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Exploring Taxation as a Substitute for Overregulation in the Development Process

Stewart E. Sterk[†]

INTRODUCTION

The process of land use regulation has endured heavy criticism in recent years, both nationally and, more particularly, in New York City. In addition to public outcry over the use of eminent domain power, influential groups have challenged the use of one of the newest tools in the land use toolkit: Community Benefit Agreements (CBAs).¹ Some critics have expressed concerns over inadequate community representation in the CBA process.² Others have objected to the use of the land use process to advance public and private ends unrelated to traditional land use objectives.³ Both groups regard the advent of CBAs as a sign of breakdown in the regulatory process.

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¹ A Community Benefit(s) Agreement (CBA) is a contract negotiated between a developer and organized community representatives that promises various community benefits in exchange for the community groups' endorsement of a development project. JULIAN GROSS ET AL., COMMUNITY BENEFITS AGREEMENTS: MAKING DEVELOPMENT PROJECTS ACCOUNTABLE 9 (May 2005), available at <http://www.goodjobsfirst.org/pdf/cba2005final.pdf>. See Terry Pristin, *Community Pacts Questioned in the Zoning Process*, N.Y. TIMES, Apr. 28, 2010, at B8, available at <http://www.nytimes.com/2010/04/28/realestate/commercial/28cba.html> (noting opposition to the use of CBAs by both the Bloomberg administration and the New York City Bar Association).

² Nathan Markey, *Atlantic Yards Community Benefit Agreement: A Case Study of Organizing Community Support for Development*, 27 PACE ENVTL. L. REV. 377, 384-88 (2010); Nicholas Confessore, *To Build Arena, Developer First Builds Bridges*, N.Y. TIMES, Oct. 14, 2005, at A1, available at <http://www.nytimes.com/2005/10/14/nyregion/14yards.html>; Matthew Schuerman, *Ratner-Style Deal with Columbia University*, N.Y. OBSERVER (Aug. 15, 2005), <http://observer.com/2005/08/ratnerstyle-deal-with-columbia-university>.

³ See Patricia E. Salkin & Amy Lavine, *Community Benefits Agreements and Comprehensive Planning: Balancing Community Empowerment and the Police Power*, 18 J.L. & POLY 157, 207-09 (2009); David W. Chen, *Bloomberg Team Pressed Hard for Use of Yankee Luxury Suite*, N.Y. TIMES, Nov. 30, 2008, at A41, available at <http://www.nytimes.com/2008/11/30/nyregion/30stadium.html>; Terry Pristin, *In Major*

The criticisms leveled at CBAs, the expansive use of eminent domain,⁴ and other pillars of modern land use regulation⁵ raise an important question: if the process is broken, can it be fixed? And if it cannot, should we rely more on taxation as a method of regulating land use and less on regulation? In other areas of law—particularly in environmental law—regulatory strategies have made greater use of market mechanisms to achieve regulatory goals.⁶ Might we better achieve land use goals by exchanging regulation for taxation, thereby freeing developers from regulatory constraints while increasing tax revenues that could target the externalities development might cause?

My tentative answer is yes. We would be better off with a carefully designed system that taxes development than we are with the present system. A taxation-based system clearly represents a second-best solution—one that would leave Henry George turning over in his grave.⁷ But a tax on development, if combined with vast streamlining of the development-approval process, would ultimately prove less burdensome for developers and would eliminate several distortions that the current regulatory scheme generates.

Projects, Agreeing Not to Disagree, N.Y. TIMES, June 14, 2006, at C6, available at <http://www.nytimes.com/2006/06/14/realestate/commercial/14agree.html>.

⁴ Charles E. Cohen, *Eminent Domain After Kelo v. City of New London: An Argument for Banning Economic Development Takings*, 29 HARV. J.L. & PUB. POL'Y 491, 498, 543-51 (2006) (advocating a ban on economic development takings); Ilya Somin, *Controlling the Grasping Hand: Economic Development Takings After Kelo*, 15 SUP. CT. ECON. REV. 183, 190-210 (2007) (advocating a ban on economic development takings).

⁵ See generally Roderick M. Hills, Jr. & David N. Schleicher, *Balancing the "Zoning Budget"*, 62 CASE W. RES. L. REV. 81 (2011) (criticizing the zoning amendment process); Stewart E. Sterk, *Environmental Review in the Land Use Process: New York's Experience with SEQRA*, 13 CARDOZO L. REV. 2041 (1992) (criticizing the environmental-review process).

⁶ See generally Bruce A. Ackerman & Richard B. Stewart, *Reforming Environmental Law*, 37 STAN. L. REV. 1333 (1985) (advocating for market-based pollution trading initiatives); Robert N. Stavins, *A Meaningful U.S. Cap-and-Trade System to Address Climate Change*, 32 HARV. ENVTL. L. REV. 293 (2008) (advocating a CO₂ cap-and-trade system). An example of a successful cap-and-trade program implemented in the United States is the Acid Rain Program, which utilizes caps to limit SO₂ emissions and allocates emissions allowances based on performance standards. See Clean Air Act §§ 401-416, 42 U.S.C. §§ 7651-7651o (2000); DOUGLAS A. BURNS ET AL., NATIONAL ACID PRECIPITATION ASSESSMENT PROGRAM REPORT TO CONGRESS 2011: AN INTEGRATED ASSESSMENT, at ES 2-3 (Dec. 2011), available at http://www.whitehouse.gov/sites/default/files/microsites/ostp/2011_napap_508.pdf (concluding that the Clean Air Act successfully reduced SO₂ and NO_x emissions).

⁷ See HENRY GEORGE, PROGRESS AND POVERTY 223-27 (Bob Drake ed., 2006) (1879). Henry George advocated a single tax on vacant land, rather than a tax on developments.

I. MARKETS AND PLANNING: THE EXTERNALITY PROBLEM AND THE DEVELOPMENT OF ZONING

One of the extraordinary advantages of a private property system lies in its concentration of decision-making responsibility in a single person: the owner.⁸ Because the owner will, through market transactions, realize all of the benefits derived from expenditures on development, the owner has incentives to acquire the best available information about potential buyers' or tenants' market preferences. At the same time, the owner of parcel *A* need not waste time and energy accumulating information about parcels *B* through *Z*; those parcels' owners will focus on making their respective parcels as productive as possible.

The age-old difficulty with leaving all development decisions to the property owner is that many uses of property generate externalities. Historically, the common law addressed externality problems through a combination of nuisance doctrine and the enforcement of private covenants. Over time, however, these devices proved inadequate to address externality problems. First, because nuisance doctrine is primarily retrospective in operation, it provided only a weak foundation for internalizing potential externalities. Additionally, because private covenants may require negotiation among multiple property owners, high transaction costs made them an inadequate solution to medium- and large-scale externality problems.

Zoning developed as a public-law response to the externality problem. It was simple in concept and potentially simple in operation. The local zoning ordinance would divide the municipality into districts, and each parcel would be limited to a set of uses that were compatible with other permitted uses in the district.⁹ Industrial uses would be prohibited on all parcels in a residential district, creating an "average reciprocity of advantage"¹⁰ since each owner would be both benefited and burdened by the prohibition of industrial

⁸ See Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 354-55 (1967); Henry E. Smith, *Property and Property Rules*, 79 N.Y.U. L. REV. 1719, 1729, 1754-55 (2004).

⁹ See 1 EDWARD H. ZIEGLER, RATHKOPF'S THE LAW OF ZONING AND PLANNING § 1.01(c), at 120 (4th ed. rev. 1994). Euclidean zoning refers to the early zoning concept of separating incompatible land uses through rigid legislative rules. *Id.*; see also *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 397 (1926) (upholding ordinance dividing municipality into zoning districts with different limits on use, area, and height).

¹⁰ *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

uses. Recognizing that foresight would be imperfect, however, the Standard State Zoning Enabling Act¹¹ and most local ordinances incorporated a “safety valve” permitting a landowner to apply for a variance when circumstances unique to the parcel made strict application of the ordinance impracticable.¹²

II. INTRODUCING FLEXIBILITY AND ELIMINATING “AS-OF-RIGHT” DEVELOPMENT

Not surprisingly, zoning proved to be an imperfect mechanism for eliminating land use externalities. Zoning eliminated conflicts between broad categories of incompatible uses, but it did little to control more fine-grained externalities.

Suppose, for instance, a developer were to propose a residential development in a district zoned for single-family homes on one-quarter-acre lots. The typical zoning ordinance would not include a provision that ensures the development's internal roads connect to the municipality's road network in a way that minimizes congestion and provides optimal access for police, fire, and other emergency services. The ordinance also would not address water or sewer connections, nor would it address drainage problems. Additionally, the ordinance would not promote traffic safety by eliminating unbroken streets that encourage speeding or by minimizing curb cuts onto main roads. To address these issues, many jurisdictions now impose a subdivision-review process that often requires discretionary review by a body separate from the zoning board of appeals.¹³

¹¹ STANDARD STATE ZONING ENABLING ACT § 7 (Dep't of Commerce 1926).

¹² *See, e.g.*, N.Y. TOWN LAW § 267(1)(b) (McKinney 2011). *See* Bazinsky v. Kesbec, Inc., 19 N.Y.S.2d 716, 720 (N.Y. App. Div. 1940) (“The purpose of a variance [from a zoning ordinance] is to afford a safety valve, so that the carrying out of the strict letter of the Zoning Ordinance may not occasion unnecessary hardship to particular property owners.”).

¹³ *See, e.g.*, N.Y. TOWN LAW § 276 (McKinney 2011); N.Y. VILLAGE LAW § 7-728 (McKinney 2011) (conferring subdivision review authority on planning board). Local subdivision regulations are enacted to achieve various public goals, including protecting future land purchasers' interests and assuring adequate public facilities related to the proposed development. 5 EDWARD H. ZIEGLER, RATHKOPF'S THE LAW OF ZONING AND PLANNING, *supra* note 9, § 89:3. For example, the stated purpose of the New York enabling acts is to:

[P]rovid[e] for the future growth and development of the town and affording adequate facilities for the housing, transportation, distribution, comfort, convenience, safety, health and welfare of its population, the town board may, by resolution, authorize and empower the planning board to approve preliminary and final plats of subdivisions showing lots, blocks or sites, with or without streets or highways, within that part of the town outside the limits of any incorporated village.

N.Y. TOWN LAW § 276.

But these traffic, drainage, and connection issues are not confined to the subdivision context. In fact, they can also arise when a developer erects a single project that requires no subdivision. For these projects, many municipalities—pursuant to their authority under state law—require discretionary review of “site plans” for projects that meet certain size thresholds.¹⁴

Subdivision and site-plan review emerged from the notion that zoning was not restrictive enough. At the same time, municipalities began to recognize that zoning was sometimes too restrictive, leading to cookie-cutter developments even where less restrictive alternatives might have been equally effective at eliminating externalities.¹⁵ As a result, municipalities established planned unit developments and floating zones in order to provide additional flexibility, controlling density without mandating rigid lot configurations.¹⁶ Again, these tools required discretionary determinations by municipal officials.

Concerns about the adverse effects that some development might have on neighborhood character—constructing an ugly building, erecting a garish sign, or tearing down a historic landmark—generated new forms of discretionary review. Often, municipalities established distinct bodies to consider these issues—architectural-review boards¹⁷

¹⁴ See, e.g., N.Y. TOWN LAW § 274-a (McKinney 2011); N.Y. VILLAGE LAW § 7-725-a (McKinney 2011).

¹⁵ See *Cheney v. Vill. 2 at New Hope, Inc.*, 241 A.2d 81, 83 (Pa. 1968) (“This general approach to zoning fares reasonably well so long as . . . no one cares that the overall appearance of the municipality resembles the design achieved by using a cookie cutter on a sheet of dough.”); Jan Z. Krasnowiecki, *Planned Unit Development: A Challenge to Established Theory and Practice of Land Use Control*, 114 U. PA. L. REV. 47, 47 (1965).

¹⁶ Planned unit developments are created when a local legislature zones land as a planned unit development district, inviting a developer to propose a project that the municipality will consider as a whole, rather than requiring the developer to abide by pre-determined standards. Daniel R. Mandelker, *Legislation for Planned Unit Developments and Master-Planned Communities*, 40 URB. LAW. 419, 420-21 (2008). See, e.g., *Cheney*, 241 A.2d at 84-85. A floating zone is a zoning district created by a municipal ordinance that specifies the uses within the zone, but is not placed on a zoning map. A developer who wishes to build in accordance with the enumerated standards may submit a development application to have the zoning district apply to an existing parcel of land. The zoning district is added to the zoning map once the development application has been approved. JULIAN CONRAD JUERGENSMEYER & THOMAS E. ROBERTS, *LAND USE PLANNING AND CONTROL LAW* § 4.16 (1998). See also, e.g., *Rodgers v. Vill. of Tarrytown*, 96 N.E.2d 731, 735-36 (N.Y. 1951).

¹⁷ See, e.g., *Torsoe Bros. Constr. Corp. v. Architecture & Cmty. Appearance Bd. of Review*, 502 N.Y.S.2d 787, 788 (N.Y. App. Div. 1986) (upholding local law delegating authority to architecture and community appearance board of review).

and landmark preservation commissions¹⁸—rather than entrusting review to zoning or planning boards already charged with reviewing other aspects of the development.

Architectural-review boards often respond to concerns about extremely localized externalities. At the other end of the spectrum, a number of states have taken steps to account for externalities that might extend beyond the municipality itself. New York and California have taken the lead in instituting environmental-review processes that require developers to show that their projects minimize potential adverse environmental impacts.¹⁹ And a number of states have required approvals by state or regional agencies before certain development projects may begin.²⁰

All of these review processes root out externalities that development projects generate. But they do so at significant cost. First, review by multiple boards—sometimes with inconsistent agendas—constrains development and makes it more expensive. Indeed, environmental review alone often requires production of multivolume tomes that cost a fortune to produce.²¹ Second, boards often condition approval on changes unrelated to remedying externalities. When members of a citizen board are charged with reviewing an application, their natural tendency is to be proactive. Why waste time reviewing an application if they do not seize the opportunity to improve the developer's plan? As a result, even if the developer's plan generates no significant externalities, each member of the board may tinker with it in a good-faith effort to make it "better." Third, citizen boards often believe that they lack the expertise to review applications. Large municipalities may hire a staff of planners and lawyers to assist in reviewing those applications.²² In smaller municipalities, paid planning consultants and lawyers might fill that role.²³ Either way, the

¹⁸ For example, the New York City Landmark Preservation Commission is vested with the power to designate historical landmarks and regulate changes to the designated buildings. NEW YORK, N.Y., ADMIN. CODE §§ 25-301 to -321 (1992).

¹⁹ CAL. PUB. RES. CODE §§ 21,000-21,177 (West 1986 & Supp. 1991); N.Y. ENVTL. CONSERV. LAW §§ 8-0101 to -0117 (McKinney 1984 & Supp. 1991).

²⁰ See, e.g., VT. STAT. ANN. tit. 10, §§ 6001-6007 (West 2012); HAW. REV. STAT. §§ 205-1 to -18 (West 2012); OR. REV. STAT. ANN. §§ 197.005 to .285 (West 2012).

²¹ See, e.g., N.Y. ENVTL. CONSERV. LAW § 8-0109 (McKinney 2012) (detailing the environmental impact statement preparation procedure); see also Sterk, *supra* note 5, at 2076-84 (1992) (discussing cost and bulk of environmental impact statements).

²² See Sterk, *supra* note 5, at 2044.

²³ See, e.g., TOWN OF KENT, N.Y., CODE § 66A-13 (adopted Jan. 24, 2012), available at <http://www.ecode360.com/15739813> (requiring final approval by Planning Board Engineer and Planning Board Environmental Consultant for all major

cost of those consultants is often passed on to developers in the form of application fees.²⁴

Moreover, many of these externalities could or would be rooted out even in the absence of extensive discretionary review. First, market forces constrain the developer. Any harm neighbors might suffer as a result of ugly houses, cumbersome road connections, or excessively long blocks will be dwarfed by the harm those features would generate for the development's home purchasers. Of course, market constraints will be imperfect, both because purchasers may not immediately recognize problematic road connections or excessively long blocks, and because developers may decide that the additional benefits of squeezing more homes into the same space outweigh the purchase-price reductions that may result when access and safety are compromised. But this leads to a second mechanism for controlling externalities generated by the development: mechanical rules. A municipality could (and many do) impose requirements or standards for road construction, emergency vehicle access, block length, or the size and material of commercial signs.²⁵ As in other areas of law, these mechanical rules will be both underinclusive and overinclusive,²⁶ but they will also ease the developer's design burden and reduce the time and expense associated with compliance.

subdivision plats); *id.* § 77-60(T), available at <http://www.ecode360.com/12348201> (permitting Planning Board to consult persons with building architecture and design expertise or landscape architecture expertise when reviewing site plans).

²⁴ See, e.g., *id.* §§ 55-1 to -2, available at <http://www.ecode360.com/8322390> and <http://www.ecode360.com/8322391> (requiring applicant and landowner to pay all engineering, legal, and consulting fees associated with the application review process).

²⁵ See, e.g., *Bevan v. Brandon Twp.*, 475 N.W.2d 37, 39 (Mich. 1991) (upholding an ordinance prohibiting landowners from building more than one home on property unless access to the property was provided by a road wide enough to allow access for emergency vehicles); *Westfield Motor Sales Co. v. Town of Westfield*, 324 A.2d 113, 124 (N.J. Super. Ct. Law Div. 1974) (sustaining an ordinance limiting the size of commercial signs); *Party City of Nanuet, Inc. v. Bd. of Appeals*, 622 N.Y.S.2d 331, 332 (N.Y. App. Div. 1995) (upholding Board of Appeals determination denying a sign permit for sign that was dissimilar in color and design to other signs in the area).

²⁶ See Jules L. Coleman, *Rules and Social Facts*, 14 HARV. J.L. & PUB. POL'Y 703, 710 (1991) ("[R]ules are necessarily under- and over-inclusive with respect to the sets of reasons that support or ground them."); Frederick Schauer, *Rules and the Rule of Law*, 14 HARV. J.L. & PUB. POL'Y 645, 646 (1991) (describing rules as "entrenched generalizations likely to be under- and over-inclusive in particular cases . . ."); Kathleen M. Sullivan, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 58-59 (1992) (comparing rules and standards); Cass R. Sunstein, *Problems with Rules*, 83 CALIF. L. REV. 953, 976 (1995) (discussing planning advantages of rules over standards).

III. EXACTIONS AND IMPACT FEES

The discretionary review processes discussed above were developed to mitigate or eliminate the negative externalities associated with development. Suppose, however, that mitigation is impossible or inefficient. For example, imagine that a proposed development would increase congestion in existing parks or on existing roads, but the developer cannot alter the development to reduce congestion. Why not require the developer to compensate for those externalities rather than mitigate them? The developer could make monetary contributions that the municipality could use to build new roads or parks.²⁷ Alternatively, if the municipality concluded that other, unrelated projects were more important than improving roads or parks, the municipality might devote the money to those improvements. This compensation scheme has potential to create a win-win situation: the developer would obtain approval even though the development generates negative externalities that would otherwise justify its rejection, and the developer's contribution might more than offset the harm generated by the development.

The problem—as emphasized by Justice Scalia in his opinion in *Nollan v. California Coastal Commission*²⁸—is that exactions and impact fees open up the development process to people who would not be adversely affected by the proposed development, but who stand to gain if the developer is required to make payments to the municipality. As a result, municipalities might be tempted to impose restrictions on development unrelated to the externalities the development creates, only to trade development approval for cash or other concessions. Any constituency looking to reduce municipal taxes or increase particular municipal services becomes a potential opponent to development, further increasing its costs. The Supreme Court's opinions in *Nollan* and *Dolan v. City of Tigard*²⁹ constrained a municipality's use of exactions by

²⁷ At least twenty-seven states have statutory provisions authorizing impact fees. ARTHUR C. NELSON ET AL., *IMPACT FEES: PRINCIPLES AND PRACTICE OF PROPORTIONATE SHARE DEVELOPMENT FEES* 103 (AM. PLANNERS ASS'N PRESS, 2009). See, e.g., FLA. STAT. § 163.31801 (2012); 53 PA. STAT. ANN. §§ 10503-A to 10508-A (West 2012); VA. CODE ANN. § 15.2-2319 (West 2012); see also Martin L. Leitner & Susan P. Schoettle, *A Survey of State Impact Fee Enabling Legislation*, 25 URB. LAW. 491, 491-92 (1993); Steven B. Schwanke, *Local Governments and Impact Fees: Public Need, Property Rights, and Judicial Standards*, 4 J. LAND USE & ENVTL. L. 215, 220-23, 245-47 (1989).

²⁸ *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 837, 841 (1987).

²⁹ *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994).

requiring that the exaction have a “nexus” with the reason for requiring development approval in the first place, and that the exaction be roughly proportional to the external costs generated by the development.³⁰

In recent years, CBAs have emerged as a strategy for evading *Nollan* and *Dolan*. Municipalities cannot directly extract concessions unrelated to the reasons for requiring development approval, so they instead withhold development approval until the developer has secured the support of a variety of neighborhood groups.³¹ Those groups, in turn, bargain with the developer to secure benefits—including jobs and wage rates—that have little or nothing to do with land use externalities.³² Developers willingly participate in the process, however, because obtaining the support of neighborhood groups increases both the likelihood and speed of approval.³³

IV. BYPASSING THE PROCESS

Small-sized to medium-sized developers are, for the most part, stuck with the process described above. They must contend with a heavy dose of discretionary review, augmented by the potential need to satisfy rent-seeking community groups. Larger developers, however, may seek out alternatives to this process. The Atlantic Yards project provides an apt example. Forrest City Ratner, the developer, took advantage of a New York statute that excuses a qualifying urban

³⁰ *Id.*; *Nollan*, 483 U.S. at 837. See Note, *Municipal Development Exactions, the Rational Nexus Test, and the Federal Constitution*, 102 HARV. L. REV. 992 (1989) (explaining the rational nexus test); see also Lee Anne Fennell, *Hard Bargains and Real Steals: Land Use Exactions Revisited*, 86 IOWA L. REV. 1, 5 (2000) (criticizing limitations on exactions as inefficient and failing to protect landowners from the threat of overregulation); Mark Fenster, *Takings Formalism and Regulatory Formulas: Exactions and the Consequences of Clarity*, 92 CALIF. L. REV. 609, 654-67 (2004) (criticizing the exactions rules as overly rigid).

³¹ Vicki Been, *Community Benefits Agreements: A New Local Government Tool or Another Variation on the Exactions Theme?*, 77 U. CHI. L. REV. 5, 7 (2010).

³² Patricia E. Salkin & Amy Lavine, *Understanding Community Benefits Agreements: Equitable Development, Social Justice and Other Considerations for Developers, Municipalities and Community Organizations*, 26 UCLA J. ENVTL. L. & POL'Y 291, 300-17 (2008) (detailing various CBAs, including the Hollywood and Highland Center, the Staples Center, and the San Diego Ballpark Village).

³³ *Id.* at 296; see also Shelby D. Green, *Development Agreements: Bargained-For Zoning That Is Neither Illegal Contract Nor Conditional Zoning*, 33 CAP. U. L. REV. 383, 394 (2004) (Among other benefits, “[u]nder the development agreement model of land use controls, the developer gains the following: (1) certainty as to the governing regulations for the development project; (2) the ability to bargain for support and the coordination of approvals; (3) easier and less-costly financing because of the reduction of the risk of non-approval.”).

development corporation project from compliance with local zoning codes where the corporation decides that compliance is not feasible.³⁴ As a result, the entire development managed to bypass New York City's cumbersome review process.³⁵

Atlantic Yards provides another blueprint for a developer looking to avoid local review: persuade a government entity to exercise its eminent domain power.³⁶ Increased use of eminent domain to implement a major project in part reflects the need to overcome holdout problems,³⁷ but converting a private project into a quasi-public project often has the added advantage of bypassing ordinary zoning processes.

V. STREAMLINING THE PROCESS: IS TAXATION AN ALTERNATIVE?

A. *The Problem*

Our current system of land use regulation suffers from at least three significant problems: too many regulatory bodies, too much discretion, and too much participation.

Consider first the abundance of regulatory bodies. Imagine a landowner who wants to renovate several retail stores on the main street of a suburban municipality. The land is zoned for the retail uses the landowner proposes, and the landowner's proposal does not exceed the ordinance's floor area ratio. But the landowner may still need to apply to the zoning

³⁴ N.Y. UNCONSOL. LAW § 6266(3) (McKinney 2011) (giving the State's Urban Development Corporation the power to override local law when it determines that compliance "is not feasible or practicable"). See Amy Lavine & Norman Oder, *Urban Redevelopment Policy, Judicial Deference to Unaccountable Agencies, and Reality in Brooklyn's Atlantic Yards Project*, 42/43 URB. LAW. 287, 307-10 (2010) (discussing the Empire State Development Corporation's removal of Atlantic Yards from the Uniform Land Use Review Procedure (ULURP)).

³⁵ NEW YORK, N.Y., R.C.N.Y. tit. 62, ch. 2 §§ 2-01 to -10 (effective Oct. 1, 1991), available beginning at http://72.0.151.116/nyc/rcny/Title62_2-01.asp. See generally N.Y.C. DEPT OF CITY PLANNING, UNIFORM LAND USE REVIEW PROCEDURE (ULURP), available at <http://www.nyc.gov/html/dcp/html/luproc/ulpro.shtml>.

³⁶ *Goldstein v. N.Y. State Urban Dev. Corp.*, 921 N.E.2d 164, 165-66 (N.Y. 2009) (upholding the use of eminent domain in the development of the Atlantic Yards Project). See AKRF, INC., ATLANTIC YARDS ARENA AND REDEVELOPMENT PROJECT: BLIGHT STUDY (2006), available at <http://atlanticyardsreport.blogspot.com/2012/06/atlantic-yards-site-now-cleared-but.html> (declaring the Atlantic Yards project site blighted).

³⁷ See Daniel B. Kelly, *The "Public Use" Requirement in Eminent Domain Law: A Rationale Based on Secret Purchases and Private Influence*, 92 CORNELL L. REV. 1, 20-21 (2006) ("[P]rivate parties can circumvent the holdout problem and assemble land using secret buying agents. These buying agents are able to avoid the holdout problem using a double-blind acquisition system."); Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 75-78 (1986) (describing the holdout problem and the use of eminent domain as a solution to this problem).

board of appeals for a parking variance, and the landowner may also need a special permit from the zoning board of appeals if any of the proposed retail stores is a restaurant.³⁸ The landowner would need to obtain site-plan approval and environmental review from the planning board, in addition to approval of any commercial signs from an architectural-review board.³⁹ Each board will want to know how the others are dealing with the project, and no board will act on the application in a single meeting.⁴⁰ The zoning board of appeals and the planning board will each have separate lawyers, and the planning board may have a variety of consultants.⁴¹ Although the lawyers and consultants will bill the municipality for their services, the municipality will pass the costs directly to the applicant through application fees—leaving the municipality largely indifferent to the cost of reviewing the application.⁴² Moreover, this already-complex process reveals only a fraction of the obstacles that would face the developer of a comparable project in New York City. These projects often involve the participation of the city planning commission, local community boards, the respective borough president, and the city council.⁴³

The discretion conferred on each of these regulatory bodies exacerbates the problem of multiple decision makers. Of course, there would be no reason to have multiple bodies unless each one could exercise some discretion. Indeed, few community volunteers want to be a rubber stamp; instead, they want to exercise their discretion to improve the developer's proposed project. But discretion without guidelines presents a

³⁸ See, e.g., TOWN OF RAMAPO, N.Y., CODE § 376-151 (adopted Nov. 22, 2004), available at <http://www.ecode360.com/11859693> (authorizing zoning Board of Appeals to grant variances).

³⁹ See, e.g., *id.* § 42-2, available at <http://www.ecode360.com/11856228> (authorizing planning board to review and approve all site plans). If a sign is not submitted as part of the site plan, a sign plan must be submitted and subject to review by the Community Design Review Committee. *Id.* § 376-83(C), available at <http://www.ecode360.com/11859280>.

⁴⁰ See, e.g., *id.* § 376-112, available at <http://www.ecode360.com/11859376> (requiring the planning board to provide public hearings for all special permit applications).

⁴¹ See, e.g., CITY OF RYE, N.Y., CODE § 87-1(B) (adopted Sept. 15, 2010) available at <http://www.ecode360.com/6972071> (authorizing city boards to refer applications to “such engineering, planning, legal, technical or environmental consultant[s] . . . as they deem reasonably necessary”).

⁴² See, e.g., TOWN OF RAMAPO, N.Y., CODE § 122-2 (adopted Feb. 24, 1999), available at <http://www.ecode360.com/11856611> (requiring applicants to place funds in escrow to reimburse the town for any fees paid in relation to application review conducted by a planning consultant).

⁴³ See NEW YORK, N.Y., R.C.N.Y. tit. 62, ch. 2 §§ 2-03 to -07 (effective Oct. 1, 1991), available at http://72.0.151.116/nyc/rcny/Title62_2-03.asp.

serious problem for developers. It is one thing for a developer to explain why its project deviates from an established rule or standard, which is the typical issue on a variance application.⁴⁴ It is quite another to seek approval before a board whose members can insist on changes to any aspect of the project simply as the price of approval. To begin with, the developer may have little guidance regarding which aspects of the project will provoke concerns by members of the board, which frustrates the developer's ability to craft plans that will elicit quick approval. Moreover, even when the actions of a planning board or zoning board of appeals are formally subject to judicially enforced standards, no sensible developer would want to endure the cost—both in money and delay—of challenging a

⁴⁴ N.Y. TOWN LAW § 267-b (McKinney 2011) sets forth the framework the Board of Appeals must use in evaluating applications for use variances and area variances. In evaluating use variance applications:

(b) No such use variance shall be granted by a board of appeals without a showing by the applicant that applicable zoning regulations and restrictions have caused unnecessary hardship. In order to prove such unnecessary hardship the applicant shall demonstrate to the board of appeals that for each and every permitted use under the zoning regulations for the particular district where the property is located, (1) the applicant cannot realize a reasonable return, provided that lack of return is substantial as demonstrated by competent financial evidence; (2) that the alleged hardship relating to the property in question is unique, and does not apply to a substantial portion of the district or neighborhood; (3) that the requested use variance, if granted, will not alter the essential character of the neighborhood; and (4) that the alleged hardship has not been self-created.

Id. § 267-b(2)(b). The standard proscribed for evaluating area variance applications requires that:

(b) In making its determination, the zoning board of appeals shall take into consideration the benefit to the applicant if the variance is granted, as weighed against the detriment to the health, safety and welfare of the neighborhood or community by such grant. In making such determination the board shall also consider: (1) whether an undesirable change will be produced in the character of the neighborhood or a detriment to nearby properties will be created by the granting of the area variance; (2) whether the benefit sought by the applicant can be achieved by some method, feasible for the applicant to pursue, other than an area variance; (3) whether the requested area variance is substantial; (4) whether the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district; and (5) whether the alleged difficulty was self-created, which consideration shall be relevant to the decision of the board of appeals, but shall not necessarily preclude the granting of the area variance.

Id. § 267-b(3)(b). In evaluating area variances, the board of appeals must “grant the minimum variance that it shall deem necessary and adequate and at the same time preserve and protect the character of the neighborhood and the health, safety and welfare of the community.” *Id.* § 267-b(3)(c).

land use board's action.⁴⁵ As a practical matter, then, the boards may exercise far more discretion than the law permits.

Public participation generates an additional set of problems. There are, of course, advantages to public participation. Indeed, neighbors are often in the best position to educate local decision makers about the potential harm associated with development projects.⁴⁶ Nevertheless, because each individual neighbor has a small stake in the development project compared to the developer's interest, public choice theory predicts that neighbors will too often forego participation and that their perspectives will be underrepresented in the process.⁴⁷ On the other hand, with the expansion of impact fees, exactions, and more recently CBAs, the incentive for organized groups to participate has increased—even where the project itself will generate few externalities. Accordingly, in light of the limited incentives for participation among affected groups and the expanded incentives for participation among unaffected groups engaged in rent seeking, participation will often generate more heat than light for decision makers.

B. *Objections to Streamlining the Process*

One approach to addressing these difficulties is to streamline the land use regulation process by returning to zoning basics: a rule-oriented system, but one with more rules to deal with externalities that early zoning codes failed to anticipate. Codes would be longer and would incorporate features that are currently found in subdivision regulations, such as standards for road construction, drainage, and water connections.⁴⁸ Planning boards, architectural-review boards,

⁴⁵ Stewart E. Sterk, Nollan, *Henry George, and Exactions*, 88 COLUM. L. REV. 1731, 1750 (1988); Theodore C. Taub, *Exactions, Linkages, and Regulatory Takings: The Developer's Perspective*, 20 URB. LAW. 515, 518 (1988).

⁴⁶ See WILLIAM A. FISCHER, *THE HOMEVOTER HYPOTHESIS* 74-75 (2001) (noting that because homeowners are aware that local government policies will affect the value of their largest single asset, they pay close attention to policies that affect those values); Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 CALIF. L. REV. 839, 870 (1983) (noting that local officials obtain expertise by "talking to constituents and interested parties about local conditions"); see also Sterk, *supra* note 45, at 1738-39 (discussing difficulties in assessing the harms a development project may cause).

⁴⁷ David A. Dana, *Land Use Regulation in an Age of Heightened Scrutiny*, 75 N.C. L. REV. 1243, 1272-74 (1997); Daniel A. Farber, *Public Choice and Just Compensation*, 9 CONST. COMMENT 279, 289-90 (1992).

⁴⁸ Performance zoning is an alternative to traditional zoning that sets performance standards regulating the result of an activity, rather than the activity

and the environmental-review process would be eliminated. A zoning board of appeals would remain, both to review interpretations by the local building department and to consider variance applications, and it would be constrained by statutory standards.⁴⁹

The standard objection to a rule-based approach is that rules are almost always both overinclusive and underinclusive.⁵⁰ Especially when facts about particular parcels of land are so individualized—for example, topography, proximity to neighboring uses, access to existing road networks—discretionary determinations are better suited to account for externalities. Many externalities are easier to identify and control in the context of a concrete project than they are in the abstract.

In land use cases, however, a countervailing consideration moves in the other direction: as the determination becomes more content-specific, rent-seeking behavior becomes more likely to distort the decision-making process. If land use regulations were promulgated in advance, designed to apply globally, and devised behind a (somewhat porous) “veil of ignorance,”⁵¹ rent seeking might be more easily cabined than when the immediate winners and losers are readily apparent. Permitting cluster development with extensive open space in residential districts may appear to be sensible policy, so long as the development meets specified design standards, but when a developer proposes a cluster development next to existing single-family homes, those neighbors may not agree that the policy is so sensible.

Another objection to a rule-based approach might relate to the imperfect foresight of the body charged with developing the rules. Neighborhood circumstances change, and so do consumer preferences. But, of course, there is nothing (other than inertia) to prevent municipalities from revisiting the rules on a periodic basis. Indeed, many communities—often prodded by their paid planning consultants—attempt to revise their comprehensive plans on a relatively fixed schedule to account for changed circumstances.⁵²

itself. Performance standards may be drafted to deal with specific issues. Frederick W. Acker, *Performance Zoning*, 67 NOTRE DAME L. REV. 363, 372-73 (1991).

⁴⁹ See NEW YORK, N.Y., R.C.N.Y. tit. 62, ch. 2 §§ 2-03 to -07 (effective Oct. 1, 1991).

⁵⁰ See *supra* note 26.

⁵¹ See generally JOHN RAWLS, A THEORY OF JUSTICE (1971) (discussing his “original position” concept and principles of justice).

⁵² 1 E.C. YOKLEY & DOUGLAS SCOTT MACGREGOR, ZONING & PRACTICE LAW § 5-4 (4th ed. 2008) (“If any plan is to be truly comprehensive, it must be kept up to

Perhaps the biggest obstacle to streamlining the regulatory process is a political one: local governments may be unwilling to relinquish control over development within their borders, especially if they will receive nothing in return. The costs of the current bureaucratic system are not always apparent to municipal officials. First, the municipality incurs few direct expenditures; most of the expenses are imposed on developers. Second, the harm in the form of higher home and office prices is hidden, so long as all other municipalities engage in the same process. If one municipality were to eliminate red tape, development might flock to it. But if purchasers view municipalities as close substitutes for one another, and other municipalities continued to make development expensive, local prices would not decline much as a result of a single municipality's red-tape reduction.⁵³

C. *Adding Taxation to the Mix*

Would it be possible to overcome political obstacles with a development tax that augmented municipal coffers? Suppose that a state were to reconfigure the land use process to eliminate discretionary review. Moreover, suppose that, instead of that review, the state authorized municipalities to impose taxes that they could use to address whatever external costs a rule-based regime failed address.

The idea of taxing development would have Henry George rolling over in his grave. While a tax on land does not distort economic activity because the owner of the land cannot avoid the tax, a tax on development does create avoidance opportunities: it encourages landowners to engage in activities exempt from the tax.⁵⁴ Taken in the abstract, a development tax is a controversial idea because of its potential to distort land use decisions.⁵⁵ But the idea should not be evaluated in the

date. This requires periodic examination and reexamination of the plan by the planning authorities of the enacting political subdivision. In some instances, state statutes require formal periodic evaluation of comprehensive plans.”)

⁵³ WILLIAM A. FISCHER, *THE ECONOMICS OF ZONING LAWS: A PROPERTY RIGHTS APPROACH TO AMERICAN LAND USE CONTROLS* 238-43 (1985) (discussing the impact of regulation on housing prices).

⁵⁴ *Id.* at 9-10 (“Many taxes on land are assessed at different rates according to use. An example is the widespread practice of assessing . . . open space at a smaller fraction of value than that of developed land (sections 13.1 and 13.8). The supply of land for these purposes is at least somewhat elastic, so the owner can avoid some land taxes by his choice of which use to put his land to.”).

⁵⁵ GEORGE, *supra* note 7, at 242-45.

abstract. We already impose a significant tax on development in the form of time, cost, and concessions made by developers during a discretionary approval process. The question to confront, then, is whether a tax on development causes more or less distortion than the current regime, not whether the tax causes more distortion than a regime with no tax at all.

Consider how a system that combines rules with taxes might work. In some ways, the system would operate like traditional zoning. The local legislative body would enact a zoning code, albeit a more detailed code than under most current regimes, incorporating into its rules many of the features currently found in subdivision regulations. A developer who complies with the code would truly be entitled to build “as of right,” subject only to review by a building inspector to ensure that the project actually complies with the code. A zoning board of appeals or a similar body would still need to review the inspector’s conclusions, issue first-order interpretations, and grant the equivalent of variances, still constrained by standards articulated in the ordinance.

At the same time, the municipality’s local legislative body would impose a general tax on development within the municipality. The tax might be based on square footage or some other easily measurable feature. Local officials might even channel development by imposing different taxes on different kinds of space. For instance, square footage devoted to affordable housing might be taxed at a rate of zero, while green buildings might be entitled to a partial exemption—all determined by preset standards that enable developers to factor the tax into their development planning.⁵⁶

The municipality could then use the tax funds it raises to control externalities generated by development. If the code failed to adequately address road, water, or sewage needs, the municipality could use funds to augment inadequate systems. If open space proved inadequate, the municipality could use the funds to condemn land for parks. Municipalities might even allocate the tax revenues to any municipal purpose whatsoever,

⁵⁶ Development incentives provided by a comprehensive tax scheme are no more objectionable than the current incentives offered by many municipalities. *See, e.g.,* TOWN OF BABYLON, N.Y., CODE § 89-86 (2006), *available at* <http://www.ecode360.com/6806042> (offering a building fee refund for projects that achieve LEED certified status); CHICAGO, ILL., MUN. CODE § 13-32-301(c) (2010) (waiving permit fees for projects that qualify for the Chicago Green Permit Program).

leaving elected officials free to decide where addressing land use externalities lies on the list of municipal priorities.⁵⁷

This combination of rules and taxes would preserve municipal autonomy. A municipality seeking to encourage development could keep development taxes low and impose less stringent standards on developers.⁵⁸ Conversely, an antidevelopment municipality could keep taxes high and impose more stringent standards.

The biggest challenge for a tax-based scheme involves the practice—which is prevalent in many municipalities—of imposing excessively restrictive zoning ordinances with the expectation that the ordinance will be amended when a developer proposes a sufficiently attractive project.⁵⁹ If municipalities were to continue that practice, a tax-based scheme would accomplish little. All of the review would be centralized in the local legislative body, which might eliminate inconsistent review by multiple boards, but the scheme would do little to reduce rent seeking. A local legislative body—unlike a zoning board of appeals or a planning board—is not typically subject to time constraints.⁶⁰ As a result, when a developer seeks an amendment, the local legislature is generally free to take as much time as it wants to review the proposal, taking input from every potential interest group, and ultimately re-drafting the ordinance to impose requirements a developer could not anticipate.

Limiting municipal power to amend the ordinance could solve this problem. Of course, evolving circumstances make it important for municipalities to retain some power to amend their ordinances, but state legislation could limit municipal power to enact amendments more often than once every three

⁵⁷ Opening up the process would increase the opportunity for rent-seeking. See generally Sterk, *supra* note 45, at 1745-46 (noting that in a regime without constraints on who might seek to benefit from exactions, the potential for rent-seeking increases). The increased opportunity for rent-seeking would not directly affect the development process so long as rent-seekers are unable to increase the size of the pie by opposing (or threatening to oppose) a particular development project. Of course, rent-seekers might seek to impose a higher development tax, but that risks discouraging marginal development (and threatening the total revenue collected). See Vicki Been, “Exit” as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine, 91 COLUM. L. REV. 473, 478, 509-45 (1991).

⁵⁸ Charles Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 418 (1956) (noting that consumer-voters can choose to move to local community that best serves their preferences).

⁵⁹ Fenster, *supra* note 30, at 622-24.

⁶⁰ See, e.g., N.Y. TOWN LAW § 267-a(8) (McKinney 2011) (requiring the board of appeals to render a decision within sixty-two days of the hearing); N.J. STAT. ANN. § 40:55D-73 (West 2011) (requiring the board to render decisions within 120 days).

years. More frequent amendments would engender a presumption of invalidity, a presumption that could be overcome only by proof that the existing ordinance reflects a zoning “mistake”—a variation on the change or mistake rule currently in force in a number of states.⁶¹ If it were apparent to the local legislative body that it could not amend its ordinance at will, the body would have an incentive to avoid excessive restrictions, since those restrictions would prevent development and therefore eliminate tax collections.

CONCLUSION

The broad discretion that characterizes our current process for regulating land use imposes costs disproportionate to the benefits generated by that discretion. Developers, however, are the principal organized interest group with an incentive to reform the process, and even they can pass some of the costs associated with discretion on to their customers—unorganized consumers. Reform, then, is likely only if other groups see benefits in cabining discretionary review. Increased revenue from a tax on development has the potential to generate those benefits.

⁶¹ See, e.g., *Clayman v. Prince George’s Cnty.*, 292 A.2d 689, 693-95 (Md. 1972); *Town of Florence v. Sea Lands, Ltd.*, 759 So. 2d 1221 (Miss. 2000); *Albuquerque Commons P’ship v. City Council*, 184 P.3d 411 (N.M. 2008).