



**Regulatory
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The Land Use Labyrinth: Problems of Land Use Regulation and the Permitting Process

State and Local

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Executive Summary

The uncertain impact of regulation is a central concern of business owners. The success of any business – whether new, old, large, or small – is often inextricably tied to the ability to avoid the entanglements of the [regulatory thicket](#). One of the most confusing layers of this regulatory thicket is land use regulation – the laws that govern real property by saying who can do what and where.

The rationale for land use regulation rests on legitimate concerns about the impact of property development on other parcels and other people. But land use law has evolved into a complex system that is often subjective and unpredictable; occasionally, it is almost impossible to navigate. The resulting regulatory uncertainty stifles innovation and leads to harsh (and frequently unintended) economic and social consequences. Our report explores today’s regulatory climate and the land use problems it has caused.

In order to explain the consequences of the land use labyrinth, we begin with a short primer on the basics of zoning and building code law. We then give an account of how and why the permitting process often goes awry. We highlight and discuss in depth some emblematic consequences of regulatory uncertainty, with special attention to the subjective nature of land use regulations and the possibility that improper motives may creep into permit review. We also describe the obstacles to judicial relief in this area that the litigant is likely to encounter.

These barriers create a chilling effect on business development. The time, energy, and money needed to jump through cumbersome regulatory hoops prevents some would-be entrepreneurs from pursuing their dream. It is not unusual for companies, and the whole economy, to experience “regulatory drag.” The ultimate consequences include detrimental effects on productivity, innovation, and economic growth.

We close by providing a number of possible options for reform. Because land use regulation is imposed on a state and local level, there may be no single correct solution to the complex problem of regulatory uncertainty. But many of the problems that we outline in this report can be ameliorated by substantive reforms that liberalize land use regulation. Inherent in all of our suggested policy solutions is the need to remove the unbridled discretion that currently rests in the land use authority.

Introduction

Archimedes famously said, “Give me a place to stand and a lever long enough, and I will move the earth.” While the focus of that boast is clearly the lever, the bigger challenge today might be finding a place to stand. Is the plot zoned for lever-work? What about earth-moving? How many permits are required and from which departments? Do the other planets get a say? How about the moon? And don’t even think about the environmental impact statement.

In the midst of a digital revolution, it can be easy to forget that physical beings need physical spaces in which to work, play, eat, study, and rest – and plug in our devices when their batteries run low.

But not all of those activities are compatible with one another (try taking a nap at a monster truck rally). So someone has to decide who can do what and where.

But these are profoundly difficult issues. These decisions have an enormous effect on economic prosperity, geographic mobility, and the quality of life. And as the process for making land-use decisions grows more complex, it generates one of the most innovation-stifling byproducts known to man: ***regulatory uncertainty***.

Innovation inevitably brings change, and people tend to resist change when it affects the physical space they occupy – hence the familiar acronym NIMBY, meaning “Not in my back yard.” It seems we just can’t help but think the neighborhood we live in became perfect the moment our house was built (any new construction, and it would obviously be too crowded); strip malls with convenient shopping and fun restaurants are fine on the other side of the highway, but an eyesore over here; and what runs down *my* driveway when I wash *my* car is just soapy water, but what runs down *your* driveway when you wash *your* car is pollution.

Of course, there are many legitimate concerns about land use that are neither hypocritical nor frivolous. That is especially true when it comes to commercial activities that threaten to increase noise, traffic, or pollution, or which impose other costs on the owners and users of adjacent properties. As a result, various regulatory systems have evolved over the years, from zoning and permitting to private arrangements under the common law of contracts, such as covenants that “run with the land” to restrict permissible uses indefinitely. But in 21st century America we see far more in the way of government regulation.

As various regulatory systems multiply and interact, it becomes less and less clear just what approvals are necessary before a given property can be put to a particular use, or what standards will be applied in making that decision, and with what level of discretion. The uncertainty this creates can become paralyzing, especially when no one person or agency bears responsibility to ensure that the overall regulatory environment remains sufficiently navigable and predictable. As such, our overarching concern here is that it has become exceedingly difficult for people to make rational decisions about business opportunities in the face of so much ***regulatory uncertainty***.

Here are just a few of the challenges entrepreneurs face in deciding whether to start a new business on a given parcel of land:

- Some permitting bodies require an executed lease before they will even accept an application, with no guarantee that the permit will ever be issued;
- In many jurisdictions there are no fixed deadlines in the permitting process, meaning that an application can sit in limbo indefinitely;
- It is not always possible to ascertain with any certainty the total number of permits and other regulatory hurdles required; and
- It is not always clear who the ultimate decision-makers will be or what standards they will apply, or what the appeal process looks like (if indeed there is one).

What is an entrepreneur to make of this nearly impenetrable [regulatory thicket](#)? What is she to tell her investors, lenders, and suppliers when seeking capital for a business that not only hasn't opened yet, but hasn't even secured a firm piece of ground upon which to stand? Those are fair – indeed, vital – questions for any country that seeks to foster economic growth, prosperity, and innovation. Simply put, there are many aspects of the permitting process that may impede socially desirable commercial investment, and that may leave entrepreneurial dreams withering on the vine.

We proceed first in providing an overview of the permitting process. In Section II, we identify common choke points. We then take a deeper dive into the problems plaguing the permitting process in Section III. We consider what all of this means for entrepreneurialism in Section IV, and address the incentives that are at the root of the problems in the land use permitting process in Section V. We then explain that there are few meaningful legal protections for landowners who feel that they've been mistreated in the permitting process in Section VI. In Section VII, we explore other economic and social consequences of the problems discussed. Finally, we conclude with some thoughts on how to bring greater predictability in land-use regulation in Section VIII.

I. A Brief Overview of the Permitting Process

A. Land Use Regulation

Across the country, small business owners report regulatory uncertainty as a top concern.¹ Established businesses worry that regulatory changes may affect their operations. Especially in an environment where new regulation may be imminent, owners may feel compelled to hold off on plans to hire new employees, expand their operations, or invest capital assets. But nowhere is regulatory uncertainty greater than in the permitting process: permits are typically required to open a new business, to build a new facility, or to move forward with a new development project. Business owners persistently report bewilderment in the face of delays and hurdles in what should be a straightforward process; what is even more vexing is that it is often difficult to say whether a permit will be approved or denied until after the owner had spent a tremendous amount of time, energy, and money in the process.

But unless you've personally slogged through the permitting process, it's easy to assume that the system works – after all, we see new development all the time. What we don't usually see are the added costs that go into new construction that could be avoided if the process were more

¹ Holly Wade, *Small Business Problems & Priorities*, NFIB Research Foundation (Nov. 2015), <https://www.nfib.com/assets/NFIB-Problems-and-Priorities-2016.pdf> (finding that “uncertainty over government actions” ranked as the sixth greatest challenge for small business out of 75 potential issues); Holly Wade, *Small Business Problems & Priorities*, NFIB Research Foundation (Aug. 2012), <https://www.nfib.com/Portals/0/PDF/AllUsers/research/studies/small-business-problems-priorities-2012-nfib.pdf> (finding that “uncertainty over government actions” ranked as a the fourth greatest challenge out of 75 potential issues).

streamlined – because those costs are cooked into our home mortgage or the high cost of renting in many communities. When it comes to commercial construction, those costs must be swallowed initially by the business developer; they are passed on in the form of higher rents for commercial tenants and higher costs for consumers. Furthermore, we do not see the lost potential of what might have been for those business ventures that never got off the ground – like the Sacramento, California brewery that never made it through the permitting gauntlet.²

The general public seems to have a vague sense that there are some problems with land use permitting, and many are under the impression that the system is fixed in favor of deep-pocketed developers who always get what they want.³ They are partially right. As we shall discuss in greater depth, those with deeper pockets tend to have more success in navigating the land use permitting process; however, even the most well-heeled owner will face frustration in getting a project off the ground that requires numerous approvals from various regulatory entities, any one of which might kill the project. In fact, the system often operates to inhibit new development, or to at least make it easy for anyone with an objection to block the project. Of course, ordinary individuals of modest means are the least capable of navigating the permitting process. This may discourage would-be entrepreneurs and snuff out innovative business models before they can debut. The systemic bias towards stasis has costs that are not appreciated – and, consequently, not fully weighed – by the general public.

i. Zoning Laws

Zoning refers to a vast set of regulations that determine where you can build, what you can build, and what activities you can conduct on your property.⁴ For example, the local zoning code will tell you whether you can build a house or a business on your land – and, if so, what kind. It will tell you how tall your building can be, how far away it needs to be from the curb, and even what color your building may be painted. In addition, zoning codes will commonly limit what portion of land you can use for your building and how large a lot must be before it is deemed suitable for development.

Over time, zoning codes have become more comprehensive, complicated, and detailed. Modern zoning codes go far beyond their historic justification of abating nuisances; they now regulate very specific features of individual buildings – such as their width, the share of surface space dedicated to windows on outer walls, the size of balconies, and the distance between entries. Zoning laws are

² That brewery never materialized for the Sacramento community. [The owners gave up and moved to Florida](#) where they opened the Fort Myers Brewing Company. But not all entrepreneurs have the luxury of pulling up stakes and moving to realize their dream. For many, the choice is either to press forward with tremendous uncertainty and cost or to give up. We can only speculate about how many dreams were snuffed out before they ever got off the ground – or what that might mean in terms of lost innovation and opportunity.

³ North Star Research conducted a focus group in Orlando, Florida on January 30, 2018. Participants expressed a general view that the zoning process does not work well in their community. Notably, participants worried about fairness and accountability in the zoning process, saying that getting a good result is typically a result of “who you know.” The general perception was that zoning decisions are driven by developers and that large commercial interests can generally do whatever they want.

⁴ Spencer Gardner, “A History of Zoning in Three Acts – Part I – Strong Towns,” <https://www.strongtowns.org/journal/2017/6/28/a-history-of-zoning-in-three-acts-part-i>

also increasingly used to specify what you can do even after a building is in place: from whether you can run a small business in it to “... [w]hether you can own a chicken to whether you can hang laundry out to dry.”⁵

ii. Building Codes

Building codes are even more technical than zoning rules in their design specifications for new construction, generally with the goal of ensuring public health and safety – though some communities have also incorporated other requirements to promote environmental and energy conservation goals.⁶ But for all their good intentions, building codes have long been criticized for imposing unnecessary, and little appreciated, costs. In the 1960s, three national commissions identified building codes as important factors affecting the efficient production of housing.⁷ But today it is evident that it’s the permitting process itself – as opposed to the substance of the building code – that stands as the primary obstacle for those seeking approval to open a new business, to expand an existing facility, or even to build a modest addition on a house for a home office.⁸ For example, common complaints include lack of information, the confusing nature of the regulatory scheme, the need to make multiple visits to the planning or regulatory departments, the lack of response to questions, and the uncertainties associated with the time and effort necessary to obtain a permit and successfully pass an inspection.⁹ And in some cases different building inspectors will apply the same rules inconsistently, all of which may – understandably – frustrate entrepreneurs who simply want to start and operate a business.

B. Typical Problems in the Permitting Process

Even ordinary homeowners may encounter difficulty in obtaining what should be routine approvals. Something as simple as the erection of a shed (perhaps to be used as storage space for a home

⁵ *Id.*

⁶ Building codes were developed in response to shoddy and unsafe construction and the consequent hazards that threaten human lives. Early use of building codes in the United States date back to the 17th century; they mainly were concerned with reducing fire hazards when wood frames were the main type of construction. James Ely, *THE GAURDIAN OF EVERY OTHER RIGHT*, 18 (3 ed. 2008).

⁷ These include the Advisory Commission on Intergovernmental Relations (ACIR), the National Commission on Urban Problems (the Douglas Commission), and the President's Committee on Urban Housing (the Kaiser Committee).

⁸ For example, in its “Doing Business” reports, which measure the relative impact of business regulations on economic growth, the World Bank dedicates an entire section to the permitting process, noting problems developers face in (1) obtaining all plans and surveys necessary to start the design phase of a project; (2) obtaining and submitting all relevant project-specific documents (for example, building plans, site maps, and certificates of urbanism) to the authorities; (3) hiring external third-party supervisors, expeditors, engineers, or inspectors; (4) obtaining all clearances, licenses, permits, and certificates necessary before a business can open doors in a space; (5) submitting all required notifications for the start and end of construction, including for inspections; and (6) requesting and receiving all necessary inspections. For details, see the methodology section in which the researchers estimate the cost of obtaining necessary permits and approvals for construction. Available at <https://www.doingbusiness.org/en/methodology/dealing-with-construction-permits>

⁹ Goldsmith and Hendrix, *Unclogging the Permit Pipeline*, URBAN POLICY 2018. <https://www.manhattan-institute.org/html/urban-policy-2018-unclogging-permit-pipeline-11509.html>

business) or the construction of an addition for a home office raises minimal safety issues and has little impact on the neighborhood.¹⁰ For these sorts of projects, one might expect a very quick and painless process; all that is necessary is to ensure structural stability and some basic safety standards. But even a simple project may stall at various regulatory chokepoints.

The uninitiated will encounter a bewildering array of regulatory bodies, all of which have competing levels of involvement in the approval process. Many of these bodies employ criteria that range from partially to entirely subjective, and which may be aimed at political priorities – wholly divorced from real safety or neighborhood concerns. Further, these determinations do not necessarily have a fixed timeline. Here is an emblematic list of permits and other approvals needed for a typical project in [Boulder, Colorado](#):

- Demolition Permit – Required to demolish an existing structure, or parts of a structure.
- [Building Permit](#) – Required to build a new home (may require a site plan, [solar shadow analysis](#),¹¹ floor plans, building elevations,¹² structural drawings, a [side yard bulk plane](#),¹³ a [side yard wall articulation](#),¹⁴ foundations plans, sections, a plumbing fixture count form, a soils report, energy code compliance, fees for a new residence, a water management fee, checklist, and inclusionary zoning review).¹⁵
- Revocable/Right of Way Lease – Required for fences, patios, or landscaping encroaching on public right-of-way.
- Electrical Permit – Required to install electrical wiring.

¹⁰ For example, to build a lighted shed greater than 200 square foot in Portland, Oregon, an individual may need a building permit, an electric permit, and a zoning permit when in a historic neighborhood, or if the shed is too close to a right-of-way or property line. Acquiring the building permit is an involved process. To present a completed building application – again, just for a shed – the proponent must present four copies of site plans and architectural plans, and perhaps an erosion control plan, a soil report, a storm water plan and/or a mitigation form; furthermore, compliance with tree preservation standards is required. Multiple regulatory bodies assess these various plans. Planning and Zoning would examine any zoning issues. Site Development considers the erosion and soil issues. Portland’s Bureau of Environmental Services reviews the storm water plan. The process may even involve the Urban Forestry division of Portland’s Parks and Recreation Department, which reviews compliance with Portland’s tree preservation standards. Depending on their review, these departments may require additional permits. For example, if waterflow will be diverted into a storm sewer, then the applicant will need a sewer permit.

¹¹ Solar analysis ascertains the amount of shade that new construction or additions would cast on adjacent properties. Different areas of the city are subject to different requirements.

¹² Building elevations show the location and elevation of the low point within 25 feet of the building, and the uppermost point of the roof in USGS terms. The building elevation plans must also show the [floor area ratio](#) and [side yard wall](#) articulation.

¹³ A side yard bulk plane is designed to ensure that buildings step down towards neighboring properties in order to enhance privacy, preserve views, and allow visual access to the sky.

¹⁴ A side yard wall articulation is designed to reduce the perceived mass of a building by dividing it into smaller components or to decrease the wall height.

¹⁵ The process can become even more exacting if the home would be constructed on a [steep slope](#), or in the [Wildlife-Urban Interface zone](#).

- Elevator Permit – Required to install elevators.
- Energy Conservation Permit– Required to comply with energy efficiency standards.
- [Erosion Control Permit](#) – Required for all construction disturbing one acre or more.
- [Fence Permit](#) – Required for all fence/retaining wall work.
- [Floodplain Permit](#) – Required for all work in designated floodplain areas.
- [Fire Systems Conformance](#) – Required to install alarm systems and hood installations for stoves. A separate electrical permit is also required.
- Landscaping Conformance – Required for compliance with city aesthetic and environmental standards.
- [Mechanical Permit](#) – Required for hookups for refrigerators, AC units, etc.
- [Plumbing Permit/Conformance](#) – Required to install plumbing.
- [Right-of-way](#) – Required for any work in a public right-of-way or anything involving a public easement.
- [Wetland permit](#) – Required for any work in a wetland area.

The process for obtaining these required permits is further complicated by the reality that the decision-makers are often granted substantial discretion in reviewing an application.¹⁶ Many of these required approvals – *e.g.*, permits and approvals for energy compliance, fencing, or landscaping – are governed by considerations that are ***at least partially subjective***. For example, building in a historic district will require a “special permit” from the Landmarks Design Review Committee, which requires consideration of the “[character](#)” of a historic structure.¹⁷

Someone wishing to build a new home in the [Mapleton Hill District](#) must meet this mark: “New construction should not imitate historic buildings, but should be an expression of its own time.” And even outside of specified areas in the overlay, Boulder imposes [historic preservation demolition review](#) from its Planning and Development Services Department in order to take down buildings that are more than 50 years old. Boulder’s preservation review factors in subjective [considerations](#) like “distinction in the development of the community of Boulder,” or whether the scope of the work has a “potentially detrimental effect” on the “potential historic resource.” Boulder also

¹⁶ For example, Portland, Oregon requires “tree permits” for projects that require removal or alteration to “heritage trees.” According to the City, this would be any tree deemed to have “historical association, horticultural value” or some other “special importance to the City.”

¹⁷ The general design guidelines are detailed in an 86-page document here: https://www-static.bouldercolorado.gov/docs/section-t-general-design-guidelines-for-historic-districts-and-individual-landmarks-1-201305201317.pdf?_ga=2.184736233.1397970950.1565795377-1945837103.1565795377

requires that all residential development satisfy its Inclusionary Housing mandates, which require 20 percent of housing to be “permanently affordable.”

And of course, every community will have its own idiosyncratic rules.¹⁸ To open a new business, the zoning code will often require a conditional use permit, which the authorities have tremendous discretion to either grant or deny. The rules can be especially difficult for owners seeking approval to launch a business or to make changes to an existing structure in special historic preservation districts.¹⁹ Or if a contemplated project is deemed impermissible under the general rules, an owner may have to request a variance, for which the decisionmakers have especially broad authority to grant or withhold approval.²⁰ So it is not surprising that the permitting process may at times feel like a high-stakes game of roulette – one where you must continue betting more time, energy, and money as the roulette wheel spins and spins and spins without knowing where the ball will land.

II. Why Is the Permitting Process Such a Gamble?

For established businesses, the headaches that come with navigating the regulatory process are understood as the cost of doing business. A firm seeking optimal results in developing land must invest not only in architects, but also in consultants, market research firms, and lawyers with exorbitant billable-hour rates – not to mention public relations gurus to sell the project to the local community.²¹ And what about the rest of us? What are ordinary mom-and-pop business owners to do when they run into kinks in the permitting process?

One option, as we shall discuss more in Section IV, is the cottage industry of self-styled “permit expeditors” who promise better and faster results, with varying price-points. That fact alone should suggest that something is rotten. But we cannot overemphasize the point that permit applicants often feel compelled to spend money (or a tremendous amount of time and energy) in pursuing required approvals with no assurance of a good outcome.

¹⁸ For example, in one specified district in Portland, Oregon, a building permit applicant must demonstrate a net benefit in “the quality of the view.”

¹⁹ For instance, Nashville, Tennessee has “[redevelopment districts](#)” with the stated aim of reversing “strategic disinvestment and blight.” Any building project in one of these districts requires the approval of a separate housing agency. In order to build, a separate agency must give its approval independent from the regular city government.

²⁰ For example, an applicant may need a variance for anything not in conformance with Nashville, Tennessee’s meticulous plan for community aesthetics, called [NashvilleNext](#). The priorities reflected in NashvilleNext include such things as “protecting existing character,” “managing growth,” and “housing affordability.” And the review process allows for substantial input from community members who contribute their subjective viewpoints on these factors.

²¹ See Daisy Linda Kone, *LAND DEVELOPMENT* (2006), at 11-16 (describing the various costs homebuilders incur even before construction, including the cost of retaining professional services from market research and financial consultants, land use planners, architects, landscape architects, land use attorneys, engineers, and interior designers).

If the aim of the law is to be fair, predictable, and neutral, why is the land use permitting process so very unpredictable? Why does it seem that politics are always involved in the decision-making process? And why is it that consultants, lawyers, expeditors, and public relations matter?

Here we cover just a few factors that make it difficult for individuals and entrepreneurs to make rational choices at the outset when contemplating whether to make a real estate investment or to start a business. Of course, there are innumerable ways for the permitting process to go awry, and it is therefore difficult – and beyond the scope of this paper – to catalog an exhaustive list of all problems that applicants may encounter. Instead, we focus on a few emblematic examples that are especially pernicious, and which contribute to regulatory uncertainty.

A. Subjective, Discretionary Criteria and Improper Motives

A permitting authority is usually charged with considering a handful of questions in evaluating a permit application. The trouble is that in many cases, deciding these questions is often a subjective call. For example, Alexandria, Virginia’s ordinances require conditional use permit applicants to explain their potential impact on the surrounding neighborhood – noise, odor, parking, and so forth.²² Applicants must also supply a map of the site and all other properties within three hundred feet of the site.²³ After meeting these rigorous requirements for a conditional use permit, the city council may still withhold approval.²⁴ If the city council decides, in its discretion, that it requires additional information, it can further delay the final decision.²⁵ The ordinances specify that the city council can consider, among other things:

- whether the glare of vehicular and stationary lights will affect the established character of the neighborhood,
- whether the location and type of signs and the relationship of signs to traffic control is appropriate for the site and whether such signs will have an adverse effect on any adjacent properties; and
- whether the proposed use will be constructed, arranged, and operated so as not to “dominate” the immediate vicinity or to interfere with the development and use of the neighboring property, including “the nature and extent of landscaping and screening on the site.”²⁶

Another example, Los Angeles County’s Department of Regional Planning, provides a set of FAQs that highlight the complexities and subjective considerations involved in conditional use permitting.²⁷ The hearing officer may consider “parking and access, landscaping, building size and

²² Alexandria, Va., Ordinances art. XI, div. B, §§ 11-503(A)(4)(a)-(b), (e) (2019).

²³ *Id.* § 11-503(A)(2).

²⁴ *Id.* § 11-503(E).

²⁵ *Id.*

²⁶ *Id.* §§ 11-504(B)(2), (4), (11)(b).

²⁷ Conditional Use Permit (CUP) FAQ, Los Angeles County Department of Regional Planning (Feb. 25, 2019), <http://planning.lacounty.gov/faq/cup>.

placement, architectural style, signage, hours of operation, *or other conditions as deemed necessary.*”²⁸ Applications are not assigned to one case planner; instead, candidates must contact the “Planner of the Day” to get an update on their application’s status.²⁹ This further complicates the process and makes the impact of subjectivity more profound.

Additionally, the zoning code might also allow approval for a conditional use permit only if the proposed development or commercial activity is deemed consistent with the “character” of the surrounding neighborhood. Without further direction, the authority might be free to deny a permit application for any conceivable reason as long as it can articulate some concern – whether vague, speculative, or tenuous – about potential impacts on already established businesses, community aesthetics, home values, public morals, or other purported community interests.³⁰

In many cases the zoning code will gesture at standards by spelling out more specifically the permissible grounds on which a permit may be denied.³¹ For example, the charge to consider the impact on the “character” of the local community might be cabined by more specific mandates to consider the impact on local traffic patterns, and to determine whether permit approval would result in excessive noise or some other nuisance to neighboring properties within some defined parameter (*e.g.*, 1,500 feet). But in practice the permitting authority will often consider other objections from vocal opponents and will yield to the prevailing political winds.

Although the authority may be prohibited from officially acknowledging that a permit denial was influenced by extraneous (*i.e.*, politically motivated) considerations, the reality is that the authority usually retains enough discretion to couch its decision on grounds that are difficult to challenge legally.³² Courts are highly reluctant to interfere in local land use decisions; they will uphold a permit denial if there is any way to justify it. To make matters worse, some courts hold that they will not even entertain an argument that a permitting authority had improper motives in denying a permit application. In fact, the federal courts often apply this rule to immunize permitting authorities from serious scrutiny.³³

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Hubbard Broad., Inc. v. City of Afton*, 323 N.W.2d 757, 763 (Minn. 1982) (holding that a denial was “legally sufficient” because there was evidentiary support and the decision “was within the bounds of the Council’s informed discretion in interpreting the plan.”).

³¹ *E.g.*, Conditional Use Permit Application, White Bear Township, <http://www.ci.white-bear-township.mn.us/DocumentCenter/View/66/Conditional-Use-Permit-Application-PDF> (indicating that the authority will deny a permit application for any one of nine reasons).

³² The typical zoning code preserves discretion for authorities to withhold permit approvals for any number of facially legitimate reasons – whether citing concerns over impacts on the environment, community aesthetics, traffic patterns, public parking, public infrastructure, affordable housing, etc. See Note, *Administrative Discretion in Zoning*, 82 HARV. L. REV. 668, 671 (1969); Ashira Pelman Ostrow, *Judicial Review of Local Land Use Decisions: Lessons from RLUIPA*, 31 HARV. J.L. & PUB. POL’Y, 717, 734-35 (2008).

³³ Many courts hold that a landowner must demonstrate an entitlement to engage in a specified use under the governing regulatory regime in order to even invoke due process protections. See *Macone v. Town of Wakefield*, 277 F.3d 1, 9 (1st Cir. 2002); *Gardner v. City of Balt. Mayor & City Council*, 969 F.2d 63, 68-69 (4th Cir. 1992); *Silver v. Franklin Twp., Bd. of Zoning Appeals*, 966 F.2d 1031, 1036 (6th Cir. 1992); *Bituminous Materials Inc. v.*

Stahl York Ave. Co. v. City of New York, decided by the U.S. Court of Appeals for the Second Circuit, provides a good example of the frustrating permitting decisions that can be perpetuated when courts hold that, so long as authorities are assigned some legal discretion, they may deny permits for any reason they like without violating due process.³⁴ In that case an owner sought to build modern apartment buildings to replace two architecturally insignificant tenement buildings that were uninhabitable. This was a project that would only serve to ameliorate New York City’s housing shortage.³⁵ In fact, the owner intended to “dedicate a large number of units . . . to affordable housing.”³⁶ But the buildings were subject to New York City’s historical preservation restrictions, which generally prohibited redevelopment.

New York’s historic preservation law only allowed for redevelopment under a “hardship exception.” To qualify, the owner would have to prove that he was incapable of earning a reasonable rate of return with the building in its existing condition. Accordingly, in reviewing the hardship application, the City’s Preservation Commission was required to consider only the question of whether the property, in its current condition, could generate sufficient cash flow. On that issue the owner had made a strong case for a “hardship exception”; the units were too small and could not accommodate modern amenities, appliances, and fixtures.³⁷ Moreover, “[t]he building[s] had obsolete electrical, mechanical and ventilation systems – deficiencies made worse by age and decay – and [which were] not handicap accessible.”³⁸



Yet at the hearing the Commission heard testimony from many residents voicing concerns that were wholly unrelated to historic preservation.³⁹ The Commission appeared poised from the outset to deny the owner’s “hardship exception” application. And that is precisely what happened.

Rice Cnty., Minn., 126 F.3d 1068, 1070 (8th Cir. 1997); *Hyde Park Co. v. Santa Fe City Council*, 226 F.3d 1207, 1210 (10th Cir. 2000); *Spence v. Zimmerman*, 873 F.2d 256, 258 (11th Cir. 1989).

³⁴ *Stahl York Co., LLC v. City of New York*, 841 F. App’x 68, 70-71 (2d Cir. 2016).

³⁵ The two buildings were largely uninhabitable because the units were too small even to accommodate a queen bed and could not accommodate modern amenities or fixtures. *Stahl York Co., LLC v. City of New York*, Cert. Pet., 2, 4-5, Sup. Ct. No. 15-1467 (2016).

³⁶ *Id.* at 8.

³⁷ *Id.* at 2, 4-5.

³⁸ *Id.* at 5.

³⁹ “The hardship review process... was steamrolled by local special interest groups motivated by an anti-development and ‘not-in-my-backyard’ animus. These groups expressed opposition to any development, based primarily on hostility to Stahl and on ordinary zoning concerns outside the LCP’s purview. Critically, during the

The owner then sought to contest this permit denial in court. He argued that the process had been hijacked by political opponents, and that the Commission had been influenced by concerns over parking and other matters that the Commission was prohibited from considering – none of which had anything to do with historic preservation. Nonetheless, because the Commission had a degree of discretion in determining what constituted a reasonable rate of return, the courts held that was enough to defeat any potential legal challenge.⁴⁰

Remarkably, the Commission designated these buildings as historical only *after* the company began initial steps toward obtaining required permits. Previously, the Commission had declined to designate the property as historical in order to encourage redevelopment, while designating other buildings in the area as subject to historic preservation restrictions.⁴¹ Yet when political opposition became apparent, the Commission reversed its prior findings.⁴² The *Stahl* case thus illustrates the problem of vesting broad discretion in a land use authority, and the attendant risk that such a regime may empower local government to make decisions inhibiting beneficial uses of private property.

Stahl is but one example of the federal courts turning a blind eye to this sort of conduct. Under this line of cases, local authorities may deny permit approvals with impunity for any capricious reason they might like – or without any reason at all. Public officials might deny a permit simply because they dislike the applicant, or to advance their own parochial pecuniary interests, or for blatantly nepotistic or protectionist reasons, or on other grounds that would shock the average American. For example, in *EJS Properties, LLC v. City of Toledo*, the Sixth Circuit refused to consider a due process challenge where a permit was allegedly denied because the applicant had refused “to donate \$100,000 to a local retirement fund.”⁴³

Empirical research further underscores the perverse incentives at work here, and the deleterious effect that unchecked discretion has on local communities. In jurisdictions where courts are at least willing to entertain an argument that a permit was denied for improper reasons (notwithstanding some degree of legitimate discretion), we see significantly lower rates of historical preservation designations.⁴⁴ For example, the data shows that only 4.4 percent of lots in Philadelphia are

proceedings, the LCP revealed that it had prejudged Stahl’s application and had every intention of denying it regardless of what the evidence showed.” *Id.* at 11.

⁴⁰ *Stahl York Co., LLC v. City of New York*, 841 F. App’x 68, 70-71 (2d Cir. 2016).

⁴¹ In 1990 the Commission subjected much of the surrounding area to historic preservation restrictions, but specifically carved out these two buildings because “it was important to allow for ... development in the future.” *Id.* at 17. Moreover, the Commission’s decision in 1990 recognized that there were historical and architectural differences between the surrounding buildings that had been designated as historical and the Stahl company’s buildings that the Commission thought worthy of redevelopment. *Id.*

⁴² Much of the opposition came from local residents who were concerned that contemplated changes might block their views. “The hearing was dominated by these special interests, which focused on ordinary zoning concerns like neighborhood density, availability of parking, traffic patterns and access to air and light – even though the LCP is legally barred from considering these factors.” *Id.* at 8-9.

⁴³ 698 F.3d 845 (6th Cir. 2012).

⁴⁴ *Stahl York Co., LLC v. City of New York*, Amici Br. of Cato Inst. And Nat. Fed. of Ind. Bus., 13-19, Sup. Ct. No. 15-1467 (2016) (using data from a 2014 study by the National Trust for Historic Preservation and Urban Land Institute); see also Ingrid Gould Ellen *et al.*, FIFTY YEARS OF HISTORIC PRESERVATION IN NEW YORK CITY (2016), Furman Center, 22, 25-26.

designated as historic, despite the fact that nearly 70 percent were built before 1945.⁴⁵ By contrast, in jurisdictions that assume the validity of a permit denial, comparable cities tend to designate larger swaths of the community as subject to preservation restrictions. For example, in Baltimore (where a little more than 70 percent of the buildings were built before 1945) one-third of the city is subject to historical preservation restrictions.

When dealing with overregulation, there are (as ever) undesirable consequences. Experts have warned that “expansive historic districts undercut zoning and significantly limit development potential by eliminating the potential use as-of-right zoning height and density, by preventing demolition for new construction, and by using the process to prevent construction that is not ‘contextual.’”⁴⁶ Not only do these restrictions impede development efforts, but they also have “a significant negative impact on the amount of new housing construction.”⁴⁷ Of course, these sort of restrictions are remarkably useful if your goal is to inject uncertainty into the permitting process.

B. Exactions

Broad discretion also enables the authorities to hold permit applications in perpetual limbo as the state engages in a one-sided bargaining process seeking valuable concessions from the applicant.⁴⁸ Specifically, the permitting authority may seek to leverage its power to deny a permit application so as to force the applicant into accepting costly permitting conditions. For example, a city might condition approval of a building permit on a requirement that the owner cover the costs of a separate public project, or pay a fee into a public fund.

The U.S. Supreme Court has held that conditions imposed on an approved permit must bear a “nexus” and “rough proportionality” to the proposed project in order to withstand constitutional scrutiny.⁴⁹ In other words, a condition requiring an applicant to give up something of value will be deemed extortionate unless it is reasonably necessary to mitigate anticipated public impacts. For example, in *Koontz v. St. Johns River Water Management District*, a state agency in Florida imposed an unconstitutional condition on a permit when it required the owner to pay money to improve public property that was completely unrelated to his plans to build a gas station.⁵⁰

This constitutional standard makes sense because it allows the government to address legitimate public concerns through conditions imposed on an approved permit, but prevents the authorities

⁴⁵ Likewise, a mere .4-.5 percent of lots are designated as historical in Chicago, where 63 percent of the city was built before 1945. *Id.* at 18.

⁴⁶ Real Estate Board of New York, *AN ANALYSIS OF LANDMARKED PROPERTIES IN MANHATTAN* (2013).

⁴⁷ Vicki Been *et al.*, *Preserving History or Hindering Growth?: The Heterogeneous Effect of Historic Districts on Local Housing Markets in New York City*, 22 (National Bureau of Economic Research, Working Paper No. 20446) (Sept. 2014).

⁴⁸ Richard Epstein, *The Harms and Benefits of Nollan and Dolan*, 15 N. ILL. U. L. REV. 479, 483 (1995) (analogizing the government’s power of refusal to that of a dockmaster who might abuse his or her bargaining power, if allowed, to take advantage of a crew’s “abject necessity,” by denying a vessel the right to port during a storm, unless the crew is willing to surrender all they own).

⁴⁹ *Nollan v. California Coastal Commn.*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

⁵⁰ 570 U.S. 595 (2013).

from holding the permit application hostage.⁵¹ Nonetheless, many localities continue to impose controversial exaction requirements, demanding permit applicants pay for pet projects as a condition of approval even where there is no obvious connection to their development plans, or where the fee charged bears little relation to what is actually necessary to mitigate anticipated impacts.⁵² In many cases the government has little doubt that an applicant is more likely to pay up than to challenge the contested condition in court both because the cost of a legal battle is great and because the applicant just wants to get approval to move on with her plans. What is more, in many jurisdictions the government is emboldened to impose extortionate conditions that do nothing to address public concerns with a private project because some courts hold that if a condition is required by a statute or ordinance, the permitting authority need not demonstrate a “nexus” or “rough proportionality” for permitting conditions.⁵³

In many cases, exactions are imposed on an *ad hoc* basis, which means it’s essentially impossible for an applicant to know what to expect at the outset of the permitting process.⁵⁴ But even where an exaction is required by statute or ordinance, it still may be difficult to know what to expect.⁵⁵ Just as with other aspects of land use law, the permitting authority may retain some degree of discretion in deciding just how large a fee to charge in order to mitigate the public harms caused by a project, or whether the project is even subject to such mitigation fees.

Even where required mitigation fees are dictated by a pre-determined formula, it may be difficult for a permit applicant to determine what requirements it will likely face at the outset; the calculation is usually predicated upon variables that may change if the permitting authority should insist upon project redesigns. This goes back to the central problem: the tremendous discretion the land use authority may assert to grant or deny an application. The greater the latitude to withhold approval and to move the goal posts, the more difficult it is for the permit applicant to navigate the system – much less to make rational calculations about the ultimate cost of moving forward with a project.

C. Inconsistent Permitting Requirements

Ever-changing permitting requirements may also arise when multiple agencies have concurrent jurisdiction over the same permit, but adopt different criteria to issue that permit. Sometimes such confusion develops when various *vertical* layers of regulations are created by successively larger forms of government: first local, then state, then federal agencies. Other times, contradictory permitting requirements arise from multiple *horizontal* layers of regulations, such as when one level of

⁵¹ *Id.* at 604-06.

⁵² *Koontz v. St. Johns River Water Mgmt. Dist.*, Amicus Br. of Inst. for Justice, Sup. Ct. No. 11-1447 (2012).

⁵³ See Luke A. Wake and Jarod M. Bona, *Legislative Exactions After Koontz v. St. Johns River Management District*, 27 GEO. INT’L ENVTL. L. REV. 539, 555-59 (2015).

⁵⁴ See *Ehrlich v. City of Culver City*, 12 Cal. 4th 854, 899-900, 911 (1996) (concluding that “when the fee is ad hoc, enacted at the time the development application was approved, there is a greater likelihood that it is motivated by the desire to extract the maximum revenue from the property owner seeking the development permit, rather than on a legislative policy of mitigating the public impacts of development or of otherwise reasonably distributing the burdens of achieving legitimate government objectives.”).

⁵⁵ See *California Bldg. Indus. Assn. v. City of San Jose*, 61 Cal. 4th 435, 351 P.3d 974 (2015) (holding that legislatively imposed conditions were subject only to highly deferential review).

government splits authority over one permit to discrete agencies. Under either regime, such inconsistencies create costly delays for business owners. Indeed, not only must applicants wait for each decision and pay sizable fees to every authority, but they may also be forced to enlist professional assistance to help them navigate complex regulatory schemes. This is especially true when authorities require redesign after redesign, as is common when bureaucrats enjoy significant discretion to disagree with one another.

For example, in Washington, D.C., securing a building permit often requires five months or more. Filing an online building permit with the Department of Consumer and Regulatory Affairs (DCRA) generally starts the process. From there, applications may have to slog through multiple rounds of review by all relevant agencies before the DCRA issues the final permit.⁵⁶ According to DCRA, 57 percent of building permits require reviews from more than one agency.⁵⁷ Multiple agencies are involved for everything from simple home additions to new-builds. To make matters more labor- and time-intensive, there is no central tracking system to consolidate each agency's decision. Even if all goes smoothly during the first round of reviews, any relevant agency may require a project to be re-reviewed from the beginning, which often happens when projects undergo design changes or alterations that an agency does not like.⁵⁸

Contradictory permitting requirements are not only inefficient, but also unjust; they punish rule-abiding individuals who lack the sophistication necessary to fight bureaucracy (to state the obvious, many permit applicants do not have ready access to legal counsel). In particular, the innumerable complaints brought against the California Coastal Commission (CCC) demonstrate how frustrating conflicting agency regulations can be. California's coast is managed by myriad state and local government entities, and coastal permits are often reviewed by organizations from each tier. Furthermore, the CCC has broad discretion to overrule decisions made by lesser agencies throughout the permitting process. As a result, the already confusing coastal permitting process is "rendered more recondite by the involvement of the [CCC's] rules and procedures, effectively overlaying the enigmatic with the abstruse."⁵⁹

What is more, the CCC often exerts its authority over "the smallest details imaginable, like what color you paint your houses, what kind of light bulbs you can use in certain places."⁶⁰

Understandably, such discretion becomes especially problematic when applicants are given competing instructions by their local authority and the CCC. For example, the City of Laguna Beach's definition of "bluff edge" and "major remodel" are different from those adopted by the

⁵⁶ Elias Pace, *The Washington DC Building Permit Process: A Closer Look*, <https://www.mgac.com/blog/washington-dc-building-permitting-process-closer-look/>

⁵⁷ *Id.*

⁵⁸ *Id.* ("According to DCRA, 53% of plans submitted in 2016 required two or more reviews.")

⁵⁹ *Fudge v. City of Laguna Beach*, 32 Cal. App. 5th 193, 196, 243 Cal. Rptr. 3d 547, 549 (Ct. App. 2019), *as modified on denial of reh'g* (Mar. 14, 2019), *review denied* (May 15, 2019).

⁶⁰ Jennifer Steinhauer, *In California, Coastal Commission Wields Vast Power*, NEW YORK TIMES (Feb. 23, 2008), <https://www.nytimes.com/2008/02/23/us/23clemente.html>

CCC.⁶¹ As a result, “[t]here have been 19 appeals filed on city approvals that involve these definition conflicts.”⁶² Even when legal claims are not brought to court, however, working through the diverging standards often costs developers more than six months in delays alone.⁶³ Frustrated Californians take notice: “The [CCC] staff is one of the most difficult bureaucracies to work with, I believe, in the entire United States,” one California real estate attorney said. “They put severe limitation on property owners’ right to use their property.”⁶⁴

Francis and Nina Bottini’s arduous ordeal with just one level of local government demonstrates just how severe permitting restrictions can be. Even after complying with every costly regulation, the Bottinis’ dream of constructing a single-family, beachfront home was thwarted by the changing whims of their local government.⁶⁵

The Bottinis’ frustrating experience began in 2009, when the couple applied to the San Diego, California government for a coastal development permit (CDP).⁶⁶ The couple was well aware of the fact that their construction plan was potentially subject to approval by multiple agencies.⁶⁷ First, because their prospective home was near the beach, Mr. and Mrs. Bottini asked the city to determine whether their construction project was regulated by the California Environmental Quality Act (CEQA).⁶⁸ Second, because an old, abandoned cottage was located on their property, the Bottinis submitted their building plans to the San Diego Historic Resources Board to ensure that it could be demolished.⁶⁹ In a sincere effort to comply with every regulation, the Bottinis spoke with multiple agencies to make sure that their project complied with the law. After spending many dollars and hours to begin building their home, the City finally made the following determinations: (1) because the cottage had gone through so many changes, the cottage was not a historical site, (2) because the cottage was uninhabitable, it could thus be demolished, and (3) because the Bottinis were building a single-family home, their construction plans were categorically exempt from the California Environmental Quality Act.⁷⁰ Relying on the validity of these formal determinations, the Bottinis demolished the cottage.⁷¹

⁶¹ See CAL. CODE REGS. tit. 14, § 13577 (2019). *But see* LAGUNA BEACH, CA., CODE tit. 25, ch. 53, § 25.53.022 (2011).

⁶² Ann Christoph, *Village Matters*, INDY (Jun. 20, 2019), <https://www.lagunabeachindy.com/village-matters-134/> (last visited Jun. 27, 2019).

⁶³ *Id.*

⁶⁴ Adam Nagourney, *Californians Fight Over Whether Coast Should Be Rugged or Refined*, NEW YORK TIMES (Feb. 8, 2016), <https://www.nytimes.com/2016/02/09/us/california-coastal-commission.html>

⁶⁵ Arthur Coon, *California Supreme Court Grants Review Of Regulatory Taking Issues In San Diego Single Family Residence CEQA Case; Merits Briefs To Be Filed Soon*, MILLER STARR REGALIA (Feb. 7, 2019), <https://www.ceqadevelopments.com/2019/02/07/california-supreme-court-grants-review-of-regulatory-taking-issues-in-san-diego-single-family-residence-ceqa-case-merits-briefs-to-be-filed-soon/>

⁶⁶ *Bottini v. City of San Diego*, 27 Cal. App. 5th 281, 290, 238 Cal. Rptr. 3d 260, 267 (2018), *review dismissed*, *cause remanded*, 438 P.3d 238 (Cal. 2019).

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ CAL. CODE REGS. tit. 14, § 15303 (2019) (stating that single-family residences are categorically excepted from CEQA).

⁷¹ *Bottini*, 27 Cal. App. 5th at 290, 238 Cal. Rptr. at 267.

Suddenly, however, and “*after* the cottage’s demolition,” the city council pivoted from its original position: “[it] declared the cottage ‘historic,’ [and] concluded that the cottage’s demolition must be considered part of the Bottinis’ project for purposes of CEQA.”⁷² Even after the Bottinis had meticulously abided by every regulation, the government not only disregarded the fact that single-family homes are categorically exempt from CEQA, but also punished the Bottinis for following *its own* instructions. As a result, the Bottinis’ project was left in limbo.

Another example comes from Ohio, where bars may only be opened after receipt of a D-6 permit. The issuance of a D-6 permit, which allows the sale of alcohol “[b]etween the hours of ten a.m. and midnight on Sunday,”⁷³ is an unpredictable process. Ohio law grants localities the power, if they choose to use it, “to decide on alcohol sales by a public referendum.”⁷⁴ This sometimes leads to confusion as to what sort of approval is and is not required. One pub in particular, “Inside the Five,” was granted a D-6 permit in November 2018, only to later discover that the State of Ohio had granted the permit “without realizing the outstanding law for that precinct.”⁷⁵ Thus, not only was Inside the Five without a permit, but the pub had to start the permitting process all over again – this time by gathering signatures and launching a campaign to convince the precinct to finally give it a D-6 license.⁷⁶ Although 91 percent of the precinct eventually approved of the license, permitting delays are costly for small businesses, especially when the authorities themselves have difficulties navigating the layered permitting requirements.⁷⁷

D. Special Challenges for Small Business

The requirement to purchase or lease a location before applying for a permit imposes enormous costs on new businesses, but this appears to be standard practice throughout the country. In fact, the near-universal first step in obtaining a business license often is getting a building permit, a certificate of use, a fire code certificate, or another similar credential. But once an owner purchases or leases a commercial property, there is no guarantee that the business license will be issued. Thus, instead of encouraging entrepreneurship, licensing requirements can actually discourage small businesses. For some entrepreneurs the reward is worth the struggle, but the significant cost and delay is still felt. Los Angeles city council candidate Navraj Singh, for example, waited almost three years for his permit to open a restaurant. Bewildered by Los Angeles’s “unfriendly business environment,” his experience prompted him to run for election to the city council.⁷⁸

⁷² *Id.* (alteration in original).

⁷³ OHIO REV. CODE ANN. § 4303.182 (West 2016).

⁷⁴ NABCA RESEARCH, WET AND DRY COUNTIES: CONTROL AND LICENSE STATES 12 (2014),

<https://www.nabca.org/assets/Docs/Research/December%202014%20WetDry%20Counties.pdf>

⁷⁵ Briana Malaska, *Local Options on Lucas County Ballot Will Determine Sunday Alcohol Sales*, NBC 24 NEWS

(Nov. 2, 2018), <https://nbc24.com/news/local/issue-23-could-mean-no-sunday-alcohol-sales-for-one-sylvania-bar>

⁷⁶ *Id.*

⁷⁷ *Regarding the Issue of Sunday Liquor Sales: Before the Ohio H. Commerce & Labor Comm.* (Ohio 2019) (testimony of Lindsey Stroud, State Gov’t Relations Manager, The Heartland Institute).

⁷⁸ *Id.*

Some ordinances burden new business owners by asking for a great amount of detail about their proposed sites. Zoning requirements focused on particular types of businesses might go beyond just requiring the business owners to supply basic information about a proposed site's location. In St. Louis, Missouri, for example, permits for arcades require the business owner to supply a plat map, the proposed location of each arcade machine, and the permanent fixtures of the facility, like doors, windows, lights, entrances, and exits.⁷⁹ Permits for billiard rooms also require an exact layout of the pool tables within the proposed location.⁸⁰ These burdensome requirements mandate that the applicant be familiar with both the surrounding community and the site's interior, which seem to extend beyond the normal rationale for restricting potential nuisances.

The experience of Ricardo and Pamela Figueroa illustrates this principle. The couple wanted to provide “a reliable breakfast spot in a neighborhood central to Puerto Rico’s tourism industry” by opening a waffle shop.⁸¹ But San Juan’s convoluted permitting requirements made achieving their dream nearly impossible. For months, the city’s vast bureaucracy demanded compliance with complex and contradictory regulations, which dramatically escalated the couple’s costs to start their business.⁸² Pamela first tried to get a permit online and spent hours uploading all her business information to the city’s database, just to find that the database was not functional.⁸³ She then went to apply for a permit in person, but encountered even more roadblocks. In one instance, a city bureaucrat told Pamela to supply a signed document from another agency, but the agency no longer existed.⁸⁴ These constantly changing requirements imposed significant delays; it took months to approve documents and answer simple questions.

Perhaps most troubling is the fact that San Juan’s permitting requirements forced the Figueras to make improvements to their shop *without electricity*. “Literally, we had to do it in the dark. We used a car battery with an inverter and hooked up a little light, so we could see while we were laying down the floor.”⁸⁵ The city told them that they would need a business permit to have access to the power grid, but they could not get the permit until they were inspected. But they could not be inspected until they completed construction and repairs. All told, the couple spent eight months and thousands of dollars on licensing and approvals, in addition to the eight months of rent they paid during this period while their paperwork was stuck in bureaucratic purgatory.⁸⁶

Puerto Rico’s system, like others nationwide, forces business owners to gamble on whether the local government will approve a business on a specific site. Even uses that would otherwise seem to comply with existing zoning codes are not always a safe bet. For instance, a business in Fall River, Texas was forced to apply for a variance when it wanted to use its property to store cars. The

⁷⁹ St. Louis, Mo., Ordinances ch. 8.16.040 (2018).

⁸⁰ St. Louis, Mo., Ordinances ch. 8.26.040 (2018).

⁸¹ Scott Beyer, *Puerto Rico’s Business Climate Problem*, FORBES (May 10, 2016),

<https://www.forbes.com/sites/scottbeyer/2016/05/10/puerto-ricos-business-climate-problem/#1ddf90726896>

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

property's zoning allowed use as a parking lot. The business proposed, reasonably enough, to park cars at the lot that it would then sell online. The site would not be a car dealership. Customers would not be coming and going from the property. Nevertheless, the business was forced to appeal to the Zoning Board of Appeals just to park cars on its property. The Board denied the variance request by a vote of four to one.⁸⁷ In other cases, sites that are zoned for restaurants may not be suitable for use as popular "fast casual" restaurants, which a local government might instead classify as "fast food" restaurants and therefore subject to different zoning requirements.⁸⁸

Larger businesses have a much easier time dealing with complex permitting requirements. For example, Massachusetts recently legalized the use of recreational marijuana. The state wanted to encourage applicants from poorer neighborhoods; it therefore created a category of "economic empowerment" applicants, who would be given priority over regular applicants.⁸⁹ These economic empowerment applicants have diminished social and economic capital, and the initiative was designed to give them a head start on licensing over the more well-funded regular applications. Despite this stated intention, the application process was so burdensome – requiring, among other things, an already-rented location, a complete business plan, a diversity plan, a community impact statement, a community outreach meeting, and host community agreements – that only three empowerment applicants completed the application. In contrast, fifty-seven medical dispensaries and regular applicants finished the application and made it to review.⁹⁰ As one economic empowerment applicant put it, "It just feels like the process was kind of set up to make it easier for the well-resourced individuals to get right on through."⁹¹

E. Procedural Merry-Go-Round

One of the primary reasons that the permitting process can prove so long and arduous is that permitting officials may threaten denial, or reject specific proposals and ask for new ones, so as to compel an owner to scale back his or her plans time and again. This is yet another consequence of vesting so much discretion in the hands of the permitting authority: there is always the potential for an authority to, in effect, deny authorization to begin a project indefinitely without ever giving a definitive answer on a permit application. Indeed, repeated rejections of multiple proposals often occurs where permitting authorities have decided they simply don't want to see new development.

⁸⁷ Peter Jasinski, *Fall River Zoning Board Denies Variance for Auto Auction Site at Weaver's Cove*, THE HERALD TIMES (Jan. 18, 2019), <https://www.heraldnews.com/news/20190118/fall-river-zoning-board-denies-variance-for-auto-auction-site-at-weavers-cove>

⁸⁸ Scott Beyer, *Washington, DC's Zoning Regulations Target 'Fast Casual' Restaurants*, FORBES (Aug. 16, 2016), <https://www.forbes.com/sites/scottbeyer/2016/08/17/washington-dcs-zoning-regulations-target-fast-casual-restaurants/#386536b51372>

⁸⁹ Allie Howell, *Equity Promises Fall Flat in Massachusetts Marijuana Industry*, Reason Foundation (Aug. 15, 2018), <https://reason.org/commentary/equity-promises-fall-flat-in-massachusetts-marijuana-industry/>

⁹⁰ *Id.*

⁹¹ Zeninor Enwemeka, *Marijuana Entrepreneurs Given 'Priority' In Mass. Are Struggling to Get Through Licensing Process*, wbur.org (July 26, 2018), <https://www.wbur.org/bostonmix/2018/07/26/marijuana-equity-struggles-massachusetts>

For example, one developer initiated a lawsuit after the city of Monterey, California rejected 19 different site plans because it became apparent that the city was never going to say yes to anything.⁹²

Rather than officially denying a permit application, the authorities often reject an applicant's plans informally. From the bureaucrat's perspective, this informal denial has the added benefit of avoiding the risk of a lawsuit: the authority can say that it hasn't reached any definitive decision about what uses it will permit on the property in question. But these informal actions put pressure on the applicant to 'try again' *ad infinitum*. The threat of denial is presented as an ultimatum, compelling the owner to submit new (less ambitious) design plans. And this process can quickly degenerate into a seemingly endless procedural merry-go-round.⁹³

The reviewing authorities can effectively move the goalposts with ever-new demands for redesign after redesign – simply by invoking their discretion to deny an application. And of course, with each new redesign there are added costs and delays, which may quickly make a project economically infeasible. This can be maddening for an individual trying to navigate the system on his own. But it's frustrating even with outside help. One consultant, representing a client before the notorious California Coastal Commission, spoke to his client's frustration when he was told to go back to the drawing-table for yet another project redesign: “[W]hen I came back and told [my clients] that they would have to spend another \$100,000 [for a third redesign], this was not well received.”

F. Possibility of Subsequent Zoning Changes

Even if you have successfully obtained a permit, that does not always mean that you will be allowed to continue indefinitely in a currently permitted use. When the authorities change the zoning or building code, they will often allow “non-conforming” properties to remain. But local officials may decide that everyone needs to come into conformance with the new plan – including buildings that were properly permitted under the old standards.⁹⁴ This is especially problematic for small businesses that may be forced to close shop or otherwise become displaced as a result.

It is true that some states provide protections for permit holders. For example, the law in some states (e.g., California) provides that once a permit is issued, the owner acquires “vested rights” that cannot be taken away.⁹⁵ Likewise, the Minnesota Supreme Court recently affirmed that the government could not revoke the right of a business to continue in an already established use

⁹² *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 698, 119 S. Ct. 1624, 1633, 143 L. Ed. 2d 882 (1999).

⁹³ William M. Hof, *Trying to Halt the Procedural Merry-Go-Round: The Ripeness of Regulatory Takings Claims After Palazzolo v. Rhode Island*, 46 St. Louis U. L.J. 833 (2002).

⁹⁴ See Luke A. Wake, *Minnesota Supreme Court Holds Municipality Cannot Revoke Right to Maintain an Existing Commercial Land Use*, State Court Docket Watch, Federalist Society, <https://fedsoc.org/commentary/publications/minnesota-supreme-court-holds-municipality-cannot-revoke-right-to-maintain-an-existing-commercial-land-use>

⁹⁵ See *Stewart Enterprises, Inc. v. City of Oakland*, 248 Cal. App. 4th 410, 418, 423 (2016) (affirming that, in California, “a party acquires a vested right in a building permit if the party ‘has performed substantial work and incurred substantial liabilities in good faith reliance upon a permit issued by the government,’” and that once an owner holds vested rights he is “immune from divestment through ordinary police power regulations...”).

without initiating eminent domain and paying compensation for taking away the right to continue in that use.⁹⁶ In other states, however, you may be without recourse if the local zoning board decides to change the code without recognizing grandfathered rights.

You might think that Texas would be a place where government wouldn't mess with property owners, but you would be wrong. Take for example, the story of Hinga Mbogo, who immigrated to the United States and lived the American dream as a self-made man.⁹⁷ He had purchased property and built a successful auto repair business in Dallas.⁹⁸ This was his livelihood. And over the course of 20 years, he had an established customer base loyal to his 3516 Ross Avenue location.⁹⁹ But in 2005, the City of Dallas decided it was time to begin phasing out auto shops in this area – in the hopes of luring in redevelopment for upscale retail and dining.¹⁰⁰

The irony is that, after displacing established auto repair shops, Dallas has yet to see the redevelopment it had hoped for. Meanwhile, displaced businesses have been forced to either permanently close shop or to relocate. Mr. Mbogo was forced to go through that process. But relocating is no easy matter. First, the owner must find a site that is comparable, affordable, and (ideally) convenient for its customers. Then the owner must weather the significant costs and logistical concerns of moving to a new location. Finally, studies show that it often takes a small business many years to rebuild its client base after being forced from an established location.¹⁰¹ This means that in addition to suffering lost income when a business is temporarily shut down during a move, the company will often see continued lost profits; after all, they are essentially starting from scratch, even if they retain the same name.

⁹⁶ *White v. City of Elk River*, 840 N.W.2d 43 (Minn. 2013).

⁹⁷ See Hinga Mbogo, Institute for Justice, <https://ij.org/client/hinga-mbogo/>. See also Nick Sibilla, *Dallas Wants to Destroy a Popular Small Business – And Not Pay Him a Dime*, FORBES (April 7, 2016), <https://www.forbes.com/sites/instituteforjustice/2016/04/07/dallas-wants-to-destroy-a-popular-small-business-and-not-pay-him-a-dime/#1cde9be37d5f>

⁹⁸ *Mbogo v. City of Dallas*, No. 05-17-00879-CV, 2018 WL 3198398, at *1-2 (Tex. App. June 29, 2018).

⁹⁹ Mbogo's shop opened in 1986; he purchased the property in 1988. He was allowed to operate his business as a "non-conforming use" from that time until the City enacted an ordinance requiring discontinuation effective April, 2008. *Id.*

¹⁰⁰ See *Mbogo*, 2018 WL 3198398, at 7 (noting that the City's goals were to encourage redevelopment and commercial activity).

¹⁰¹ See Nicole Stelle Garnett, *The Neglected Political Economy of Eminent Domain*, 105 MICH. L. REV. 101, 106-10 (2006) (observing that small businesses are especially vulnerable when displaced and many are unable to reopen, or fail once relocated); Michael H. Schill, *Intergovernmental Takings and Just Compensation: A Question of Federalism*, 137 U. PA. L. REV. 829, 891-92 (1989); Lynda J. Oswald, *Goodwill and Going-Concern Value: Emerging Factors in the Just Compensation Equation*, 32 B.C. L. REV. 283, 287 (1991) (observing that businesses may suffer lost good will and going concern value when displaced); Comment, *Eminent Domain Valuations*, 67 YALE L.J. 61, 75 (1957) (noting that, among other things, "the customer's habit of dealing with the firm" is "often completely destroyed or greatly damaged when the owner must move from the neighborhood to some other locale.").

III. The Problem of Regulatory Uncertainty and a Telling Response

A. The Chilling Effect

Think of the handful of products and services that have helped transform our lives in recent years: smartphones, ridesharing, Airbnb, Facebook, Twitter, and Instagram. But we should also think of the proverbial dogs that didn't bark. What if something even more revolutionary than the iPhone never came to market – because, unlike Bill Gates and Steve Jobs, its inventor lived in a community where people are not allowed to tinker in their garages?

The point is simple but stark: Just because someone has a potentially transformative idea does not mean it will be brought to fruition. Take, for example, Esmerelda Rodriguez's ingenious business idea.¹⁰² She conceived of a unique way to let parents unwind. Her vision was to create a fun and safe space for children to play on rainy days or during the long and cold Chicago winter months. The only trouble was that Esmerelda's vision was innovative – so unique that it didn't fit neatly within one of Chicago's rigid and overly prescriptive zoning categories. In the end, city bureaucrats crushed her dream for a business that would have enriched the lives of families in her community.

Because customers would pay a fee to use the play center, the city categorized the business as a public place of amusement, like a stadium or strip club. But that classification required substantial off-street parking, which meant that she could not use the building that she had leased. Unfortunately, after having already invested significant time and money, she was not able to start her business. She lost not only the time and energy she devoted to creating her business plan and navigating the permitting process, but also the substantial savings that she had invested.

By its nature, the *what if* question is difficult. For one, counterfactuals are inherently speculative – it's hard to reconstruct other plausible outcomes on assumptions about what history might have looked like if something had played out differently. We can never really know what transformative ideas or life-enriching developments were snuffed out by happenstance. But we know that we would be missing something beautiful if we lived in a world in which the Beatles never came to be, or where Amazon was never allowed to perfect its two-day “prime” shipping, or where our favorite restaurant was never permitted to open its doors.

But without conjecture, we can say that small businesses (like your favorite little bookstore or your family's favored cafe) struggle the most in getting regulatory approvals to open in any given location. Obviously, some succeed, but only after unnecessary hangups, delays, and costs. Then there is the reality that many embryonic businesses never even advance to the stage of submitting a permit application. For some, the entrepreneurial spirit may be crushed at the moment of inception by the daunting prospect of jumping through cumbersome regulatory hoops without any certainty of

¹⁰² See Elizabeth Milnikel & Emily Satterthwaite, *Regulatory Field: Home of Chicago Laws*, *Institute for Justice: City Study Series* (Nov. 2010), http://ij.org/wp-content/uploads/2015/09/ij-chicago_citystudy.pdf (detailing the extensive regulations inhibiting entrepreneurialism in Chicago).

outcome. Others are more strong-willed. But even the most fearless entrepreneur eventually faces the hard reality that they must secure regulatory approval to open shop, which can be difficult for the reasons set forth above.

As a practical matter, many good ideas die on the vine, as would-be entrepreneurs find it difficult to secure necessary financing – especially because it usually takes a while to show a profit and to recoup up-front investment costs. The data show that most small business owners rely heavily on their own family and close friends when getting off the ground, because banks are less willing to provide financing for an upstart mom-and-pop operation.¹⁰³ Other small business owners take huge personal financial risks, from racking up credit card debt to taking out a second mortgage on their home. But what do you say to your uncle when asking him for money to invest in an auto repair shop, a gym, or a juice bar when you simply can't be sure that you will ever get authorization to open? And how do you pitch the idea of taking out a second mortgage on your home or charging thousands of dollars on a personal credit card to launch a business that may never be approved?

This is likely where many would-be entrepreneurs get cold feet, or where they hit their proverbial brick wall. After all, if you can't convince your uncle or your spouse that the venture is worth the risk, the entrepreneurial dream will die before it ever has a chance. By the same token, your uncle and your spouse cannot be faulted if they are hesitant to move forward on a venture that may threaten their financial security. Of course, some people are more risk-averse than others. But the fact that some people are more thick-skinned does not satisfactorily answer the question of why we tolerate a system that unnecessarily exacerbates risks for aspiring entrepreneurs. If our goal is to encourage innovation, entrepreneurialism, and human flourishing, shouldn't we seek ways to address legitimate public health and safety concerns while minimizing risk and ensuring greater predictability for those with vision, drive, and ambition?¹⁰⁴

B. Regulatory Drag in Plain Sight: Expedite That, Please!

We're not just talking about individual entrepreneurs and particular inventions that may be discouraged. We are also concerned with the drag that labyrinthine and prohibitory regulations impose on whole sectors of the economy, vocations, and entire cities. The phenomena of "regulatory drag" manifests itself in many ways, including the social and economic impacts discussed in Section VII. But there are few areas where the real-world effect of regulatory drag is more apparent than in land-use permitting, where you usually have to "pay to play."

¹⁰³ See *Small Business, Credit Access, and Lingering Recession*, NFIB Research Foundation (July 26, 2018); see also Alicia Robb, *Access to Capital among Young Firms, Minority Owned Firms, Women-Owned Firms, and High-tech Firms*, U.S. Small Business Administration (Apr. 2013) (observing that entrepreneurs must often rely on personal assets when seeking to acquire startup loans).

¹⁰⁴ The more elements we inject into the permitting process and the more uncertainty there is surrounding a business's ability to succeed, the more likely it becomes that a particular business will commit its resources to some other opportunity. The net loss to society in squandered productivity, innovation, and tax revenue is – like the odds of navigating many land-use permitting regimes in a timely fashion – literally incalculable.

A telling measure of the unintentional complexity in our system of land-use permitting – and an illustration of the lengths to which people will go in trying to navigate it – is the rise of so-called “expeditors.” By this we refer to a guild of regulatory sherpas who will, for a fee, guide their clients from the base of confusion and despair to the summit of bureaucratic approval.¹⁰⁵ Consider New York City, where expeditors form a full-fledged industry of men and women who queue up at the New York City Department of Buildings (DOB) to file the documents and pull the permits that allow construction projects.¹⁰⁶ Not only homeowners, but also contractors, architects, and managing agents have to hire expeditors because they just don’t have the time or expertise to manage the DOB minefield. On large projects, sometimes an expeditor has to hire an expeditor.¹⁰⁷

The growth of the industry in America’s largest city has exploded over the last 100 years. In the early 1990s, expeditors numbered 300 to 400; today, there are more than 8,300.¹⁰⁸ This explosion in expeditors is a direct result of regulations that require even the smallest projects to be filed with DOB. For example, the number of jobs filed at the DOB in fiscal year 2013 rose by 4.9 percent in one year to 72,288, and by 14.2 percent in the next year to 82,551.¹⁰⁹ In 2016, expeditors, contractors, and others filed 165,000 permit applications.¹¹⁰ To get these jobs done, expeditor fees range from \$200-\$400 to get a permit and from \$1,500-\$3,500 to file a project, depending on time outlays and job complexity.¹¹¹ Some expeditors charge an hourly rate comparable to attorneys – between \$75 and \$150 per hour.¹¹²

Just as in New York City, getting a permit in the nation’s capital is often tedious and time-consuming. The process provides a fertile environment for those who can help businesses find their way through – or in some cases around – a maze of regulations. Not surprisingly, some permit expeditors are willing to go the extra mile for their clients, and some staffers within Washington, DC’s Department of Consumer and Regulatory Affairs (DCRA) were willing to supply a workaround for the right price. Between 2010 and 2013, self-styled permit expeditor allegedly offered “lunch money” in amounts ranging from \$20 to \$500 to DCRA staffers for assistance in fast-tracking his clients’ permit applications.¹¹³ In exchange, prosecutors argued, the expeditor

¹⁰⁵ Will Sommer, *Permit Expediter Accused of Paying Off DCRA Staffers With “Lunch Money,”* WASHINGTON CITY PAPER, <https://www.washingtoncitypaper.com/news/loose-lips/blog/13135503/permit-expediter-accused-of-paying-off-dcra-staffers-with-lunch-money>; *Former D.C. Government Employee Pleads Guilty To Accepting Bribes in Scheme Involving Permits*, U.S. Department of Justice, <https://www.justice.gov/usao-dc/pr/former-dc-government-employee-pleads-guilty-accepting-bribes-scheme-involving-permits>; Kathryn Brenzel, *Is Time Up for NYC’s Construction Expeditors?*, https://therealdeal.com/issues_articles/2379456/.

¹⁰⁶ Joanne Kaufman, *Renovating? Don’t Forget the Expediter*, NEW YORK TIMES, <https://www.nytimes.com/2014/12/14/realestate/renovating-dont-forget-the-expediter.html>.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ Brenzel, *Is Time Up?*

¹¹¹ Kaufman, *Renovating? Don’t Forget the Expediter*.

¹¹² Brenzel, *Is Time Up?*

¹¹³ Sommer, *Permit Expediter Accused*.

achieved faster permit approval for his clients than those who did not provide such payments to DCRA officials.¹¹⁴

A similar scheme collapsed in 2016, when DCRA staffer pled guilty to bribery for accepting cash in return for facilitating the issuance of construction permits.¹¹⁵ From July 2001 until June 2012, she reviewed and processed applications for various permits. In April and May of 2012, she accepted a total of \$900 in cash from an undercover FBI agent and then falsified the signature of a certified licensed tradesman, who she knew was not involved in the construction work at issue.¹¹⁶ In exchange for this payment, she issued two air conditioning permits and one electrical permit.¹¹⁷ Permit expeditors were willing to pay nearly a thousand dollars for two relatively minor permits; that price tag speaks volumes about how onerous DCRA requirements are.

Despite periodic calls to eliminate expeditors in the wake of major scandals and ensuing corruption crackdowns, there is a general consensus that the industry could never be fully eliminated.

According to Benjamin Stavrach, a leasing and property management director at a real estate investment firm, “In my opinion, the DOB makes it so complicated. The expeditors ease that process. They navigate the waters for you. If you don’t use them, and you try to do it yourself, you are asking for trouble.”¹¹⁸

While there is a perception that whole idea of expeditors is inherently corrupt,¹¹⁹ this misses the forest for the trees. The real problem is not the expeditor industry itself; the problem is a regulatory system in which such middlemen not only survive but prosper. If expeditors were banned tomorrow without any change in the underlying scheme that provides their job security, the problem of corruption would simply be replaced with the problem of even greater inefficiency.

IV. Why Is Land Use Regulation Such a Mess?

A. Within A Short History Lesson

In 1916, New York City became the first locality in the United States to adopt a zoning ordinance, and many cities followed shortly behind. Department store owners led the push for zoning in New York.¹²⁰ Throughout the 18th and early 19th centuries, Manhattan development pushed rapidly northward up the island. Wealthy homeowners kept moving to new neighborhoods at the northern frontier of development, while neighborhoods further south were repurposed and later redeveloped. Single family homes were turned into boarding houses, and then counting houses as land prices

¹¹⁴ *Id.*

¹¹⁵ Department of Justice, *Former D.C. Employee*.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ Brenzel, *Is Time Up?*

¹¹⁹ *Id.*

¹²⁰ Seymour Toll, *ZONED AMERICAN* (1969).

increased; eventually, they were redeveloped as warehouses, offices, hotels, and high-end retail stores.¹²¹

But the redevelopment pressure didn't stop there. Fancy department store owners couldn't stop adjacent property owners from selling to garment factory owners who wanted to locate near retailers.¹²² Department store owners saw zoning as a tool to stop garment factories – and their immigrant workers – from moving onto the same blocks that they wanted to maintain for high-end shopping to the exclusion of other uses.¹²³

In 1926, the U.S. Supreme Court upheld the validity of zoning in *Village of Euclid v. Ambler Realty*.¹²⁴ Since that time, “Euclidean zoning” has become nearly ubiquitous in the United States, with Houston remaining as America’s only major city without zoning. Beginning in the 1970s, land use regulations – and, therefore, the permit approval process – became increasingly more complex. As discussed below in Section VII, empirical studies have found that such regulatory expansion has restricted housing supply in many regions of the country. This rising tide of regulation affects everyone from homeowners who want to modify their house to entrepreneurs with an innovative vision.

B. The Out-Sized Power of the “Homevoter”

Zoning proponents originally saw land use regulation as a tool to protect commercial property values, but today homeowners are the leading proponents of policies restricting new development. Economist William Fischel has termed homeowners “homevoters” because they are such an important voting bloc for politicians at the local level.¹²⁵ Homeowners are more likely to vote than renters and more likely to stay in the same jurisdiction over time. Politicians, who are elected by their jurisdiction’s current residents, are therefore encouraged to cater to these residents’ preferences, rather than pursuing a policy agenda that will encourage new residents to move in.

Homevoters tend to support supply restrictions; that is because, for many homeowners, their home is their largest financial asset. They are averse to policies that make it more likely for their home to decline in value; instead, they tend to support housing policy that causes scarcity, creating the potential for their home value to increase if housing demand increases in their jurisdiction.¹²⁶ Zoning rules, particularly single-family zoning and minimum lot-size requirements, are the primary policies homevoters have supported to restrict housing supply and ensure that new homes will be expensive.

Early homevoter activism often focused on blocking unpleasant commercial or government land uses from activists’ neighborhoods, such as industrial development, highways, or landfills. As a

¹²¹ Charles Lockwood, *MANHATTAN MOVES UPTOWN* (1976).

¹²² Toll, *ZONED AMERICAN*.

¹²³ *Id.*

¹²⁴ *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

¹²⁵ William A. Fischel, *THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES* (2005).

¹²⁶ *Id.*

result, evidence shows that these land uses are disproportionately located near low-income, disproportionately minority communities that tend to be relatively less well-connected and organized relative to higher-income communities.¹²⁷ But in 21st-century America, local activists tend to focus more of their energy on restricting new housing construction, particularly relatively low-cost multi-family housing. As a result, the areas where demand for housing is highest add jobs much faster than they add than new homes. For example, since 2010, the Bay Area has experienced job growth four times as large as the growth of its housing stock.¹²⁸

C. Baked in the Process: NIMBY Veto Power

Homevoters not only lobby in favor of zoning rules that prevent new residents – particularly lower-income residents – from moving into their community, they also take advantage of localities’ complex approval processes for new projects to block or delay new developments, including mixed-use developments that promise both new housing and commercial opportunities.¹²⁹ For example, in 1999, Giant Food proposed a redevelopment of one of its outdated grocery stores in a wealthy neighborhood in northwest Washington, DC.¹³⁰ At the time, the District’s zoning code had not been updated since 1958. Although the number of households in the city has increased since that time and tastes in development have shifted from auto-oriented to mixed-use and walkable, the zoning code had not been amended to reflect these changes. The grocery store’s land was zoned for retail or office development. Like many landowners during the time period, Giant sought a Planned Unit Development (PUD) permit for a mixed-use project that would include a new grocery store, housing, and additional retail space.¹³¹

In 2005, Giant’s PUD application received support from local politicians and agencies; however, some neighbors of the project remained vehemently opposed to the development that would make

¹²⁷ Michelle Bell and Keita Ebusu, *Environmental Inequality in Exposures to Airborne Particulate Matter Components in the United States*, ENVIRONMENTAL HEALTH PERSPECTIVES (120(12)) (Apr. 2013).

¹²⁸ George Avalos, *Bay Area Job Market Sets New Record*, MERCURY NEWS (June 21, 2019), <https://www.mercurynews.com/2019/06/21/bay-area-job-market-extends-winning-streak-climbs-record-highs-tech-google-apple/>

¹²⁹ In many high-cost jurisdictions, even when developers propose projects that follow current zoning rules, they face substantial permitting obstacles. In 2013, a developer proposed a 331-unit building in San Francisco’s Mission District. The project complied with the site’s zoning; it would have included 49 units of income-restricted housing at another site so as to conform with the city’s inclusionary zoning policy. Nonetheless, it garnered severe protests from neighborhood organizations and labor unions who wanted to see a smaller, 100-percent affordable project built at the site; they termed the proposal “the monster in the Mission.” The project required approval from the San Francisco Board of Supervisors who stopped the project from moving forward, in part due to pressure from local activists. Randy Shaw, “The Mission’s ‘Monster’ Revives,” April 13, 2017, <http://beyondchron.org/missions-monster-revives/>; see also Tim Redmond, “Chilly Reception for the New Monster in the Mission Plan,” February 8, 2019, <https://48hills.org/2019/02/chilly-reception-for-the-new-monster-in-the-mission-plan/> (noting that the project later won labor approval, but was still stalled by vocal opponents in the community).

¹³⁰ Neil Flanagan, “New Density Will Change the Face of Upper Northwest,” November 6, 2014, <https://ggwash.org/view/36374/new-density-will-change-the-face-of-upper-northwest>.

¹³¹ A PUD is a type of approval process where developers may get permission to build more densely or differently than zoning rules typically allow in exchange for providing public benefits. This is an inherently uncertain process, and small developers may lack the resources to endure its delay and expense.

room for new residents and increased traffic in their neighborhood, along with a new and larger grocery store. To attempt to scuttle the development, they filed an application to preserve the 1950s grocery store as a historic landmark.¹³² The application was ultimately denied, and the project moved forward, but homeowners created a delay of nearly ten years between the time the project was proposed and when it received approval. A local land use attorney estimates that the typical PUD process costs developers \$500,000 and three to four years.¹³³ The immense legal and holding costs of this lengthy and uncertain approval process are ultimately reflected in a reduced supply of new buildings and higher costs for housing and commercial space.

To offer another example of how homevoters can throw up roadblocks, consider this account of how neighborhood activists in Cambridge, Massachusetts played a role in the Board of Zoning Appeal's decision to deny a permit to &pizza, a proposed restaurant outlet. The company wanted to open a store in Harvard Square,¹³⁴ one might think this was a promising business venture. But vocal residents argued that the neighborhood had too many pizza restaurants already. In the end, the company was authorized to open shop in this location only after it dramatically changed its plans to partner with a celebrity pastry chef to bring a new dessert option to the neighborhood. This account illustrates that new market entrants are often at the mercy of the shifting political winds generated by a few outspoken community organizers.

D. Self-Serving Environmentalism and Other Expedient Objections

Fischel theorizes that the environmental conservation movement that expanded in the United States in the 1970s provided the cover that homeowners needed to create organized opposition to new development.¹³⁵ As it became politically unacceptable to expressly oppose new development on grounds of race or class, local environmental and quality-of-life concerns provided an acceptable justification. Fischel's account of the concurrent rise of environmental concerns and increase in land-use regulations in the 1970s suggests that NIMBY groups have succeeded in increasing antigrowth laws at the municipal and state levels. There is room for both genuine environmental concerns and narrow self-interest in his account of their motivations.

Environmentalism has motivated the "smart growth" movement, a school of thought in urban planning that emerged in the 1970s as an alternative to traditional zoning practices. Although "smart growth" advocates encourage regulations that restrict greenfield development on the outskirts of cities, they often support liberalization in other areas of city planning, including reform to density

¹³² Lori Aratani, *After 10 Years, Will Northwest D.C. Neighborhood Get a New Giant?*, WASHINGTON POST (May 15, 2011), https://www.washingtonpost.com/local/after-10-years-will-northwest-dc-neighborhood-get-a-new-giant/2011/05/10/AFZvJP4G_story.html?utm_term=.78754e8e4879.

¹³³ Emily Hamilton, "The Tyranny of Zoning: Exhibit A," March 16, 2012, <https://marketurbanism.com/2012/03/16/the-tyranny-of-zoning-exhibit-a/>.

¹³⁴ Sarah Wu, *&pizza Partners with Dessert Bakery in Another Bid at Harvard Square*, THE HARVARD CRIMSON (July 9, 2017), <https://www.thecrimson.com/article/2017/7/9/pizza-bakery-square/>

¹³⁵ William A. Fischel, *An Economic History of Zoning and a Cure for Its Exclusionary Effects*, URBAN STUDIES, vol. 41, no. 2 (February 2004).

restrictions and parking requirements. As such, smart growth typically seeks to facilitate relatively dense, mixed-use neighborhoods that are convenient for walking, cycling, and transit.

But in practice, smart growth has been subject to the same pressures from homevoters as traditional land use regulations. Although growth boundaries have been implemented in several cases at both the state and the local level, few jurisdictions have accompanied growth boundaries with reduction of density restrictions inside the boundary.¹³⁶ They have instead layered growth boundaries on top of traditional land use regulations, blocking both infill housing development and new development on the urban fringes.¹³⁷ Growth boundaries have thus catered to homevoters by serving as a new barrier to housing supply.

And it's not just homevoters who support the status quo of land use regulations that stand in the way of new development. Other interest groups have found ways to turn an environment of supply scarcity, especially when combined with the regulatory thicket, to their favor. The California Environmental Quality Act (CEQA) allows parties to sue to block development on environmental grounds, but trade unions abuse the law in order to delay projects from moving forward and to put pressure on developers to use union labor.¹³⁸ Likewise, CEQA may be invoked in some cases by established businesses to discourage competition from new market entrants.

V. Current State of the Law

Another factor that increases the innumerable uncertainties facing permit applicants is the fact that one cannot expect much in the way of judicial relief when a permit is denied. As noted in Section II, just getting a definitive decision from a permitting entity is often difficult. It is not uncommon for the authority to avoid giving a formal denial; doing so might invite a lawsuit. But while permit applicants have an unquestionable right to their day in court if they believe they've been wronged, the truth of the matter is that both federal and state courts are highly deferential to local government decisions. That's not to say the landowner never wins. But the deck is stacked against the permit applicant, either when challenging an improper denial or when seeking compensation for a decision that restricts economically beneficial uses.

When a permit is denied, the applicant faces a few unenviable choices: (1) abandon the desired use; (2) start the permitting process all over again, perhaps with revised plans; or (3) file a costly lawsuit and hope for the best. By this point, the applicant most likely has red tape exhaustion and is often

¹³⁶ Oregon's growth boundary policy is perhaps both the most binding and the most studied growth boundary policy in the nation. At the time of its passage, Oregon policymakers said that the policy would be paired with other policies that regulated how much localities could limit new housing construction within those boundaries. In 2019, the state legislature passed a bill eliminating single-family zoning within the state's urban growth boundaries, decades after the passage of the original boundary policies – which themselves contributed to sharply rising house prices in Oregon cities.

¹³⁷ Ikeda and Washington, *How Land-Use Regulation Undermines Affordable Housing*, Mercatus Center (November 2015).

¹³⁸ Scott Shackford, *Developer Sues Labor Groups Over Use of California Environmental Laws To Stop Construction*, REASON MAGAZINE (January 11, 2019), <https://reason.com/2019/01/11/developer-sues-labor-groups-over-use-of/>.

forced – due to high costs and market factors – to give up. But if you proceed in litigation, what are your odds of success?

A. Expect a Rubber Stamp: Due Process and Equal Protection Claims

If your local zoning code provides zoning as of right for specified uses, you may find success when arguing that the authorities violated governing law in denying a permit application. But to the extent that the code vests discretion in the permitting authority, you face an uphill fight. In such a case, the aggrieved applicant is left to argue that the denial was improper because of the right to due process or under the Equal Protection Clause.

In either case, the permitting authority’s decision will stand if the government can make even a lackluster argument that its decision was rational. This so-called “rational basis standard” places a thumb on the scales of justice in favor of the local permitting authority. As a matter of due process, the permit denial will be deemed proper if there is any conceivable justification concerning public health, safety, morals, or public welfare. This is an exceedingly low bar for a governmental defendant, as the authority can justify regulation of the most innocuous land use decisions on tenuous ground – for instance, a zoning code that prohibits vegetable gardens on wholly subjective aesthetic grounds.¹³⁹ In some cases, the authorities may get away with denying a permit based on its ostensible public concerns without evidence that the restriction is really necessary – as with the City of Sanibel, Florida, which denied a permit application for construction of a dock in order to protect seaweed that was not present on site or in the near vicinity. Still worse, some courts have pronounced even more extreme rules of deference – like saying a restriction must “shock the conscience” to run afoul of the Constitution,¹⁴⁰ or that an arbitrary and irrational restriction, as such, is insufficient to trigger judicial rejection.¹⁴¹

Equal protection claims are assessed under the same highly deferential rational basis standard. This sort of claim boils down to a complaint that a permit denial is unfair because the government is treating people differently. To be sure, there are cases where the government selectively and arbitrarily denies similar permit requests. For example, the city might deny your permit to build a fence a month after granting your next-door neighbor’s permit.

¹³⁹ Hermine Ricketts and her husband, Tom Carroll, were forced to destroy the garden they cultivated for 17 years to grow food for their own personal consumption; if they didn’t, they faced a fine of \$50 per day from the City of Miami Shores, Florida. When challenged, the Court upheld the ban, deferring to Miami Shores’ perspective on what is or is not physically attractive and giving the village essentially unlimited discretion to outlaw whatever they consider undesirable. *Ricketts v. Vill. of Miami Shores*, 232 So.3d 1095 (Fla. 3 Dist. Ct. App. 2017).

¹⁴⁰ See *Nestor Colon Medina & Sucesores, Inc. v. Custodio*, 964 F.2d 32, 46 (1st Cir. 1992); *O’Connor v. Pierson*, 426 F.3d 392, 400 (2d Cir. 2005); *United Artists Theatre Circuit v. Twp. of Warrington*, 316 F.3d 392, 400 (3d Cir. 2003).

¹⁴¹ Other federal circuits require that the challenged restriction be “grave[ly] unfair” or “truly irrational.” *George Washington Univ. v. Dist. of Columbia*, 318 F.3d 203, 209 (D.C. Cir. 2003); *Chesterfield Dev. Corp. v. City of Chesterfield*, 963 F.2d 1102, 1104 (8th Cir. 1992) (suggesting that only zoning actions based on flipping a coin would be considered irrational). And at least one court has said that the owner must show a separate constitutional violation or that the state law remedies are inadequate. *New Burnham Prairie Homes, Inc. v. Vill. of Burnham*, 910 F.2d 1474, 1481 (7th Cir. 1990).

Of course, by its very nature zoning is a line-drawing exercise that may treat properties differently depending what side of town (or what side of the street) they are on. That sort of line-drawing is generally going to withstand scrutiny so long as there is some rationale – however tenuous it may seem – for treating some properties as agricultural, residential, mixed-use, commercial, heavy-industrial, etc., but not others. In practice the rational basis standard is so deferential that even the most rigidly prescriptive codes will be upheld. A judge will assume that there must be a reason why the city council would want to allow a pool hall or gyms here and not there.

But there are cases where there seems to be no rational justification for treating similarly situated properties differently. Imagine that you decide to purchase a fast food franchise. You think you are ready to move forward after engaging a consultant, identifying the business, spending months negotiating the financing, working out a franchise agreement, and selecting the ideal location. But then you hit a brick wall.

Perhaps you've chosen a location on a largely commercial street that already has several fast food restaurants with drive-up windows. You fully expect the city to approve your site plan. The city has approved numerous other site plans without trouble over the past few years. While the city has rejected a few site plans for totally unrelated businesses, those businesses weren't seeking approval to open a restaurant. But then you learn, to your surprise, that the city is rejecting your site plan; it believes that it would be aesthetically displeasing to allow another restaurant in the area, and it has concerns over increased traffic in the area. This makes no sense, given the number of restaurants (both sit-in and drive-through) on the street. And you are all the more startled to see the city approve another restaurant on the other side of the street not long after.¹⁴²

You might argue that you've been inappropriately singled out without a rational justification because the city has treated you differently than other "similarly situated" permit applicants. But this is difficult to prove because it requires an apples-to-apples comparison; unfortunately, it's often difficult to find an entirely analogous case. In the nearly 20 years since the U.S. Supreme Court recognized "class-of-one" claims, the lower courts have been unable to settle on consistent analytical rules. For one, they disagree as to how *similarly situated* you must be to your chosen comparator.¹⁴³ If I'm trying to open a McDonald's franchise, does it matter if the city has approved construction of a Wendy's a half-mile away, or a department store on the same block? The answer, as ever in the law, is "It depends."

¹⁴² This is exactly what happened to one unfortunate McDonald's franchisee in *McDonald's Corp. v. City of Norton Shores*, 102 F. Supp. 2d 431 (W.D. Mich. 2000).

¹⁴³ *Del Marcelle v. Brown Cty. Corp.*, 68 F.3d 887, 888 (7th Cir. 2012) (en banc) ("The lower courts are divided, and "[t]he law concerning 'class of one' equal protection claims is in flux."); *Grider v. City of Auburn*, 618 F.3d 1240, 1264 (11th Cir. 2010) ("Too broad a definition of 'similarly situated' could subject nearly all state regulatory decisions to constitutional review in federal court and deny state regulators the critical discretion they need to effectively perform their duties. Conversely, too narrow a definition of 'similarly situated' could exclude from the zone of equal protection those who are plainly treated disparately and without a rational basis."). See also *Tapalian v. Tusino*, 377 F.3d 1, 9 (1st Cir. 2004); *Swanson v. City of Chetek*, 719 F.3d 780, 784 (7th Cir. 2013).

B. The Takings Clause as the Last Hope in a Losing Cause

Alternatively, an aggrieved permit applicant might pursue an inverse condemnation claim seeking just compensation for a regulatory taking if the imposed restrictions seriously devalue the property and frustrate the owner's investment-backed expectations. Specifically, a landowner might invoke the Takings Clause of the Fifth Amendment, which prohibits government from imposing restrictions that go "too far" in abrogating common law property rights. But courts are extremely deferential to government defendants here as well.

The one concrete rule is that the government must allow at least some modest development because it will owe compensation for the market value of the land if it completely denies all economically beneficial uses.¹⁴⁴ But even in cases where the government denies the most modest development opportunities, some courts will deny takings liability if the property retains any modicum of economic value.¹⁴⁵ Of course, this sort of total denial of development rights is relatively rare.¹⁴⁶

In most cases, contested restrictions will allow some development – but just not the sort of plans the owner had in mind. What happens to these landowners? Well, the courts apply an *ad hoc* balancing test that considers the economic impact, the owner's investment-backed expectations, and the character of the government's conduct. But the Supreme Court has never given guidance on how to apply these "cryptic and convoluted"¹⁴⁷ factors, which can mean unpredictable results in the courtroom. In practice, however, empirical studies confirm that aggrieved permit applicants almost invariably lose.

C. How Judicial Deference Contributes to Uncertainty in the Permitting Process

As noted in Section V, it can be easy for affluent and politically connected residents to exercise inordinate political power at the local level where elected officials are beholden to fewer people. That phenomenon is more severe in the absence of meaningful judicial review. Indeed, we see that powerful governments and their political allies can run roughshod over the rights of smaller businesses and homeowners in the permitting process. For that matter, scholars have observed that minorities and those on the lower end of the socioeconomic ladder are most vulnerable in a system

¹⁴⁴ *Lucas*, 505 U.S. at 1015.

¹⁴⁵ Take Michael and Cathy Zito, for example. All they wanted to do was rebuild their vacation cottage in Nags Head, North Carolina after a fire destroyed it in 2016. But state and local governments denied permits because the property is now within a no-build zone. The Zitons are left in a line of beach homes and can do little more than pitch a tent and camp on their property. At best, the property has a residual value of only 5 percent of its prior value. The Zitons filed a federal lawsuit challenging the governments' decision to deny them all use and value of their beach lots as an unlawful taking. Only time will tell if the court will find that since the Zitons can't rebuild, they lost all value and are due just compensation – or if the court will find that there was no taking, because the Zitons still have 5 percent of the prior value.

¹⁴⁶ One study of 1,700 state and federal opinions found "only 27 cases in 25 years in which courts found a categorical taking under *Lucas*." Brown and Merriam, *On the Twenty-Fifth Anniversary of Lucas: Making or Breaking the Takings Claim*, 102 Iowa L. Rev. 1847, 1848-49 (2017).

¹⁴⁷ *Ganson v. City of Marathon*, 222 So.3d 17, 20 (Fla. Dist. Ct. App. 2016) (Shepherd, J., dissenting).

with weak private property rights protections.¹⁴⁸ By contrast, those with greater political clout generally tend to find the system easier to navigate.

The reality is that when property rights are left unprotected, they are wholly subject to prevailing political winds. And this further contributes to uncertainty for individuals with entrepreneurial aspirations, especially those of limited means. To be sure, if the courts are unlikely to intervene, land use regulators have a free hand to dispense a shifting and more or less subjective version of the law – whether just or unjust in practice.

VI. Other Economic and Social Consequences

While our focus thus far has been on the impact that regulatory uncertainty has on aspiring entrepreneurs and innovative businesses across the country, it is worth pointing out that the everyday citizen also feels the consequences of these permitting regimes in day-to-day life. And even as we acknowledge their impact on residential properties, we should also take note of the macro-level impact on the economy: in manipulating housing markets, unnecessarily complicated permitting regimes manipulate the labor market and ultimately slow down the nation's economic production.

A. Restrictive Land Use Regulations Increase Housing Costs

It is difficult to pinpoint how much housing value appreciation is caused by restrictive land use regulations, or how much is caused by construction costs, increased demand, or other macroeconomic factors. Use restrictions, as well as demand for housing, vary greatly across the country. It is common to see large swaths of land dedicated to low-density use – specifically single-family housing. But the impact of such zoning is different in Washington, New York City, or San Francisco than in Buffalo, Detroit, or Baltimore.

To circumvent these problems, researchers look at housing value growth in closely situated places with different restrictive regimes; compare (for example) construction costs to housing values to estimate the value premium that cannot be explained by economic fundamentals; and use comprehensive information on land regulation to control for differences around the country so as to estimate what portion of price increases can be linked to restrictive land regulations. These studies universally find one thing: restrictive land use practices increase house prices. Here are some examples:

- In San Francisco, market values for houses were between 17 and 38 percent higher in communities with moratoria on growth or other types of growth-controlling plans, as compared to communities with no such plans.¹⁴⁹

¹⁴⁸ See Ilya Somin, *The Civil Rights Implications of Eminent Domain Abuse*, Testimony before the United States Commission on Civil Rights (Aug. 12, 2011).

¹⁴⁹ Katz and Rosen, *The Interjurisdictional Effects of Growth Controls on Housing Prices*, *JOURNAL OF LAW AND ECONOMICS* 30(1), 149-60 (1987).

- The differential growth and land use restrictions in New Jersey’s “Comprehensive Management Plan” show that differential restrictions resulted in measurable differences in housing prices within five to six years.¹⁵⁰
- Homes in Chicago neighborhoods with historic district designations command a price premium of 29 to 38 percent;¹⁵¹ the historic district premium in New York City is 20 percent.¹⁵²

How do we know these differentials are due to restrictive land use, not some underlying variation in the cost of construction? Researchers from the Wharton School of Business created a national index that captures how strictly residential land is regulated across major housing markets through the country.¹⁵³ Their index captures various types of regulatory interventions to show that coastal markets in the United States are more highly regulated, and that land use regulation is stricter in wealthier communities. Researchers using the information from this index found that minimum lot sizes are among the most restrictive policies.¹⁵⁴ They also found that cities with a large gap between construction costs and housing prices turn out to have the most strictly regulated residential land use.¹⁵⁵

B. Costly Reviews Associated with Zoning Changes and Permitting and Inspections Processes Increase the Cost of Construction

The experience of obtaining construction permits and going through inspections can be substantially different across cities with respect to costs, time, and required procedures. Most of these differences stem from the ease or difficulty of the zoning approval process, the need for reviews from other government agencies (such as environmental reviews), and the efficiency of the building permitting and inspection practices. The impacts of these administrative reviews on housing costs could be significant: on average, regulatory burdens account for nearly a quarter of the cost of building single-family homes across the nation’s major residential markets.¹⁵⁶ Just the costs associated with the development stage – figuring out what could be done and where, given such constraints as zoning ordinances – account for 60 percent of regulatory costs.¹⁵⁷ Homes are 3.1 percent more expensive

¹⁵⁰ W. Patrick Beaton, [*The Impact of Regional Land-Use Controls on Property Values: The Case of the New Jersey Pinelands*](#), LAND ECONOMICS 67(2), 172 (1991).

¹⁵¹ Schaeffer and Millerick, [*The Impact of Historic District Designation on Property Values: An Empirical Study*](#).” ECONOMIC DEVELOPMENT QUARTERLY 5(4): 301-12 (1991).

¹⁵² Vicki Been *et al.*, [*Preserving History or Hindering Growth?: The Heterogeneous Effect of Historic Districts on Local Housing Markets in New York City*](#) (National Bureau of Economic Research, Working Paper No. 20446) (Sept. 2014).

¹⁵³ Gyourko, Saiz, and Summers, [*“A New Measure of the Local Regulatory Environment for Housing Markets: The Wharton Residential Land Use Regulatory Index.”*](#) URBAN STUDIES 45(3): 693-729 (2008).

¹⁵⁴ Glaeser, Shuetz, and Ward. 2006. [*REGULATION AND THE RISE OF HOUSING PRICES IN GREATER BOSTON \(2006\)*](#).

¹⁵⁵ Glaeser, Gyourko, and Saks, [*Why Is Manhattan So Expensive? Regulation and the Rise in House Prices*](#) (National Bureau of Economic Research, Working Paper No. 10124) (Nov. 2003).

¹⁵⁶ Paul Emrath, [*Government Regulation in the Price of a New Home \(2016\)*](#).

¹⁵⁷ *Id.*

just because of the interest expense for debt-financed land acquisition caused by the inherent delay of subdivision and zoning approval.¹⁵⁸ Then there is opportunity cost, the cost of land unbuilt or undeveloped because zoning would not allow it: 2.6 percent of the final price of a house. In housing markets where there are fewer delays, the cost of housing is relatively close to the construction costs.¹⁵⁹

Higher construction costs affect commercial development too. Costs of construction permits vary substantially – administrative compliance costs could be as low as 0.3 percent to 0.7 percent of the total cost of construction in Dallas, Raleigh, and St. Louis, and as high as 3 percent in Los Angeles and San Francisco.¹⁶⁰ Regulatory costs across sixteen high-growth cities in the country run an average of 1 percent of the construction costs and 3 months of processing in order to complete (on average) a set of fifteen standard procedures. This process includes both pre- and post-construction phases for small commercial buildings.

C. Land Use Regulations Operate through Labor Markets to Reduce Growth and Increase Inequality

Ultimately, higher housing prices driven by land use or permitting regulations encourage workers (especially new workers and low-skill workers) to travel to low-productivity markets. When there are changes in demand for labor in a locality, workers respond to these changes by moving. To the extent that restrictive land use practices constrain the movement of labor, they have a significant influence on the economic health of local communities.

Recent research shows that when low-skilled workers are excluded from high-productivity, high-return areas because they simply cannot afford to live there, we see slower economic growth and higher income and wealth disparities. One study has found that states that have a larger accumulation of state appellate court cases dealing with land use have less in-migration from low-wage locations and stronger sorting of skills: by channeling low-skilled labor to low-productivity areas, the authors estimate that zoning has caused about 10 percent of the increase in hourly wage inequality from 1980 to 2010.¹⁶¹

The ultimate cost of all these factors is slower growth. One new study, using data from 220 metropolitan areas, shows that housing supply constraints lowered aggregate national growth by 36 percent from 1964 to 2009.¹⁶² A shortage of affordable housing apparently limits the number of

¹⁵⁸ *Id.*

¹⁵⁹ Glaeser and Gyourko, [The Impact of Zoning on Housing Affordability](#) (National Bureau of Economic Research, Working Paper No. 8835) (March 2002).

¹⁶⁰ U.S. Chamber of Commerce Foundation, [Regulatory Climate Index \(2015\)](#).

¹⁶¹ Ganong and Shoag, [Why Has Regional Income Convergence in the U.S. Declined? \(2015\)](#)

¹⁶² Hsieh and Moretti, [Housing Constraints and Spatial Misallocation](#), AMERICAN ECONOMIC JOURNAL: MACROECONOMICS 11(2): 1-39 (2019). Macroeconomists estimates vary as to how much spatial misallocation affects aggregate output. For a critique of Hsieh and Moretti's approach, see Glaeser and Gyourko, [The Economic Implications of Housing Supply](#), JOURNAL OF ECONOMIC PERSPECTIVES 32(1) (Winter 2018). See also Kyle F.

workers who have access to high-productivity cities. Ultimately, in restrictive land use regimes, higher productivity does not result in greater local employment but in higher nominal wages; these nominal wages are then capitalized in housing, lowering aggregate output and welfare of workers in all U.S. cities.

VII. Potential Policy Solutions

The problems outlined above all spring from the confusion and uncertainty that pervade the permitting and land use process. Unbridled permitting discretion makes it difficult to make rational investment decisions. Those who want to find a place to live or build a business want reliable answers to questions like these: *Is it feasible to get approval? What will be required to obtain approval? Will those requirements change during the process? Will the government move the goal posts? Are land-use regulators making reasonable and neutral decisions on the merits? Can we secure approval before substantial investment (e.g. buying or leasing property)? How long will it take? How long will approval last?* This section suggests some reforms that are intended to make the answers to such questions less mysterious.

Of course, we cannot act as Dworkin’s “Judge Hercules,” a “lawyer of superhuman skill, learning, patience and acumen” who knows the “single right answer to complex questions of law and political morality.”¹⁶³ There may be no single correct solution to complex political problems. Those whose values differ will likely favor different policy recommendations. Many of the problems outlined in this paper can be ameliorated by substantive reforms that liberalize land use regulation instead of merely eliminating uncertainty or promoting transparency. Houston’s famous lack of traditional zoning or recent “upzoning” reforms in Minneapolis and Seattle come to mind. But to the extent possible, we seek to base policy recommendations on values that are universally persuasive and accepted – values like eliminating waste or encouraging predictability and rationality in public decisional processes. Finally, although many of the recommendations below may seem substantively or conceptually simple, they may not be politically simple to achieve. “Pink Zones” are a potential gateway suggested by the Project for Lean Urbanism: small areas in a community (say, a neighborhood) designated for lighter red tape or streamlined regulatory burdens.¹⁶⁴ These may enable policymakers to experiment with land use reform, figure out what works (and what doesn’t), and demonstrate the benefits of reform to those in the larger community.

A. Reducing, Reforming, or Eliminating the Role of Subjective or Indeterminate Standards

The discretionary nature of the permitting process often drives land use uncertainty. People need enough information to make rational decisions based on neutral and predictable standards – whether

Herkenhoff et al., *Tarnishing the Golden and Empire States: Land-Use Restrictions and the U.S. Economic Slowdown*, JOURNAL OF MONETARY ECONOMICS 93, 89-109 (2018). These authors estimate that land use regulations reduce U.S. gross domestic product by 1.5 percent.

¹⁶³ Ronald Dworkin, TAKING RIGHTS SERIOUSLY, 105-106, 279.

¹⁶⁴ https://leanurbanism.org/wp-content/uploads/2018/02/Dittmar_Falk_PinkZones.pdf

in the realms of environmental concerns, public health issues, or geologic stability – while not being faced with ill-defined restrictions, such as preserving the “neighborhood character.”¹⁶⁵ Subjective judgment in land use decisionmaking, however, is typical. Totally eliminating these standards may be politically infeasible. Taking away discretion may also induce concerned communities to create strict, rigid requirements that drastically reduce opportunities for development, change, and putting land to productive use. Nonetheless, there are several possible solutions which could reduce the scope of the problem.

One potential solution is an “as-of-right” or “by-right” permitting and zoning regime that requires permit approval when an applicant has met all codified criteria. Indeed, this is the primary tool advocated by the Obama Administration to combat onerous land use regulations that make housing and business unaffordable.¹⁶⁶ It also reduces the opportunity for rent-seeking. By-right permitting is, of course, aided by relaxing the restrictions in the first place, which lowers the need for applicants to seek and receive variances and waivers. Regular updating is important too, in order to ensure that codes do not become ossified and unreasonable barriers to change. Any updates should be careful to replace existing rules rather than just adding to them, so as to avoid the unreasonable increase of regulatory burdens that would come about just by layering a new community plan onto an old one.

But depriving decisionmakers of unbridled discretion does not mean one cannot take into account a variety of “soft” factors. “Form-based codes” offer an emerging tool for people to decide the form of the community they want to live in while also creating clear, predictable rules that allow development and a multitude of permitted uses within that community vision.¹⁶⁷ As Rick Hills and David Schleicher have suggested, comprehensive citywide plans that disallow deviation (through judicial means or otherwise) have the virtue of at least creating certainty with respect to land use, rather than the tumultuous and unpredictable parcel-by-parcel fight that characterizes the typical zoning process.¹⁶⁸ That said, the requirements must be clear and objective. One particular pitfall to avoid is requiring the decisionmaker to predict the future in order to grant a permit. And decisionmaking bodies must do their best to articulate and make available all of the steps, criteria, and standards that a landowner must meet to get his or her permit.

Relatedly, policymakers might reasonably add additional guardrails to agency decisional procedures if experience has shown that those agencies are ignoring legal norms. Consider the case of the New York City Preservation Commission discussed above – a case in which the Commission was only supposed to consider the fairly technical question of whether a certain property was capable of generating a sufficient cash flow. In that case, the Commission reportedly heard testimony from nearby residents that was entirely unrelated to the narrow scope of the matters it was to consider, and there is reason to believe that testimony which the law required the Commission to ignore

¹⁶⁵ <https://www.nytimes.com/2018/01/03/upshot/zoning-housing-property-rights-nimby-us.html>;
<https://ggwash.org/view/66966/we-are-left-looking-like-nimbys-whats-more-important-neighborhood-stability>;
https://leanurbanism.org/wp-content/uploads/2018/12/LU-Lean_Code_Tool.pdf at 14-15.

¹⁶⁶ https://www.whitehouse.gov/sites/whitehouse.gov/files/images/Housing_Development_Toolkit%20f.2.pdf

¹⁶⁷ <https://formbasedcodes.org/definition/>

¹⁶⁸ Hills and Schleicher, *Can ‘Planning’ Deregulate Land Use?*, REG. 36 (Fall 2015); Hills and Schleicher, *Planning an Affordable City*, 101 IOWA L. REV. 91 (2015).

played a role in the Commission’s ultimate decision. Lawmakers could create new procedural guardrails to prevent administrators from failing to do their jobs – jobs which, in this case, necessarily include restricting public testimony to germane matters. For example, lawmakers could enact a policy that deters lax agency administration (that is, administration which invites testimony that cannot appropriately receive agency notice) by making a failure to gavel down such testimony a basis for reversal on appeal.

In any event, the law should require decisionmakers to provide a statement that explains or justifies its decisions in terms of the governing law or standard. This could be required for every decision or, to reduce administrative burdens, upon request of the applicant. As expanded on below, such a requirement should be paired with robust judicial review. Moreover, including hortatory language in relevant statutes might have the effect of focusing decision-makers’ attention on desirable policy goals. And departure from those hortatory goals can signal to a reviewing body and the public that something is amiss. Hortatory language is sometimes a feature of state and federal constitutions; it’s a relatively weak but nonetheless ever-present signal to decision-makers.

B. Other Structural and Procedural Reform Opportunities

i. Improving Regulatory Transparency

Transparency is central to regulatory certainty: objective standards need to be easy to understand and widely publicized. Opaque regulatory standards impose disproportionately high burdens on those who lack the sophistication or the resources of a big developer or a large corporation. The Project on Lean Urbanism recommends, for example, that localities have dedicated persons on staff to assist applicants with project design and explain requirements.¹⁶⁹

ii. Creating Certainty by Eliminating Shifting Permit Demands

As discussed above, city officials have the power to create a list of permit requirements. In most states, however, that list is completely non-binding: the government can simply decide not to grant the permit application or, even worse, inspectors can impose a completely new list or even a succession of new lists. To address this shifting of permit demands and curtail the resulting uncertainty, cities or states could adopt a rule that prevent officials from changing their requirements. Or they could impose a statute of limitations on code enforcement when the government has knowledge about a condition on the property for more than a specified period. North Carolina has taken this approach. There, the government only has five years to prosecute violators after either the facts of the violation are made known to a government official/body or the violation is apparent to the public.¹⁷⁰ Like an estoppel defense, a statute of limitations prohibits a government from arbitrarily enforcing obscure regulations against landowners after passively accepting, and implicitly permitting, a violation for many years.

¹⁶⁹ https://leanurbanism.org/wp-content/uploads/2018/12/LU-Lean_Code_Tool.pdf at 10.

¹⁷⁰ [N.C. Gen. Stat. §1-51\(5\)](#).

iii. Shifting More Land Use Policy to the State Level

A chronic issue with land use policy is its hyperlocal nature, in that it allows small but intense interests to override broader concerns one land use decision at a time.¹⁷¹ This creates greater uncertainty because parochial interests can coopt individual decisionmaking processes to block a land use proposal in ways unforeseen by those who want to make more productive use of the lot. But shifting more land use planning to the state level not only allows a broader array of stakeholders to have a say – for example, affordable housing advocates – but also makes local land use decisions more predictable because they are constrained by state law. Ontario, Canada provides an example of robust provincial decisionmaking on land use. In the United States, New Jersey has implemented affordable housing policies akin to a “zoning budget” proposed by David Schleicher and Rick Hills.¹⁷² States can also promote systemic certainty by requiring a cost-benefit approach to land use regulation, coupled with a statewide review office, as suggested by Edward Glaeser and Cass Sunstein.¹⁷³

iv. Imposing Public Deadlines on Decisionmaking Bodies

Permitting timeliness is an important tool in land use reform. The imposition of deadlines forces state actors to make choices; it creates a regime in which decisional delay, past a certain point, is unacceptable. Examples of jurisdictions that use such timelines include Austin, San Diego, Rhode Island, and Massachusetts. Another potential model for ensuring that permitting decisions are timely made, and that persons seeking a permit are assured that they will not be faced with an interminable process, is California’s Permit Streamlining Act.¹⁷⁴ The Act specifies certain time frames for permitting actions, such as notifying the applicant when an application is complete or when a permit decision will be made, and creating a default or “deemed” approval when the permitting body fails to act. It also prohibits agencies from forcing applicants to waive or extend their speedy decision rights. Lawmakers might also create a takings-like cause of action for unjustified permitting delays.

Opponents of deadlines may argue that they create regulatory inflexibility or government powerlessness. However, incorporating a set of deadline rules does not necessarily imply a one-size-fits-all deadline regime. Policymakers could, for example, establish a regime of varied deadlines for different kinds of applications.

v. Eliminating Sunk Cost Application Requirements

Although some cost to the applicant will inevitably be involved for any land use application, minimizing the costs associated with knowing whether a particular use will be permitted will lower informational asymmetries and expand opportunities. For example, eliminating requirements to own or lease a particular property before applying for a permit will allow persons to make land use

¹⁷¹ See David Schleicher, *City Unplanning*, 122 YALE L. J. 1670 (May 2013); Hills and Schleicher, *Balancing the Zoning Budget*, REG. 24 (Fall 2011).

¹⁷² David Schleicher, *City Unplanning*, at 1723.

¹⁷³ Glaeser and Sunstein, *Moneyball for State Regulators* (Mar. 29, 2014).

¹⁷⁴ <https://www.cacities.org/UploadedFiles/LeagueInternet/c1/c1174374-f6b2-4723-af76-b0d8ddcc60e0.pdf>

decisions prior to expending substantial investment. Citizens should have the ability to require government to consider the development of property that is only contingently controlled. Conversely, the requirement that actual control of the property must precede public consideration of how it may be used can result in years of wasted time and effort. Similarly, applications should only require the minimum specificity needed to ensure that a proposed use meets objective requirements. Demanding extraneous detail increases planning and design costs which all could be wasted if a permit is denied.

vi. Consolidating Permits or Permit Offices

A permitting process that requires a prospective property developer to acquire multiple interlocking permits for the same development is an invitation to dysfunction. The consolidation of public permitting responsibility in one unitary office would be a simple but effective solution. If different permitting sub-agencies demanded different requirements for permit approval, it would then become the job of the unitary agency to create a unified set of requirements.¹⁷⁵ This forces the public body, not the applicant, to resolve the frictions of internal government disagreement.

vii. Providing an Adequate Procedure for Review

In addition to requiring governments to make permitting criteria clear and decisions in a timely fashion, the Goldwater Institute's model Permit Freedom Act helpfully adds that permitting decisions must be coupled with an adequate review/appeal process, including due process, evidentiary rules, and non-deferential review.¹⁷⁶ Once decisionmakers are required to articulate the basis for their decisions, the failure to connect regulatory decisions with the larger goals of the governing statute – or the failure to connect the articulated reasons with the arrived-at policy – could serve as a basis for reversal on review. The availability of judicial review has both remedial and prophylactic effects. Permit decisionmakers will know they will be held accountable for decisions made based on undue influence or improper factors. This will help minimize the unpredictability and uncertainty associated with arbitrary or unreasonable decision making.

viii. Ensuring that Barriers to Land Use are Costly

Those who stand in the way of a proposed land use – whether they're neighbors or a permitting body – often do so because, however slight the effect of change may be, objecting to change comes at little to no price. Accordingly, the costs society bears from land use prohibitions is borne entirely by newcomers and not at all by incumbents. Solving this issue involves ensuring appropriate incentives. Permitting bodies could be subject to fee-shifting provisions akin to the well-known Section 1983 civil rights statute (42 U.S.C. § 1983).

¹⁷⁵ See https://leanurbanism.org/wp-content/uploads/2018/12/LU-Lean_Code_Tool.pdf at 11.

¹⁷⁶ Timothy Sandefur, *Permit Freedom*, Goldwater Institute, available at https://goldwaterinstitute.org/wp-content/uploads/cms_page_media/2017/2/14/Tim%20Rela%20paper%20FINAL%20.pdf.

Another way to disincentivize unnecessary lawsuits is by requiring payment of attorney’s fees and costs to the prevailing party. In 2019, Florida successfully enacted a law with this language.¹⁷⁷ Such reforms may discourage opposition from stalling a permit approval, except in cases where a genuinely improper land use is proposed.

ix. Diminishing Parochialism by Expanding the Franchise

If public decision-making is supposed to be impartial, NIMBYism must be understood as a problem. But there is a structural fix that can diminish parochialism’s political power. When agencies are run by leaders who are chosen by district elections, the district-election structure creates additional incentives for agency leaders to pay disproportionate attention to local matters. Conversely, the political structure created by at-large elections, in which multiple officials share the same electorate, will dampen political transmission of parochial sentiments.

x. Creating Vested Rights in Land Use Approvals

Those who seek to invest and build need to know that if they obtain approval, that permit will stick. States like California recognize “vested rights” that cannot be taken away once a permit is issued. Likewise, the Minnesota Supreme Court recently affirmed that the government could not revoke the right of a business to continue an already established use without initiating eminent domain and paying compensation for taking away the right to continue that use.¹⁷⁸ States might act to protect property rights through enactments in the same manner.

C. Liberalization of the Zoning Code

i. Simplify Uses

In downtown regions, businesses are often transient as various areas grow and trends shift. It is therefore imperative for zoning codes to ease the transition between occupants by simplifying the type of use allowed in each building. Buildings should only be classified as commercial, industrial, or residential; it is often difficult to understand the justification for more exacting levels of classification (for example, bank, laundry, or tattoo parlor). By creating broader use categories, property owners will avoid lengthy change of use processes for minor transitions.

For example, the Congress for the New Urbanism provides a sample code with only 5 broad categories, each containing no more than 8 subcategories.¹⁷⁹ But many cities like Spokane, Washington still base their use categories on the International Building Code’s Use and Occupancy Classifications: its scheme includes 10 categories of general classification, each with up to 34

¹⁷⁷ [Fla. Stat. §163.3215\(8\)\(c\)](#).

¹⁷⁸ *White, Trustee for Lorraine M. White, Trust Fund, et. al. v. City of Elk River*, 840 N.W.2d 43 (Minn. 2013).

¹⁷⁹ Congress for the New Urbanism, *Users’ Guide to Zoning Reform*, Sept. 15, 2018, <https://www.cnu.org/sites/default/files/PCR-9-15-18.pdf> (pages 47-48).

subcategories.¹⁸⁰ Getting rid of unnecessary labels will allow cities to attract development and business.

Savannah, Georgia provides a good example of a city that recently updated its zoning code and use categories. It successfully cut its use table from 37 to 12 pages; in doing so, the city “reduced and dramatically simplified” its code in part by collapsing “uses with their own categories in the current ordinance, such as bicycle shops, ... [into] a more general retail classification.”¹⁸¹ Other cities can likely reduce their categories as well.

ii. Overlay Zoning

Some districts need revitalization, but they lack the political will needed to overhaul their zoning codes. Overlay zoning that establishes a layer of permissible zoning on top of an established zone in order to diversify the usage of space can be used to spot-treat these districts. For example, the city of Anaheim, California successfully used overlay zoning in 2004 to invite development without the use of eminent domain. Mayor Curt Pringle advocated adding commercial and residential use zones over a traditionally light industrial zone. By streamlining the permitting process in the overlay zone, the city was able to encourage new business and housing projects.¹⁸² The overlay zone process is appealing because it is flexible; it can be used to efficiently address a range of unpredictable land use issues.

iii. Eliminate Single-Family Zoning Requirements

Restrictive zoning limits options for developers and buyers alike. One way to increase choice is by getting rid of single-family housing zones. The elimination of restricted zones allows for higher-density developments, which increase the supply and lower the price of housing. This reform also gives developers freedom in how and where to build. The potential gains from abolishing single-family zones have not gone unnoticed. In an effort to encourage affordable housing developments and diversity in historically segregated communities, Minneapolis, Minnesota recently eliminated single-family zones. Just this year, Oregon became the first state to pass legislation that preempts cities from instituting single-family zoning requirements.¹⁸³ The Minneapolis and Oregon bills both passed with bipartisan support, suggesting that the problems created by single-family zoning are widely appreciated.

iv. Eliminate Minimum Square-Footage Requirements

Another regulation that divides communities and prevents expanded housing options is the minimum square-footage requirement. Minimum square-footage regulations also drive out

¹⁸⁰ [IBC 2015 Ch. 3 §302.1](#)

¹⁸¹ City of Savannah, *City of Savannah Zoning Ordinance Update Executive Summary*, at 10-11, http://www.newzo.org/docs/Draft7/Executive_Summary.pdf

¹⁸² Curt Pringle, *Development without Eminent Domain* (June 2007), pp. 5-7, Institute for Justice, <http://www.castlecoalition.org/pdf/publications/Perspectives-Pringle.pdf>

¹⁸³ Laurel Wamsley, *Oregon Legislature Votes To Essentially Ban Single-Family Zoning*, National Public Radio (2019), <https://www.npr.org/2019/07/01/737798440/oregon-legislature-votes-to-essentially-ban-single-family-zoning>

individuals and families that don't need additional space or can't afford it. Even if a city does not abolish single-family zones, eliminating square-footage requirements would still be an improvement. Some cities, like Austin, Texas, do not require buildings to meet a certain square-footage. This suggests that neighborhoods can thrive without government telling citizens how big their home must be.¹⁸⁴ But other cities, like Des Moines, Iowa, restrict their citizens' autonomy in housing decisions. Des Moines itself acknowledged the inherent problems in its minimum square-footage regulations when public pressure inspired lawmakers to lower the minimum square-footage requirement earlier this year.¹⁸⁵

Recent years have seen an upsurge in tiny house enthusiasts. But many antiquated square-footage and lot restrictions prohibit tiny house construction. To meet the demands of this new movement, some cities enacted exceptions to square-footage requirements. Rockledge, Florida created a special pocket neighborhood district for tiny homes. The creativity of the zoning and planning commission is laudable, but the root of the problem – Rockledge's 1,200 square-footage requirement – still exists.¹⁸⁶

D. Enacting Statutes to Enhance Constitutional Protections

Finally, lawmakers could minimize regulatory uncertainty for landowners by enacting statutes to provide better protection for property rights. Constitutional prohibitions against uncompensated takings, the unequal application of the law, and the lack of due process are not only backed by developed bodies of law, but also reflect deep intuitions about basic fairness. But case law has largely neutered the ability of these doctrines to create efficient markets and promote predictability in land use decisions. It is a mistake to assume, however, that addressing miscarriages of justice in these areas is only the province of the courts. Legislative bodies can enact measures that enhance constitutional protections by creating legal rights, standards, and causes of action that correct the inadequacies of case law.

For example, legislatures can guard against abuses associated with regulatory takings by statutorily defining what constitutes an impermissible taking. For example, a regulatory taking could be defined as a set of regulations which reduce a parcel's value by some fixed percentage, such as 50 percent. Statutes like those recommended above, which require regulatory bodies to articulate reasons for decisions and provide certain processes, can also prevent violations of the right to due process of law. Moreover, enacted laws can require courts to use a more penetrating level of scrutiny than rational basis review during judicial examination of the relationship between the decisional explanation and the criteria that the decisionmaker is supposed to apply. Equal protection rules can

¹⁸⁴ *City of Austin Guide to Zoning* (Sept. 2016),

https://www.austintexas.gov/sites/default/files/files/Planning/zoning_guide.pdf

¹⁸⁵ Kim Norvell, *Des Moines Lowers Size Requirements From New Homes in Contentious Zoning Code*, DES MOINES REGISTER (Aug 26, 2019),

<https://www.desmoinesregister.com/story/money/business/development/2019/08/26/des-moines-development-zoning-code-minimum-square-footage-home-building-new-construction-housing/2120622001/>

¹⁸⁶ [FL Land Dev. Reg. VI § 62.35\(b\)](#).

be improved by statutes that define or provide a framework for what it means for actors to be “similarly situated” to one another and (once again) requiring courts to use a more penetrating level of scrutiny than rational basis review.

* * *

It isn’t much of an oversimplification to say: a central motivation of the federal Constitution was the insight that it’s not so much the *people* as it is the *government* that needs to be regulated. That insight is valuable here: implicit in the proposals described above is that there is simply too much discretion in public decisionmaking about land use, and that this looseness creates a high likelihood of dysfunction and abuse.

VIII. Conclusion

We all want a society where the law is neutral, fair, and predictable. This is because uncertainty in the law is paralyzing – it prevents people and the institutions they create from growing, developing, and innovating. Over time, subjectivity, expanding requirements for approval, lack of oversight and review, and increased deference to public decisionmakers have become embedded in land use regulation. In the realm of land use permitting, the norm is for the law to be stacked against landowners, unfair in application, and excessively unpredictable. This is an area ripe for regulatory reform.

Undoubtedly there are legitimate concerns that drive some of land use law’s complexities. But all too often, it appears that landowners are subject to obstacles and delays that are unnecessary and unjustifiable. This result has adverse consequences for society at large, and so there is a compelling need for reform in existing regimes. Ultimately, citizens should be able to make reasonable and socially beneficial uses of their land in a manner that is compatible with the community. There are various means to accomplish this, whether through objective rather than subjective standards, streamlining the permitting process through consolidation, adequate procedures for review, or statutory solutions where the courts have improperly deferred to local governments. In choosing a proper solution, the fundamental goal must be to enable people to make well-grounded decisions at the outset about the best way to use their property. We hope this paper will be relied on to address legitimate concerns without adding to the regulatory thicket.