2002) ("The cacophony of opinions in *Palazzolo* and *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, the Court's most recent efforts to amplify and apply the regulatory takings approach, comprises a cry for help by a badly divided Court. The Takings Clause has proved to be an unwieldy and potentially devastating tool for balancing private rights and public needs . . . . All that lawyers and judges have to show for their efforts is a body of law that nearly all observers acknowledge is hopelessly confused, with no immediate resolution in sight.") MARGARET JANE RADIN, REINTERPRETING PROPERTY 146 (1993) ("The takings issue is also remarkably intractable . . . . Judicial efforts to develop a coherent takings doctrine have met with consistently telling criticism . . . . The sight of such a pervasive and central field of law in apparent disarray has enticed many able theorists, but their critical commentary has been more convincing than their efforts to reconstruct.").

297. *See, e.g.*, Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

298. *See, e.g.*, Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992).

299. Penn Centr. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978).

300. *Id*. at 136 ("Unlike the governmental acts in *Goldblatt*, *Miller*, *Causby*, *Griggs*, and *Hadacheck*, the New York City law does not interfere in any way with the present uses of the Terminal . . . [T]he law does not interfere with what must be regarded as Penn Central's primary expectation concerning the use of the parcel. More importantly, on this record, we must regard the New York City law as permitting Penn Central not only to profit from the Terminal but also to obtain a 'reasonable return' on its investment.").

301. Doremus, *supra* note 296, at 13 ("Law has always shaped property rights. That is not inherently problematic. What is problematic is a regulatory transition too drastic or abrupt to permit any response, or imposition of the costs of transition on only a subset of similarly situated landowners.").

In practice, however, it is unclear how the fate of non-conforming uses would play out if statutory protections were removed. As a general matter, federal courts are hesitant to weigh in on local zoning issues, seeing this as primarily a state and local matter.[302] Although state courts could develop more aggressive takings jurisprudence than mandated under federal law—some states even have "takings" clauses in their own constitutions—few appear eager to do so.[303] Instead, state courts tend to be very deferential to local government when hearing takings claims.[304] State courts tend to be deferential to the government when applying the *Penn Central* test.[305] In a statistical study of takings cases, James Krier and Stewart Sterk found that "state courts have come close to developing a categorical rule that regulatory actions do not constitute takings unless they are governed by one of the Court's two per se takings rules."[306] Nevertheless, attacks on existing uses are somewhat of an exception to this rule being the one area in which claimants have some hope of success under *Penn Central*.[307] Although this trend emerges from an analysis of a large sample of takings cases, its doctrinal basis is less certain as state courts tend to be less than clear in their analysis when applying *Penn Central*. Krier and Sterk note that "[w]e surely cannot say that state courts roundly ignore the rules, but we do have the impression that they wander off untethered to an unsettling degree."[308]

302. *See e.g.*, Cenergy-Glenmore Wind Farm #1, LLC, v. Town of Glenmore, 769 F.3d 485, 487 (7th Cir. 2014) ("We note at the outset, however, that federal courts, as we have explained time and again, are not zoning boards of appeal. State and local land-use decisions are entitled to great deference when constitutional claims are raised in federal court.") (internal citations omitted) (citing General Auto Serv. Station v. City of Chicago, 526 F.3d 991, 1000 (7th Cir. 2008); Discovery House, Inc. v. Consolidated City of Indianapolis, 319 F.3d 277, 283 (7th Cir. 2003); Centres, Inc. v. Town of Brookfield, 148 F.3d 699, 704 (7th Cir.1998); River Park, Inc. v. City of Highland Park, 23 F.3d 164, 165 (7th Cir. 1994); Polenz v. Parrott, 883 F.2d 551, 558 (7th Cir. 1989)).

303. James E. Krier & Stewart E. Sterk, *An Empirical Study of Implicit Takings*, 58 WM. & MARY L. REV. 35, 93 (2016) ("Regarding the ambitions of state governments to protect private property more than the Court says they must, state courts and legislatures on the whole do not seem particularly interested in moving significantly beyond the constitutional bottom, with just a few exceptions."); FISCHEL, *supra* note 61, at 333 ("The U.S. Supreme Court's constitutional floor for regulatory takings—no physical invasion and some scintilla of economic use—has become in effect the ceiling in the state courts.").

304. Krier & Sterk, *supra* note 303, at 89 ("Our survey demonstrates that state courts, in turn, have been content to respect decisions made by the political branches.").

305. *See id.* at 94 ("When regulation is at issue, state courts, like the Supreme Court, appear content to leave local officials accountable to voters, not to judges, despite the oft-cited concern that land use regulation has the potential to single out victims who may have little clout in the local political process.").

306. *Id.* at 64.

307. *Id.* at 67 ("Successful takings claims almost always involve some interference with an existing use.").

308. *Id.* at 92.

This should not be surprising since state constitutional land use law is no closer to being a model of doctrinal order and perspicuity. As Norman Williams Jr. and John M. Taylor have noted, "A literal-minded reading of the case law will show that, in perhaps nine out of ten cases involving constitutional questions, there is no indication as to which constitutional doctrine was involved."[309] If state court judges do not even make clear what doctrines their land use cases are decided under, asking to craft a nuanced response involving the careful application of the complex *Penn Central* test is asking much.

The likely effect of removing statutory protection for existing uses would be to subject a large new groups of regulations to a legal standard so vague and confusing that leading commentators have remarked that "[i]t would dignify the approach too much to describe it as a multi-factoral test or even a balancing test."[310] It is likely that given the sensitivities around terminating non-conforming uses and the sympathies of at least some number of judges for such claimants,[311] the number of successful claims would not be entirely trivial. Nevertheless, there is significant danger that such a solution would leave us with the worst of both worlds, providing enough litigation risk to deter local governments from making use of their new power to terminate non-conforming uses when this might be appropriate, while failing to provide an adequate remedy for more than a small number of deserving claimants.

In addition to the problems with the substance of regulatory takings claims, there are serious difficulties with the remedies available to the owners of non-conforming properties. It is widely recognized that compensation in terms of fair market value undercompensates those whose property is taken by eminent domain.[312] There are pragmatic reasons to limit compensation in takings cases to market value. Courts are usually poorly positioned to assess super-market subjective valuations of owners, especially when plaintiffs have an incentive to

309. WILLIAMS, JR. & TAYLOR, *supra* note 4, § 4.3.

310. DAVID A. DANA & THOMAS W. MERRILL, PROPERTY: TAKINGS 131 (2002).

311. *See, e.g.*, Bettendorf v. St. Croix Cty., 631 F.3d 421, 435 (7th Cir. 2011) (Hamilton, J., dissenting) ("I do not mean to suggest that local government can *never* change the law to prohibit an existing lawful use without effecting a compensable taking of property. The United States Supreme Court has avoided such a bright line, as have the Wisconsin courts. But apart from the nuisance or noxious use cases, such cases are at best rare.").

312. *See* Lee Anne Fennell, *Taking Eminent Domain Apart*, 2004 MICH. ST. L. REV. 957, 962 ("It is a truism that fair market value – the usual benchmark for 'just compensation' does not compensate landowners completely."). *But see generally* Brian Angelo Lee, *Just Undercompensation: The Idiosyncratic Premium in Eminent Domain*, 113 COLUM. L. REV. 593 (2011) (arguing that fair market value compensation for property taken by eminent domain does not unfairly undercompensate property owners).

overstate their valuations. And some of the damage done by a taking, such an interference with the autonomy of the property owner, may not be readily monetizable even under perfect information. Furthermore, one might worry that high compensation will discourage worthwhile regulations and uses of eminent domain. Given that the doctrine governing compensation for takings is unlikely to change, compelling more property owners to resort to takings claims in the face of new zoning regulations will only compound the under-compensation problem.

Although residential property might be thought to typically involve more consumer surplus than commercial property, the under-compensation problem is particularly acute for commercial property in other respects. Business goodwill is not usually considered property for the purposes of takings analysis.[313] Even when courts find that a regulation constitutes a regulatory taking, compensation is usually calculated in terms of lost property value, not foregone profits.[314] In some cases, the two measures will be roughly equivalent. But where an affected business has a great deal of goodwill, a regulatory taking that disrupts an existing enterprise might result in diminution of profits that are far greater than diminution of property value. The failure of takings jurisprudence to protect goodwill, future profits and other such interests beyond the fair market value of property is one motivation for protection of existing uses. Amortization policies exist in part to allow property owners to realize these sorts of value before they are subject to the new regulatory regime. To the extent that property owners are not able to recover lost profits, even successful takings claims may not provide adequate compensation for their losses. And this, in turn, only

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313. *E.g.* Sawyer v. Commonwealth, 65 N.E. 52, 53 (1902) ("It generally has been assumed, we think, that injury to a business is not an appropriation of property which must be paid for. There are many serious pecuniary injuries which may be inflicted without compensation. It would be impracticable to forbid all laws which might result in such damage, unless they provided a quid pro quo . . . . But a business is less tangible in nature and more uncertain in its vicissitudes than the rights which the Constitution undertakes absolutely to protect. It seems to us, in like manner, that the diminution of its value is a vaguer injury than the taking or appropriation with which the Constitution deals.").

314. Rose Acre Farms, Inc. v. United States, 559 F.3d 1260, 1268 (Fed. Cir. 2009) ("[T]he vast majority of takings jurisprudence examines, under Penn Central's economic impact prong, not lost profits but the lost value of the taken property."); THOMAS J. MICELI & KATHLEEN SEGERSON, COMPENSATION FOR REGULATORY TAKINGS: AN ECONOMIC ANALYSIS WITH APPLICATIONS 15 (1996) ("Most takings cases since Pennsylvania Coal have generally applied some form of Holmes's diminution of value standard."). Although future profits are not compensable under federal law, several states require payment of consequential damages in certain kinds of eminent domain cases. Christopher Serkin, *The Meaning of Value: Assessing Just Compensation for Regulatory Takings*, 99 NW. U. L. REV. 677, 687-88 n.47 (2005).

strengthens the bargaining power of local governments seeking to settle claims for substantially less than a court would award a successful claimant.

Whereas removal of statutory protection for non-conforming uses would introduce a great deal of uncertainty about the scope takings claims that would result for local governments exercising their new authority, the situation with respect to substantive due process claims is more clear. Land use regulations can be invalidated as a matter of substantive due process if they lack "any reasonable justification in the service of a legitimate governmental objective," or are arbitrary.[315] This inquiry tends to be deferential to regulatory authorities.[316] Courts usually uphold a regulation if the government can advance some plausible rationale.[317] This seems to follow from a broader tendency for judges to try to avoid resolving land use regulation disputes, which often might be thought to turn on factual nuances and the particulars of local context.[318] Termination of a non-conforming use is unlikely to be arbitrary by virtue of its non-conformity since the feature that renders a property non-conforming is its violation of the applicable zoning regulation (particular state actions against non-conformities might, of course, turn out arbitrary for any number of reasons idiosyncratic to the case in question). And the implementation of even rather onerous zoning regulations must surely be considered, for better or worse, a legitimate governmental objective nearly one hundred years after *Euclid*.[319] It is unlikely, therefore, that removing categorical protection for existing uses will result in careful weighing of costs and benefits by a court as is Serkin's hope. Current practice suggests that courts hearing substantive due process claims from owners of non-conforming properties will find for the government unless the court views the government's actions as manifestly irrational. The choice, therefore, would not be between protection of existing uses and judicial weighing of costs and benefits, but between statutory protection of existing uses and judicial deference to regulations that appear minimally rational.

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315. Cty. of Sacramento v. Lewis, 523 U.S. 833, 845-46 (1998).

316. *See* Daniel R. Mandelker, *Litigating Land Use Cases in Federal Court: A Substantive Due Process Primer*, 55 REAL PROP. TR. & EST. L.J. 69, 109-21 (2020) [hereinafter Mandelker, *Litigating Land Use*]; FISCHEL, *supra* note 61, at 93 ("As applied to zoning, substantive due process has seldom provided relief for aggrieved property owners or developers, especially after the 1930s, when the Supreme Court adopted a highly deferential view of New Deal legislation.").

317. *See* Mandelker, *Litigating Land Use*, *supra* note 316, at 115-19.

318. *See, e.g.*, Cenergy-Glenmore Wind Farm #1, LLC, v. Town of Glenmore, 769 F.3d 485, 487 (7th Cir. 2014); FISCHEL, *supra* note 61, at 127.

319. Euclid v. Amber Realty Co., 272 U.S. 365 (1926).

Serkin's contention that repealing the exemption for existing uses will result in a more direct judicial inquiry into the character and magnitude of a regulation's effect on property rights suffers from two fundamental problems.[320] The first is that courts approach to substantive due process and, to a less extent, takings claims in the land use context is highly deferential to local government so long as the government avoids *per se* regulatory takings. The second is that the applicable test for regulatory takings is so vague that if courts do not defer to local governments, a great deal of legal uncertainty would result. Although it is theoretically possible that a new raft of land use takings cases would jolt the judiciary into crafting rules for termination of existing uses that provide both practical guidance to property owners and local governments and reach a reasonable result in terms of policy, the more likely outcome would be that takings jurisprudence would muddle on in much the same way it has in the over forty years since *Penn Central*. Even in the unlikely event that legal doctrine settled in just about the right place and greater flexibility for zoning authorities to terminate existing uses in some instances raised the average quality of regulatory policy, it is not clear that these benefits would outweigh the greater legal uncertainty and litigation expenses that would result in having the judicial conduct searching analysis of the policy merits of zoning laws targeting pre-existing uses. The risks are not worth it. Such a step would be exciting for property law experts, but ominous for landowners, taxing for judges and perplexing for local government attorneys and their clients.

VII. CONCLUSION

Statutory protection for existing uses is sound public policy. Although it did not fit the vision of most of the original proponents of comprehensive zoning, it has become an accepted part of zoning practice for good reasons that flow from the nature of zoning law and the normative function of property rights. Vigorous elimination of nonconformities that do not constitute nuisances is justified only on a model of zoning that elevates strict separation of uses over other objectives. As zoning regulation has developed, however, it has become clear that its core function is to guide development rather than to resolve pre-existing land use conflicts. When combined with existing use protection and other police power authority, zoning regulation allows local government to implement land use plans and eliminate the most noxious uses while allowing landowners to make investment and pursue

320. *See generally* Serkin, supra note 6.

long term plans in reliance on the existing zoning rules. In a context in which land use regulations are arguably too onerous in many urban areas,[321] protection of existing uses is a valuable check on fiscal zoning.

Protection for existing uses reflects two underlying commitments. First, private property is valuable in part because it provides individuals with a sphere in which they can exercise exclusive control.[322] Part of the value of this private sphere is the ability to carry out one's plans and projects over time. From this point of view, frustration of an ongoing project is a different sort of harm than elimination of a future option. Protection of existing uses allows property owners to begin new projects with confidence that these projects will not be disrupted by most new land use regulation. Distinguishing between an owner's interest in pursing ongoing projects and her interest in freedom to choose between various options provides a principled reason to prohibit certain future, but not existing, uses of land under some circumstances. Because of this asymmetry, existing use protection may be justified even in cases where it does not maximize property values. It is especially valuable for homeowners and small business owners who may not be sophisticated about regulatory risk and who are not likely to have the ability to "self-insure" against future land use regulations.

By contrast, a zoning regime in which existing uses were not respected would leave landowners uncertain about the future legal status of their activities even if they are careful to acquire land that presently has zoning designation that fits their plans. Landowners would not only lose control over the types of use permitted on their land, they would not be able to rely on the zoning designation of any property acquired to pursue a particular activity. This would leave almost any commercial or industrial project perpetually at the mercy of zoning authorities and substantially undermine the degree to which property ownership protects the freedom of choice of property owners.

The second commitment is a hesitance to use zoning law to resolve land use conflicts between existing legal uses. A land use conflict exists when two nearby landowners lawfully develop their property in a way such that at least one of the uses reduces the value of the other use. There are various possible ways to resolve the conflict. Private bargaining might resolve the conflict. If one use is a nuisance or otherwise violates police power regulations, one of the landowners could sue the other. Or the government could try to eliminate one of the uses as a public

321. *See, e.g.*, Glaeser & Ward, *supra* note 252; Glaeser et al., *supra* note 252, at 329-33; *see generally* YGLESIAS, *supra* note 262.

322. *See generally* LOCKE, *supra* note 215; *see generally* KANT, *supra* note 217; *see generally* HEGEL, *supra* note 217; *see generally* FICHTE, *supra* note 217.

nuisance. Finally, the local government could use land use regulation to prohibit one of the two uses. The protection of existing users reflects a policy of refraining from using zoning law to resolve this sort of conflict and letting the chips fall where they may. Resolution of pre-existing land use conflicts by regulation involves reallocation of rights and wealth between neighbors and disrupts the common law regime that regulates relations between neighbors. Aggressive use of zoning law upsets this equilibrium between neighbors and unsettles the allocation of decisional authority that property rules are meant to fix.

The compromise that emerged from the controversy over zoning laws in the early twentieth century was that zoning regulations would be permitted to significantly impinge on the unfettered discretion of property owners but that pre-existing activities or structures that did not constitute nuisances would generally be permitted to continue. The argument of this Article is that although this was not the original intention of the early proponents of zoning, the political process ended up in the right place. Existing use protection is often viewed as a grubby concession to current property owners necessary to soften political opposition. This attitude is a mistake. Existing use protection instead reflects the adaptation of traditional property rights in land to modern conditions.