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I thank two anonymous referees for their comments.

Revitalizing Land Use Law: Introductory Notes

RONIT LEVINE-SCHNUR*

Pour célébrer le centenaire du zonage dans la ville de New York, je développe une vision relative à la revitalisation de l'utilisation des terres et de la réglementation du zonage. Le centenaire de la ville n'est pas la seule raison pour laquelle nous avons besoin d'une telle vision. Étant donné le grand impact des lois sur l'utilisation des terres sur la vie des personnes et sur leur entourage, il est crucial de ré-imaginer le système d'utilisation des terres, et notamment le contrôle judiciaire des lois sur l'utilisation des terres, et de lui donner un fondement éthique. Le système d'utilisation des terres devrait être fondé sur un engagement éthique à promouvoir l'équité et la durabilité. Ce système devrait être guidé par des principes de démocratie et de transparence, par des normes d'accessibilité, de diversité et de densité, et par l'exigence de maintenir un rapport équitable entre la distribution des charges et l'allocation des avantages. Cet article explique pourquoi le droit relatif à l'utilisation des terres est présentement dépourvu d'engagement éthique. L'article offre aussi un aperçu général de la forme que pourrait prendre un tel engagement.

As a way of celebrating its centenary, I sketch out a vision of how to revitalize land use and zoning law. Such a vision is called for not merely because of the marking of 100 years since zoning was first introduced in New York City. Due to the immense impact land use laws have on human lives and their surroundings, it is crucial to re-imagine the land use law system, and in particular judicial review of land use law, and to ground it within an ethical foundation. A land use law system should be based on an ethical commitment to fairness and sustainability. It should be guided by principles of democracy and transparency; by norms of accessibility, diversity, and density; and by a requirement to preserve a fair ratio between the distribution of burdens and the allocation of benefits. This article provides an account of why land use law is currently missing an ethical commitment and offers a broad outline of the form such an ethical commitment could take.

THERE IS PROBABLY NO NEED FOR ANOTHER HISTORICAL REVIEW of how it all started for zoning, and land use law more generally.¹ Mumford,² Hall,³ and Wolf,⁴ for instance, offer a few

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¹ The article focuses on the Canadian and American experiences and does not take into account other jurisdictions' historical turn toward extending planning and land use regulation and powers.

² Lewis Mumford, *The City in History: Its Origins, Its Transformations, and Its Prospects* (New York: Harcourt, Brace & World, 1961).

³ Peter Hall, *Cities of Tomorrow: An Intellectual History of Urban Planning and Design in the Twentieth Century* (Oxford and New York: Wiley-Blackwell, 2002) [Hall].

⁴ Michael Allan Wolf, *The Zoning of America: Euclid V Ambler* (Lawrence, Kansas: University Press of Kansas, 2008) [Wolf]. See also John F Hart, "Land Use Law in the Early Republic and the Original Meaning of the Taking Clause" (2000) 94 Nw UL Rev 1099.

such investigations into the past. When marking now the passage of the first 100 years of zoning, the reference is to the first comprehensive zoning plan. That plan was implemented in New York City in 1916.⁵ The “Zoning Resolution,” as it was officially called, regulated and restricted the location of different kinds of uses, such as industries and residential housing, the lot area to be built on, and the size and height of buildings.⁶ Its model was soon to be followed by many other local communities in the United States and in Canada.⁷ The Zoning Resolution came after some thirty years of pioneering building restrictions which were imposed throughout North America, including in Canada.⁸ Nonetheless, it was the first attempt to comprehensively regulate land use, and for that, it gained its glory. Its lingering influence on other jurisdictions is evident, arguably, from the close legal ties that exist between Canadian and American land use jurisprudence, despite the many legal and cultural differences between the two countries.⁹

But there are at least two other competing milestones to mark the emergence of modern land use law. The first is the planning initiatives of late nineteenth century architects, such as Ebenezer Howard, with his plans for utopian “Garden Cities,” a detailed model for planned-from-above towns.¹⁰ Howard’s ideas spread to Canada, with the support of the British planner Thomas Adams,¹¹ and were perceived as “the model for achieving the development of healthy, attractive communities in Canada.”¹² Or Frederick Law Olmsted, with his successful efforts in the mid-nineteenth century to convince decision-makers in New York City to fund what would later be known as the Central Park.¹³ Olmsted correctly predicted that such an urban park would

⁵ Stanislaw J Makeilski, *The Politics of Zoning: The New York Experience*, Metropolitan Series; No. 4 (New York: Columbia University Press, 1966); Seymour I Toll, *Zoned American* (New York: Grossman Publishers, 1969).

⁶ Raphaël Fischler, “The Metropolitan Dimension of Early Zoning: Revisiting the 1916 New York City Ordinance” (1998) 64:2 *Journal of the American Planning Association* 170.

⁷ Elizabeth Bloomfield, “Town Planning Efforts in Kitchener-Waterloo, 1912–1925” (1980) 9 *Urban History Review / Revue d’histoire urbaine* 3 [Bloomfield]; Eran Kaplinsky, “The Zoroastrian Temple in Toronto: A Case Study in Land Use Regulation, Canadian-Style” in Eric Tucker, James Muir & Bruce Ziff, eds, *Property on Trial: Canadian Cases in Context* (Toronto: Irwin Law for the Osgoode Society for Canadian Legal History, 2012) 223 [Kaplinsky]; Marcia Valiante & Anneke Smit, “Introduction” in Marcia Valiante & Anneke Smit, eds, *Public Interest, Private Property: Land and Planning Policy in Canada* (Vancouver and Toronto: UBC Press, 2016) 11 [Valiante & Smit].

⁸ E.g. Raphaël Fischler, “Development Controls in Toronto in the Nineteenth Century” (2007) 36 *Urban History Review / Revue d’histoire urbaine* 16.

⁹ See, e.g. Ed Morgan, “The Sword in the Zone: Fantasies of Land-Use Planning Law” (2012) 62:2 *UTLJ* 163 [Morgan]; Cherie Metcalf, “The (Ir) Relevance of Constitutional Protection for Property Rights? Compensation for Takings in Canada and the United States” (2015) 65:3 *UTLJ* 143, 173 [Metcalf]: “In both Canada and the United States, the reach of takings law is limited by generous deference to land use planning and zoning regulation, weakening practical differences in the degree of protection of property across regimes;” Ronit Levine-Schnur & Avigail Ferdman, “On the Just Distribution of Land Use Rights” (2015) 28:2 *Can JL & Jur* 317 [Levine-Schnur & Ferdman]. There are however others who stress the differences between the two countries. In this article, I aim not to emphasize differences but rather the shared grounds of the two legal systems, although, naturally similarity is a matter of scale.

¹⁰ Sir Ebenezer Howard, *Garden Cities of To-Morrow* (Cambridge: MIT Press, [1902] 1965).

¹¹ Oiva Saarinen, “The Influence of Thomas Adams and the British New Towns Movement in the Planning of Canadian Resource Communities” in Alan FJ Artibise & Gilbert A Stelter, eds, *The Usable Urban Past: Planning Politics in the Modern Canadian City* (Montreal and Kingston: McGill-Queen’s Press-MQUP, 1980) 268.

¹² “Urban and Regional Planning” in *Canadian Encyclopedia*, online: <thecanadianencyclopedia.ca/en/article/urban-and-regional-planning/> [perma.cc/JBN9-5B2W].

¹³ Frederick Law Olmsted, “Public Parks and the Enlargement of Towns” in *American Social Science Association 1870* (reprinted: Michael Larice & Elizabeth Macdonald, eds, *The Urban Design Reader*, 2d ed [New York: Routledge, 2013] 36).

have positive externalities on its surroundings, and that these could be used to secure high property taxes.¹⁴ Indeed, early uses of zoning were designed to preserve the land values of properties in existing residential neighbourhoods.¹⁵ Howard and Olmsted advanced, in different ways, the idea that zoning and city planning can produce wealth, health, and prosperity, especially when they are binding and centrally directed. Distributional concerns were not their central interest, if an interest at all.

The second milestone in land use law was achieved in the year 1926, when the United States Supreme Court delivered its decision in *Village of Euclid v Ambler Realty Co.*¹⁶ In this landmark case, the US Supreme Court upheld, for the first time, a comprehensive zoning ordinance in the Village of Euclid, a suburb of Cleveland, Ohio. The Supreme Court affirmed the constitutionality of zoning ordinances, and ruled that a zoning ordinance must be “clearly arbitrary and unreasonable, and without substantial relation to the public health, safety, morals, or general welfare,” before it can be declared unconstitutional. The American Federal government’s recognition of the zoning practice—with the enactment of the *Standard State Zoning Enabling Act (SZEA)* in 1926, and the *Standard City Planning Enabling Act* in 1928—was another important step towards the legal institutionalization of zoning. Thus, by the early part of the 20th Century, local governments had guaranteed their power to have full, almost unhindered, discretion over zoning and urban planning decisions.¹⁷ Likewise, in Canada, the constitutionality of zoning was never in doubt,¹⁸ although early judicial attention was given to natural justice considerations such as generality and non-retroactive legislation.¹⁹

Planning and zoning laws are usually explained as a modern response to the genesis of industrial cities and the resulting social challenges.²⁰ In this sense, arguably, government officials in Toronto, New York City, and elsewhere were inspired by ideas such as those developed by Howard, when they aimed to promote the public’s interest by providing safe, healthy, well organized, top-down, controlled spaces.²¹ Alternatively, the development of zoning might be explained as reflecting the politics of interest groups.²² Property owners and land developers realized Olmstead’s predictions in their broader sense and urged city politicians to protect and enhance the value of their assets by separating uses, and regulating the density, shape, and size of buildings in order to secure higher land values and to preserve the local tax

¹⁴ John L Crompton, “The Impact of Parks on Property Values: A Review of the Empirical Evidence” (2001) 33 *Journal of Leisure Research* 1.

¹⁵ Valiante & Smit, *supra* note 7 at 12.

¹⁶ *Village of Euclid v Ambler Realty Co.*, 272 US 365 (1926) [*Village of Euclid*].

¹⁷ William A Fischel, “Zoning and Land Use Regulation” in Boudewijn Bouckaert & Gerrit De Geest, eds, *Encyclopedia of Law and Economics*, Volume II (Cheltenham: Edward Elgar, 2000) 403.

¹⁸ Leo Longo, “A Brief History of the Initial Zoning Power in Ontario and its Judicial Consideration” (2010) 72:4 *Municipal and Planning Law Reports* 62.

¹⁹ *E.g.* *Cridland v City of Toronto* (1920) 48 OLR 266; *City of Toronto v Wheeler* (1912) 3 OWRN 1424; *Toronto v Williams* (1912) 27 OLR 186 (Div Ct).

²⁰ *E.g.* Marcia Valiante, “In Search of the ‘Public Interest’ in Ontario Planning Decisions” in Anneke Smit & Marcia Valiante, eds, *Public Interest, Private Property: Land and Planning Policy in Canada* (Vancouver and Toronto: UBC Press, 2016) 104 [Valiante]; Susan S Fainstein & James DeFilippis, “Introduction: The Structure and Debates of Planning Theory” in Susan S Fainstein & James DeFilippis, eds, *Readings in Planning Theory*, 4th ed (Oxford and New York: Wiley-Blackwell, 2016) 1; Hall, *supra* note 3.

²¹ Bloomfield, *supra* note 7; Kaplinsky, *supra* note 7 at 229–231.

²² Nadav Shoked, “Reinvention of Ownership: The Embrace of Residential Zoning and the Modern Populist Reading of Property” (2011) 28 *Yale J Reg* 191.

base.²³ These two background stories may stand in conflict, as they offer different justifications and goals for land use law systems. They might, however, be conceived as complementary explanations, since either way, whether intentionally or unintentionally, zoning laws are correlated with racial and wealth-based segregation.²⁴

As said, this is not an historical project. The empirical question of how zoning came to be in any particular jurisdiction is not the focus of this article. I do wish, however, to point out that the existence of two narratives about the purposes of zoning, two different views about the driving forces behind its birth—efficiency versus social planning—and the *tension* between them, is in fact ongoing and remains at the core of land use law.²⁵ On the one hand, zoning is a way to progress towards idealized forms of living. On the other hand, zoning is an externalities-management mechanism to advance particular interests of the more powerful segments of a given society, in particular—a means to influence land prices and subsequent property taxes.²⁶

I argue that the problem with zoning and land use law and particularly with judicial review in this field as set from its genesis by the *Euclid* Court or the lack of substantial overview of planning decisions by Canadian courts, is that zoning and land use law provides a framework for decision-making but *lacks any substantial ethical commitment*. In the larger picture of planning, the multiplicity of interests involved in the planning decision-making process has led the judiciary, as well as many scholars, to shy away from a focus on the substantive content of planning to the *mere process* of making planning decisions.²⁷

In this short article I offer an account of how it came to be that such a commitment is missing, provide preliminary thoughts as to what such a commitment could look like, and suggest what type of questions should be a part of the judicial review of zoning decisions. In other words, I argue that there is currently no “narrator” for land use law; it operates under a formal setting of “an appeal to reason and logic, through a strong claim to objectivity and certain knowledge, through a voice that claims objectivity and authority.”²⁸ The omission of an ethical commitment in zoning is especially striking given the deeply important distributive justice considerations that are determined in the planning process, and that planning has been described as having ethical issues at heart.²⁹

²³ J Vernon Henderson, “The Impact of Zoning Policies which Regulate Housing Quality” (1985) 18:3 J Urban Econ 302; William C Wheaton, “Land Capitalization, Tiebout Mobility, and the Role of Zoning Regulations” (1993) 34:2 J Urban Econ 102.

²⁴ Rolf Pendall, “Local Land Use Regulation and the Chain of Exclusion” (2000) 66:2 J Am Inst Plann 125; Jonathan Rothwell & Douglas S Massey, “The Effect of Density Zoning on Racial Segregation in US Urban Areas” (2009) 44:6 Urban Affairs Review 779; Leah Platt Boustan, *Competition in the Promised Land: Black Migrants in Northern Cities and Labor Markets* (Princeton: Princeton University Press, 2016) 105.

²⁵ Levine-Schnur & Ferdman, *supra* note 9.

²⁶ Bruce W Hamilton, “Property Taxes and the Tiebout Hypothesis: Some Empirical Evidence” in Edwin S Mills & Wallace E Oates, eds, *Fiscal Zoning and Land Use Controls: The Economic Issues* (Lexington, Mass: Lexington Books, 1975) 13; Walter Van Nus, “Towards the City Efficient: The Theory and Practice of Zoning, 1919–1939” in Alan FJ Artibise & Gilbert A Stelter, eds, *Usable Urban Past Planning and Politics* (Montreal and Kingston: McGill-Queen’s Press-MQUP, 1980) 237; William A Fischel, *The Homevoter Hypothesis: How Home Values Influence Local Government Taxation, School Finance, and Land-Use Policies* (Boston: Harvard U Press, 2005) [Fischel].

²⁷ Valiante, *supra* note 20 at 108; Adam J MacLeod, “Identifying Values in Land Use Regulation” (2012) 101 Ky LJ 55 [MacLeod].

²⁸ Gerald B Wetlauffer, “Rhetoric and Its Denial in Legal Discourse” (1990) 76 Va L Rev 1545, 1565.

²⁹ Heather Campbell, “‘Planning Ethics’ and Rediscovering the Idea of Planning” (2012) 11:4 Planning Theory 379; Mick Lennon & Linda Fox-Rogers, “Morality, Power and the Planning Subject” Planning Theory online 20 May

I. WHY IT IS THAT LAND USE LAW LACKS AN ETHICAL FOUNDATION?

The Village of Euclid's zoning ordinance regulated and restricted the location of different kinds of uses, including the lot area to be built on, and the size and height of buildings.³⁰ As a result, it had an adverse effect on the value of the property of Ambler Realty Co.: while the property was held vacant waiting to be sold for industrial uses, the ordinance restricted its future uses. This limitation meant that its worth would be 25% or less the value of progressive industrial development which the owners had been anticipating. The US Supreme Court denied a due process and equal protection claim based on the Ordinance's provisions, and found that the Ordinance—and, consequentially, all similar laws and regulations—was justified as an application of the police power, asserted for the public welfare.³¹

The *Euclid* Court set a very high standard for when judicial interventions in the provisions of zoning ordinance will be justified—only when such provisions are “clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.”³² Subsequently, in the *Nectow* case, shortly after *Euclid* was delivered, the Court did leave the door open for concrete overruling of a zoning ordinance application to particular conditions if the public goal was not promoted by the zoning classification as applied.³³ But a claim based on this exception has never (or almost never) been accepted, and land use law was established as an area of law in which substantive judicial review is beyond reach. This is as true in Canada as it is in the US.³⁴

The governing review standard on land use law is therefore that as long as the purposes of the land use regulation are “fairly debatable” the court will not substitute its judgment for that of the zoning authorities.³⁵ This is the predicted result of the judicial reluctance to find *de-facto* expropriations, or “regulatory takings” as they are termed in the US, and as such, leaves judicial intervention in land use regulation as only a theoretical option. As Valiante and Smit note, “the restrictive test for *de facto* expropriation in Canada ... sends a message about the wide berth for

2016. For some of the extensive debates in the planning literature over the planner's profession and the ethical values of planning, see, e.g. Susan S Fainstein, *The Just City* (Ithaca, NY: Cornell University Press, 2010) [Fainstein]; Timothy Beatley, *Green Urbanism: Learning from European Cities* (Washington, DC: Island Press, 2012) [Beatley]. My focus is on the legal framework although it draws from these works.

³⁰ Wolf, *supra* note 4 at 36–37.

³¹ *Village of Euclid*, *supra* note 16.

³² *Ibid* at para 8.

³³ *Nectow v Cambridge*, 277 US 183 (1928) [*Nectow*]. It should be noted that in this case the Court found a zoning ordinance invalid on substantive due process grounds where a master appointed by the lower state court had found no justification for the zoning as applied to Nectow's land. This might explain why in other cases the Court was reluctant to intervene in zoning decisions. See Julian Conrad Juergensmeyer & Thomas E Roberts, *Land Use Planning and Development Regulation Law*, 2d ed (St Paul, MN: Thomson/West 2007) 456 [Juergensmeyer & Roberts].

³⁴ See e.g. *The Township of Scarborough v Bondi* [1959] SCR 444; *Cohen v Calgary (City)* (1967), 64 DLR (2d) 238; *Mariner Real Estate Ltd v Nova Scotia (Attorney General)* (1998), 65 DLR (4th) 727; *Canadian Pacific Railway v Vancouver (City)*, 2006 SCC 5.

³⁵ *Village of Euclid*, *supra* note 16 at 388; *Zahn v Board of Public Works*, 274 US 325 (1927) 328; *Nectow*, *supra* note 33 at 188; *Robinson v City of Bloomfield Hills*, 350 Mich 425 (Supreme Court of Michigan, 1957) at 430.

planning in Canada.”³⁶ Over time, it became clear that the application of a zoning ordinance to a particular property would not be upheld by courts, if and only if “the ordinance does not substantially advance legitimate state interests or denies an owner economically viable use of his land.”³⁷ Little, if any, practical limits are actually enforced on the prerogatives of local zoning officials,³⁸ other than in cases of bad faith, manipulative downzoning (for instance, prior to public acquisition by a public body), or extreme discrimination.³⁹

In the American context, the *Standard State Zoning Enabling Act* of 1926 includes a requirement that zoning be done “in accordance with a comprehensive plan.”⁴⁰ Yet, the requirement of a master plan has had little practical effect as community-wide zoning ordinances were considered sufficient to comply.⁴¹ The recent influential ruling in *Kelo*⁴² was considered by some as having the potential to induce a shift concerning the necessity to prepare a comprehensive plan that contains thoughtful policy goals, at least when the government seeks to take private property. In *Kelo*, the US Supreme Court (Justice Stevens) rested its finding that the taking at issue—of Susette Kelo’s private home, for the purpose of imposing an economic revitalization development project which would be handed over to private entities after the taking—satisfied the constitutional requirement that taking of property be for public use, on the existence of a plan of comprehensive character that was adopted following thorough deliberation, a plan that “advances some *conceivable* public purpose.”⁴³ Furthermore, in a growing number of states, the adoption of zoning ordinances in the absence of a general comprehensive plan “may cast doubts upon the validity of the ordinances.”⁴⁴ This current pro-planning approach is evident in other countries around the globe.⁴⁵ However, there are

³⁶ Valiante & Smit, *supra* note 7 at 14. See also Metcalf, *supra* note 9. In the American context, this is the result of *Pennsylvania Coal v Mahon*, 260 US 393 (1922), and the *Penn Central* framework for regulatory takings. According to the *Penn Central* test, the courts examine a regulation’s “character” and “economic impact,” asking whether the action goes beyond “adjusting the benefits and burdens of economic life to promote the common good” and whether it “interfere[s] with distinct investment-backed expectations.” *Penn Central Transportation Co. v New York City*, 438 US 124 (1978); *Lingle v Chevron USA Inc.*, 544 US 528 (2005) at 538; *Murr v Wisconsin* 582 US (2017).

³⁷ *Agin v City of Tiburon*, 447 US 255 (1980) at 260.

³⁸ Carol M Rose, “Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy” (1983) 71:3 *Cal Law Rev* 901, 902 (arguing that “local readjustments of land controls may be upheld unless their redistributive effects are egregious”); Valiante & Smit, *supra* note 7 at 13; Mark Fenster, “Failed Exactions” (2011) 36:3 *Vt L Rev* 623 at 630.

³⁹ See e.g. *Re Gibson and Toronto* (1913), 28 OR 20 (CA); *Hauff v Vancouver* (1981), 15 MPLR 8 (BCCA).

⁴⁰ SZA § 3 (Dep’t of Commerce 1926).

⁴¹ William A Fischel, *The Economics of Zoning Laws: A Property Rights Approach to American Land Use Controls* (Baltimore, Maryland: John Hopkins University Press, 1985) 33.

⁴² *Kelo v City of New London*, 545 US 469 (2005) at 484. For the decision’s influence on Canadians, see Valiante & Smit, *supra* note 7 at 25.

⁴³ Nicole Stelle Garnett, “Planning as Public Use?” (2007) 34:2 *Ecology LQ* 443, 444 (“*Kelo* sends a signal to Takers that planning is good.”); Wendell E Pritchett, “Beyond Kelo: Rethinking About Urban Development in the 21st Century” (2006) 22 *Ga St U L Rev* 895, 915–16; Daniel R Mandelker, “Kelo’s Lessons for Urban Redevelopment: History Forgotten” *Wash U L Rev Slip Opinions* (24 Nov 2008), online <[http://landuselaw.wustl.edu/Articles/Mandelker%20article%20-%20EIC%20edit%20final%20\(clean\).pdf](http://landuselaw.wustl.edu/Articles/Mandelker%20article%20-%20EIC%20edit%20final%20(clean).pdf)> [perma.cc/ND6R-SEKM]. See Abraham Bell & Gideon Parchomovsky, “The Uselessness of Public Use” (2006) 106 *Colum L Rev* 1412.

⁴⁴ Juergensmeyer & Roberts, *supra* note 33 at 25 and 27.

⁴⁵ Rachele Alterman, “Planning Laws, Development Controls, and Social Equity: Lessons for Developing Countries” (2014) 5 *World Bank Rev* 329, 329 (“Implementing or revising planning laws is a booming trend around

substantial reasons why Americans are still hesitant to subordinate local land use decision-making to planning, which include deficiencies in decision-making procedures that guarantee existing residents' control,⁴⁶ insufficient consideration of inter-local and regional impacts,⁴⁷ and the effect of the taking jurisprudence.⁴⁸

In Canada, all provinces have enacted planning legislation. The task of zoning and planning is under municipal authority as a result of provincial legislation.⁴⁹ However, there have been some changes in recent years, with the imposition of a highly prescriptive policy direction by provincial governments, illustrated for example, in Ontario by the *Provincial Policy Statement* (2014) (*PPS*).⁵⁰ These provincial directives do not generally concern urban development and, thus, despite the new guidance, “determining where the public interest lies in an individual case remains challenging, and the answer is often unpredictable.”⁵¹ In addition, despite the fact that the *Act* provides opportunities to allow robust public deliberation, there are no guarantees that such deliberation is achieved in practice. As Marcia Valiante summarizes: “the *Planning Act* provides no guidance to municipal councils on how to balance competing interests.”⁵² Thus, Canadian municipalities, within their legislative powers, have considerable discretion, and judicial review is not regarded as “a vehicle for consideration of the merits of a municipality’s decision to pass the bylaw, [but rather of] whether it conforms to proper municipal planning principles.”⁵³ The power to quash a municipal bylaw is arguably subject to *prima facie* deference,⁵⁴ and practically only a failure to follow a fair process would be a ground for quashing a bylaw.⁵⁵

The provincially-mandated Ontario Municipal Board (OMB), which has oversight over local municipalities in regard to land use planning, has often been regarded as casting shadows over local level government’s discretion with regards to specific by-laws. The OMB holds and applies an unusual degree of regulatory authority over planning matters in comparison to similar tribunals in other Canadian provinces.⁵⁶ The board can review all land use planning decisions of municipalities or local boards under the Ontario *Planning Act*,⁵⁷ and it has authority to approve or reject those decisions or substitute them with its own decisions. The Board’s pivotal role in

the globe, especially in developing countries”).

⁴⁶ See e.g. Fischel, *supra* note 26; David Schleicher, “City Unplanning” (2013) 122 Yale LJ 1670.

⁴⁷ See Richard Briffault, “Our Localism: Part II—Localism and Legal Theory” (1990) 90 Colum L Rev 346, 426–27 (discussing local externalities); Gerald Frug, *City Making: Building Communities without Building Walls* (Princeton, NJ: Princeton University Press, 1999); David Schleicher, “The City as a Law and Economic Subject” (2010) U Ill L Rev 1507, 1516–1528 (pointing to the inefficiency of having many small local governments, a reality which reduces agglomerative gains).

⁴⁸ A Dan Tarlock, “Zoned not Planned” (2014) 13:1 Planning Theory 99.

⁴⁹ Jill Grant, “The Nature of Canadian Planning: Planning Canadian Communities” in Jill Grant, ed, *A Reader in Canadian Planning: Linking Theory and Practice* (Toronto: Thomson Nelson, 2008) 3, 18; Sandeep Kumar, “Canadian Urban Design Practice: A Review of Urban Design Regulations” (2002) 11 Canadian Journal of Urban Research 239.

⁵⁰ Valiante, *supra* note 20 at 108–113.

⁵¹ *Ibid* at 108.

⁵² *Ibid* at 115.

⁵³ *Country Park Ltd v Township of Ashfield* (2002), 60 OR (3d) 529 at 542 (ONCA).

⁵⁴ *Immeubles Port Louis Ltée v Lafontaine (Village)*, [1991] 1 SCR 326; Morgan, *supra* note 9 at 169.

⁵⁵ *London (City) v RSJ Holdings Inc.* [2007] 2 SCR 588.

⁵⁶ Sandeep Kumar, “Urban Design Decision-Making: A Study of Ontario Municipal Board Decisions in Toronto” (2005) 14:2 Canadian Journal of Urban Research 209, 213.

⁵⁷ *Ontario Planning Act*, RSO 1990, c P13.

planning in Ontario is due to the fact that “it has to a great extent applied its own policy as opposed to externally derived public policy.”⁵⁸ Members of the community, including land-owners and developers, may apply to the OMB concerning local level decisions to implement changes to zoning regulations. It is necessary to prove to the OMB that the proposed alteration furthers the intent of the comprehensive plan, where zoning changes are often among the most contentious land use disputes.⁵⁹

The OMB’s decisions are final and not subject to judicial review, except on questions of jurisdiction or law. In *Highbury*, the Supreme Court of Canada held that the Board or the Minister of Municipal Affairs and Housing (who serves as the head of the Board), in considering a subdivision application, was granted wide discretion, but also “that the discretion, wide though it is, must be exercised judicially and that it is not a judicial exercise of discretion to impose upon the applicant, as a condition of the giving of approval, an obligation the imposition of which is not authorized by the [Planning] Act.”⁶⁰ John Chipman notes that neither this decision nor Ontario’s *Planning Act* provide any guidance as to how the Board was to engage in that exercise, and it was therefore “left on its own to decide how it should do so, and it has filled this legislative and judicial vacuum with its own policies.”⁶¹ While in a recent case, the OMB listed the multiple public interests that it must balance in its decisions,⁶² the Board’s policy is that “there is no hierarchy of rights between public and private interests ... planning decisions should attempt to *balance* the public good and the private interest.”⁶³ The Board’s discretion is, in fact, only narrowed by the province’s demand for greater adherence to “provincial interest.”

The OMB’s practices with regard to agreements under Section 37 of the *Planning Act* are an interesting test case with respect to showing the influence of a quasi-judicial discretionary body on municipalities’ behaviour.⁶⁴ Under Section 37, the local government may agree to pass a zoning by-law authorizing increases in the height and density of development otherwise permitted by the by-law in exchange for the provision of facilities, services or other matters by the developer. Aaron Moore has argued that while Section 37 incentivizes municipalities to amend their own plans and by-laws as it allows them to wrest concessions and contributions from developers, it also subordinates them to do so, because the fact that such an amendment is needed for a proposed development project cannot justify the rejection of such an application. The result is that local politicians’ functional control over land-use decision-making is effectively ceded to the OMB, which can criticize those amendments.⁶⁵ While the OMB has

⁵⁸ John G Chipman, *A Law Unto Itself: How the Ontario Municipal Board has Developed and Applied Land Use Planning Policy* (Toronto: University of Toronto Press, 2002) 19 [Chipman].

⁵⁹ Jill Grant, “Tools of the Trade: Why we Regulate Land” in Jill Grant, ed, *A Reader in Canadian Planning: Linking Theory and Practice* (Toronto: Thomson Nelson, 2008) 339, 340.

⁶⁰ *Etobicoke Board of Education v Highbury Developments Ltd*, [1958] SCR 196 at 200; Chipman, *supra* note 58 at 75.

⁶¹ *Ibid.*

⁶² *Re Town of Oakville OPA No 296* (2010), 64 OMBR 55 at 72–73.

⁶³ Valiante, *supra* note 20 at 121.

⁶⁴ See Morgan, *supra* note 9; Stanley M Makuch, “The Disappearance of Planning Law in Ontario,” in Marcia Valiante & Anneke Smit, eds, *Public Interest, Private Property: Land and Planning Policy in Canada* (Vancouver and Toronto: UBC Press, 2016) 99 [Makuch], who note that recent decisions of the OMB adopt the American approach for developers’ contributions that requires a connection between the contributions asked for and the project receiving the bonus, such as under the *Nollan/Dolan* test. *Nollan v Cal. Coastal Comm’n*, 483 US 825 (1987); *Dolan v City of Tigard*, 512 US 374 (1994).

⁶⁵ Aaron A Moore, *Planning Politics in Toronto: The Ontario Municipal Board and Urban Development* (Toronto:

developed its own policies and practices, and may have been able to offer a more coherent approach to planning over time, it is still limited on both ends: it does not set the planning agenda or the official city's plan which are still left for the local government to set; and it is not subject to substantive judicial review.

Recent reviews of the Ontario land use system, such as those offered by Stanley Makuch, argue that the oversight powers of the OMB, along with politically-driven amendments to the practical procedures of land use decisions, bring about lesser degrees of “rule of law” values in the Ontario land use system. This is manifested, for example, in the loss of the right of appeal to the OMB with respect to many planning decisions (such as under s 34(19) of the Planning Act, which limits the right of appeal in respect of the parts of a by-law that give effect to inclusionary zoning policies). Those changes contribute to “a growing sense that planning powers are arbitrary and virtually limitless.”⁶⁶

To conclude, the open texture of *Euclid* and the first Canadian land use court cases, the lack of constitutional or clear legislative guidelines, and the complexity of land use law as it has developed over the years, have resulted in a nearly unhindered regulatory discretion granted to local governments (and, in the Ontario case, the OMB).⁶⁷ Land use limitations are sustained “as long as they advance the community’s general welfare,”⁶⁸ and the development potential of private land is an allocable community asset.⁶⁹ The construction of the judicial review of zoning and land use law in the *Euclid* case and the first Canadian court cases has been followed since then—in the United States, in Canada,⁷⁰ and in other jurisdictions—as if it was an almost Euclidean axiom.⁷¹ What are the acceptable ends that land use laws and zoning ordinances should promote? What is the normative basis for governmental intervention in private land development? These and related questions were yet to be sufficiently resolved at the doctrinal level of US or Canadian constitutional law. At the basis of this normative state of affairs, its enabler, is the lack of an ethical foundation for land use law.

I argue that while full, substantive, judicial review of particular planning decisions should not be introduced, we do need to pay sufficient consideration for the normative principles that ought to guide the system of land use law. Such basic principles could assist the courts, legislators, and the general public in evaluating how the system functions. In other words, I contend that courts should not intervene in setting planning or development goals. But the fact that this limited mode of intervention in the specific purposes is justified does not mean that no normative foundation should exist. Land use law is about the allocation of resources, spaces,

University of Toronto Press, 2013).

⁶⁶ Makuch, *supra* note 64 at 87.

⁶⁷ Levine-Schnur & Ferdman, *supra* note 9; Morgan, *supra* note 9; Kaplinsky, *supra* note 7; Ashira Pelman Ostrow, “Judicial Review of Local Land Use Decisions: Lessons from RLUIPA” (2008) 31 Harv JL & Pub Pol’y 717 at 731–33; Lee Anne Fennell, “Hard Bargains and Real Steals: Land Use Exactions Revisited” (2000) 86 Iowa L Rev 1 at 4–5; MacLeod, *supra* note 27 at 56 (“[L]and use regulators enjoy broad freedom to exercise their regulatory discretion in arbitrary ways, untrammelled by meaningful judicial oversight”).

⁶⁸ John J Costonis, “Development Rights Transfer: An Exploratory Essay” (1973) 83 Yale LJ 7 at 108.

⁶⁹ Juergensmeyer & Roberts, *supra* note 33, at 86–87. See also Vicki Been & John Infranca, “Transferable Development Rights Programs as “Post” Zoning” (2013) 78 Brook L Rev 435.

⁷⁰ *The Township of Scarborough v Bondi*, [1959] SCR 444; *Roncarelli v Duplessis*, [1959] SCR 121 at para 140; *Brown v British Columbia (Minister of Transportation and Highways)*, [1994] 1 SCR 420 at 442; *Nanaimo (City) v Rascal Trucking Ltd.*, 2000 SCC 13; *Entreprises Sibeca Inc. v Frelighsburg (Municipality)*, 2004 SCC 61 at para 21.

⁷¹ See e.g. Robert C Ellickson & Vicki Been, *Land Use Controls: Cases and Materials*, 3rd ed (Netherlands: Aspen Publishers, 2005) 77; Juergensmeyer & Roberts, *supra* note 33 at 46.

burdens, and benefits and as such, it must rest on some guiding norms to make the allocation of development rights just and fair. Such an alternative would allow for the basic tension between efficiency and social planning to continue, but inject to the land use system a necessary layer of ethical commitment to fairness.

II. AN ETHICAL FOUNDATION FOR LAND USE LAW: INTRODUCTORY NOTES

In an urban society, land development patterns, particularly urban development, have enormous ramifications for human prosperity, freedom, autonomy, and for economic, cultural, and social matters.⁷² Conflicting visions and interests are intertwined in almost every land-based decision. It is a common wisdom to hold that landowners' desire is to be the sole and despotic deciders regarding their property⁷³ or the "agenda-setters" for it.⁷⁴ Viewed from this perspective, legal restrictions prescribing what can and cannot be done with private property are considered interventions in a property right, which often enjoys a constitutional guarantee.⁷⁵ However, many people, owners and non-owners,⁷⁶ have an interest in there being concrete public spheres⁷⁷ in which social, political, cultural, and economic interactions can take place.⁷⁸ The fact that the world is becoming increasingly digitized does not eliminate (at least for now) the human need

⁷² In an *urban society* a majority of the people live in cities. The world in 2008 has become urbanized in that sense. The urban population is swelling by 1 million every week. It is estimated that by 2030, almost 6 in 10 people will live in metropolitan areas and all of the world's population over the next 30 years will be concentrated in urban areas. See Kingsley Davis, *The Urbanization of the Human Kind*, Scientific American (September 1965), reprinted in Richard T LeGates & Frederic Stout, eds, *The City Reader 20*, 5th ed (London and New York: Routledge / Taylor & Francis Group, 2011) (offering a definition of urban society); UN-Habitat, *State of the World's Cities 2010/2011 — Cities for All: Bridging the Urban Divide* (2010), online <<https://unhabitat.org/books/state-of-the-worlds-cities-20102011-cities-for-all-bridging-the-urban-divide/>> [perma.cc/H2CM-Y2E2]; "Cities: The Urban Equation" (2010) 467 Nature 899 (providing the data).

⁷³ William Blackstone, *Commentaries on the Laws of England*, Book 2, Ch 1 (1765-1769), online: <lonang.com/exlibris/blackstone/bla-201.htm> [perma.cc/M2HG-2UAG].

⁷⁴ Larissa Katz, "Exclusion and Exclusivity in Property Law" (2008) 58 UTLJ 275 (developing the idea of ownership as an office of agenda-setting authority).

⁷⁵ The constitutionality of property rights is guaranteed worldwide, even if controversies do arise, concerning, e.g. their scope or applicability. See Gregory S Alexander, *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence* (Chicago: University of Chicago Press, 2006) ch 1; and Andries Johannes Van der Walt, *Constitutional Property Law* (Cape Town: Juta Law, 2011).

⁷⁶ See Ira Gary Peppercorn & Claude Taffin, *Rental Housing: Lessons from International Experience and Policies for Emerging Markets* (Washington, DC: The World Bank, 2013) 4 (presenting data on 14 selected countries from around the world. The average rate of owners in this sample is 66%. It is noted, however, that across the sample, "the percentage of people who do not own a home is significantly higher in central cities").

⁷⁷ The exact relationships between the concrete, physical public spheres and the non-concrete public sphere, where "[T]he society [is] engaged in critical public debate," and whether one can exist without the other, for instance, are beyond the scope of our discussion here. See e.g. Habermas's seminal work: Jürgen Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society*, translated by Thomas Burger (Mass: MIT Press, 1989) 51–53, and Hannah Arendt, *The Human Condition* (Chicago: University of Chicago Press, 1958) 50–53.

⁷⁸ Constant conflicts over the use of the public sphere, originating from religious, gender, and racial background differences, can serve as supporting evidence for that claim. See generally: Niamh Reilly & Stay Scriver, eds, *Religion, Gender, and the Public Sphere* (New York: Taylor and Francis, 2014); Josh Kun & Laura Pulido, eds, *Black and Brown in Los Angeles: Beyond Conflict and Coalition* (Berkeley: University of California Press, 2014).

for physical—real as opposed to virtual—places for social interactions.⁷⁹

The riots around the world circa 2011—from Tahrir Square to Wall Street, and to Syntagma Square,⁸⁰ to name just a few—exemplified people’s need to occupy public spaces to protest and for social interactions.⁸¹ Moreover, many, even if not all, members of society would like urban places to provide all women and men with opportunities for self-fulfillment; and they would like the allocation of land development rights to be, at the very least, sensitive to its effects on desired social and political policies, such as ensuring equality or protecting the environment. Creating and maintaining vibrant public spaces, as well as promoting social goals through the allocation of land development rights, come in conflict with property owners’ perceptions with respect to their position as such. The conflict between those interests informs land use law.

The basic requirement from any system of land use law should be that it would be committed to fairness and sustainability, whereas sustainability stands for fairness between present and future, and between mankind and the environment.⁸² In the context of urban planning, fairness would be guided by principles of democracy and transparency, by norms of accessibility, diversity, and density,⁸³ and by a requirement to preserve a fair ratio between the distribution of burdens and the allocation of benefits. I will very briefly describe these principles below.

A. DEMOCRACY AND TRANSPARENCY

Marking 1916 and the enactment of the first comprehensive zoning plan in New York City as the starting point of modern land use law, as many scholars usually do, is a substantive choice. It tells us that land use law is not only about the act of land planning *per se*, even if it is at the basis of it; it is also not primarily about the legal-institutional-constitutional aspects of zoning. This choice signals the promise which was hidden with the enactment of the first comprehensive plan in New York City after a long process of consultation and deliberation: that zoning and city planning can be used to secure *a joint agreement* about the shared expectations for the city’s development. Land use law is thus first and foremost about *the practice of determining together, at the local level, the future of our built environments in a legally binding form*.

Because of the competing goals, the guiding norms for an ethical land use law system should touch upon the modes of allocation and the potential goods for allocation. Accordingly, a city must conduct an ongoing process of public consultation about the future of its development. This process should not be limited to a case-by-case hearing on specific developments.⁸⁴ It

⁷⁹ Jeffrey Ghannam, “In the Middle East, this is not a Facebook Revolution,” *The Washington Post* (18 February 2011), online: <www.washingtonpost.com/wp-dyn/content/article/2011/02/18/AR2011021802935.html> [perma.cc/NS8N-62YH] (arguing that “[S]ocial media is chronicling and amplifying the revolution that is happening on the streets”).

⁸⁰ See Yair Wallach, “The Politics of Non-Iconic Space: Sushi, Shisha, and a Civic Promise in the 2011 Summer Protests in Israel” (2013) 20 *European Urban and Regional Studies* 150; Nurit Alfasi & Tovi Fenster, “Between Socio-Spatial and Urban Justice: Rawls’ Principles of Justice in the 2011 Israeli Protest Movement” (2014) 13:4 *Planning Theory* 407.

⁸¹ Craig Calhoun, “Occupy Wall Street in Perspective” (2013) 64 *The British Journal of Sociology* 26.

⁸² Beatley, *supra* note 29.

⁸³ Fainstein, *supra* note 29.

⁸⁴ Indeed, the procedures to update the Official Plan in Ontario, for instance, require a review every 5 years.

should be future-looking. It requires, at the local level, an interdisciplinary think tank, which could include urban planners, sociologists, economists, community workers, philosophers, and others, as consultants, which would work with local people as representatives of different types of groups—residents, developers, young people, families, etc.—who would suggest the *local* policy. Cities are not identical, neither in their current status nor in their visions about the future, which may well change over time. A local statement must be prepared, and updated from time to time. This statement need describe the current situation—to what extent is it just? How diverse is the city? What about density? Are there any specific areas which are denser than others? And what about accessibility—is it granted to all? Answering these questions (for example) need rely on a report about the city and its users, in a format that includes reference to the economic, cultural, and societal viewpoints. On this basis, the statement should address the way it views the future (5-10 years), and should be translated into complementary statutory land-use documents.⁸⁵

B. DENSITY

The most important characteristic of urban areas is their density (number of people or dwelling units per unit area) and thus their ability to accumulate clusters of activities.⁸⁶ It has been argued that the future of the city depends on the demand for density.⁸⁷ This attribute is intimately connected to advancing the economic viability, social homogeneity, and cultural development of the world as a whole. Economists define cities as the spatial concentration of economic actors.⁸⁸ Proximity to a concentrated labour market is economically valuable to producers and contributes to the value of properties.⁸⁹ The implication of this is that “the demand for cities must come ultimately from the desire to reduce transport costs for goods, people and ideas.”⁹⁰ Richard Schragger notes that, “clustering of people and firms is the chief characteristic of city space and the central economic benefit for which some firms and residents are willing to pay higher rents.”⁹¹ People and firms are more productive in cities because their agglomeration contributes to the development of ideas and technology.⁹² The exchange of ideas in the urban environment is, as Jane Jacobs maintained, one of the greatest advantages.⁹³ With regard to the societal-psychological aspect, one of the main advantages of dense urban areas is that they facilitate social interactions. Density is thus correlated with consumer amenities.⁹⁴ Population density also has a strong positive relationship with local innovation. People tend to be more inventive when

⁸⁵ Roderick M Hills Jr & David Schleicher, “Planning an Affordable City” (2015) 101 Iowa L Rev 91.

⁸⁶ Leonie Sandercock, “Towards a Planning Imagination for the 21st Century” (2014) 70 J American Planning Association 133 (asserting that planning needs to come to terms with the social realities of 21st-century cities, most of which are demographically multicultural, presenting the challenge of a new urban condition in which difference, otherness, and plurality prevail).

⁸⁷ Edward L Glaeser, Jed Kolko & Albert Saiz, “Consumer City” (2001) 1 J Economic Geography 27 [Glaeser, Kolko, & Saiz].

⁸⁸ Edward L Glaeser, “Are Cities Dying?” (1998) 12 J Econ Perspectives 139.

⁸⁹ Alfred Marshall, *Principles of Economics* 8th ed (London: MacMillan and Co., 1890) at sec. V.XI.4.

⁹⁰ Glaeser, Kolko, & Saiz, *supra* note 87 at 30.

⁹¹ Richard C Schragger, “Rethinking Theory and Practice of Local Economic Development” (2010) 77 U Chi L Rev 311 at 321.

⁹² Glaeser, Kolko, & Saiz, *supra* note 87 at 31.

⁹³ Jane Jacobs, *The Economy of Cities* (New York and Toronto: Random House, 1970).

⁹⁴ Edward L Glaeser & Joshua D Gottlieb, “Urban Resurgence and the Consumer City” (2006) 43 Urb Stud 1275.

they are around other inventive people.⁹⁵ Several reasons have been offered for this phenomenon: not only economies of scale and the availability of human capital, but also the ability to be selective in identifying team members, which leads to more-productive work environments.⁹⁶

C. DIVERSITY

Population density must be accompanied by diversity. For density to play its part, it requires a mixture of people from different backgrounds, who work in different occupations and hold different beliefs, as well as a mixture of industries, services, facilities, and the like. Put differently, if all people in the city were the same, they could not make a contribution to inventiveness or productivity. To produce people who are more tolerant, cities must be heterogeneous. Moreover, people are attracted to those cities which feature combinations of niche sectors. A study of the occupational structure of fifty large American metropolitan areas found that niches in exporting sectors and the related occupational mix were a key to urban resurgence.⁹⁷ Cities on the tourism map offer a variety of high-quality activities.⁹⁸ Diversity is perceived as an urban amenity, since urban consumers are attracted to ethnic restaurants, international cultural offerings, and a lively street scene.⁹⁹

A few years ago Robert Putnam, in a provocative paper, argued that residential racial diversity has a price: it causes a decline in social capital.¹⁰⁰ The derivative conclusion regarding the reduced value of racial diversity was warmly adopted by some, while driving others to re-examine Putnam's findings.¹⁰¹ Among the latter, Stephanie Stern recently suggested a reverse explanation of the relationship between diversity and social capital, according to which it is actually the case that where high levels of social capital are found, resistance to diversity will be found. Supporting the existence and creation of diverse environments has moral value, with or without this explanation. It puts people of heterogeneous backgrounds together, enabling them to meet and interact; and it is a practice that facilitates possibilities of demarcating the discriminating effects of social, racial, economic, and other natural or adopted categorizations.

D. ACCESSIBILITY

⁹⁵ Brett M Frischmann & Mark A Lemley, "Spillovers" (2007) 107 Colum L Rev 257 at 260.

⁹⁶ Gerald Carlino et al, *Matching and Learning in Cities: Urban Density and the Rate of Invention* (Working Paper No. 04-16/R, Federal Reserve Bank of Philadelphia, 2005) 17–23, online: <philadelphiafed.org/research-and-data/publications/working-papers/2004/wp04-16R.pdf> [perma.cc/VU9T-NPFM].

⁹⁷ Ann Markusen & Greg Schrock, "The Distinctive City: Divergent Patterns in Growth, Hierarchy and Specialisation" (2006) 43 Urb Stud 1301.

⁹⁸ Deborah Edwards, Tony Griffin & Bruce Hayllar, "Urban Tourism Research: Developing an Agenda" (2008) 35 Annals of Tourism Research 1032 at 1032.

⁹⁹ Glaeser, Kolko, & Saiz, *supra* note 87 at 48; Peter Hall, *Cities in Civilizations* (London, UK: Weidenfeld & Nicholson, 1998).

¹⁰⁰ Robert D Putnam, "E. Pluribus Unum: Diversity and Community in the Twenty-first Century" (2007) 30 Scandinavian Pol Stud 137, 144, 149–150. On the theory of social capital which concerns the aggregate value of civic participation for creating social networks and norms of trust and reciprocity, see Robert D Putnam, *Bowling Alone* (Simon & Schuster 2000) 19.

¹⁰¹ Stephanie M Stern, "The Dark Side of Town: The Social Capital Revolution in Residential Property Law" (2013) 99 Va L Rev 811.

Accessibility has two relevant meanings: (1) connectivity, *i.e.*, the ability to physically arrive at a place, using a means of transportation which does not cost too much or take too much time; and (2) equal, free access to services, places, and opportunities.

It is commonly argued that accessibility qua connectivity is a fundamental concept in theories of metropolitan spatial structure. The standard urban model explains urban structure as a function of the trade-offs between access to jobs and housing costs; newer research focuses on the trade-offs between access to jobs or other given activity and housing values.¹⁰² Areas with good access to public amenities not only gain better land value,¹⁰³ but also attract a larger portion of new development.¹⁰⁴ Others have established that high environmental standards and good access to facilities and services have a direct, positive impact on quality of life.¹⁰⁵

Accessibility is also about non-excludability. Urban environments promise the accessibility of services and public places and the opportunity to participate in political and social life. This concept of accessibility and the importance accessibility should carry was influenced heavily by the writings of Henri Lefbvre, though others, such as Iris Marion Young, have also made clear the significance of “open and undecidable” borders to city life.¹⁰⁶

E. BURDEN-BENEFIT RATIO PRINCIPLE¹⁰⁷

The most important thing, and the trickiest one, is to identify how to fairly correlate between burdens and benefits.¹⁰⁸ A planning practice may be considered as creating inequality, or unfair treatment, if those targeted by harmful regulation, such as eminent domain or the location of unattractive uses, “are systematically different from those benefiting from public use projects and the benefits of public projects do not sufficiently compensate.”¹⁰⁹ The future of land use law is in identifying new regulatory models that mitigate these concerns. This should rely on empirical, methodological, and theoretical work that would uncover the patterns of inequalities, and support innovative ways to overcome them. Recent empirical works on the distribution of burdens and benefits in the context of expropriations are a first step in this direction.¹¹⁰

¹⁰² Genevieve Giuliano et al., “Accessibility and Residential Land Values: Some Tests with New Measures” (2010) 47 *Urb Stud* 3103.

¹⁰³ Eugene F Brigham, “The Determinants of Residential Land Values” (1965) 41 *Land Economics* 325.

¹⁰⁴ *E.g.* Amy Armstrong et al., *State of New York City’s Housing and Neighborhoods* (New York: Furman Center, NYU, 2009) 15.

¹⁰⁵ Finbarr Brereton, J Peter Clinch & Susana Ferreira, “Happiness, Geography and the Environment” (2008) 65 *Ecological Economics* 386.

¹⁰⁶ Iris Marion Young, *Justice and the Politics of Difference* (Princeton, NJ: Princeton University Press, 1990) 238–39.

¹⁰⁷ I develop this principle in Ronit Levine-Schnur, “Revitalizing Land Use Law: The Burdens-Benefits Ratio Principle” in Amnon Lehavi, ed, *100 Years of Zoning and the Future of Cities* (Springer, forthcoming).

¹⁰⁸ Daphna Lewinsohn-Zamir, “Compensation for Injuries to Land Caused by Planning Authorities: Towards a Comprehensive Theory” (1996) 46 *UTLJ* 47.

¹⁰⁹ Daniel L Chen & Susan Yeh, “Expropriation, Inequality, and Growth: The Economic Impacts of Eminent Domain” (2012) *NBER Papers*.

¹¹⁰ Jinfeng Du et al., “Land Wealth Generation and Distribution in the Process of Land Expropriation and Development in Beijing, China,” (2016) *Urban Geography* 1; Ronit Levine-Schnur, “Winners and Losers in Takings for Pure Public Uses: An Empirical Examination” under preparation.

III. CONCLUSION

At the start of this paper, I promised only preliminary thoughts as to the contents and contours of a vision for an ethical commitment in land use planning. I centred this article on the problem with zoning and land use law, and particularly with the judicial review in this field, as the lack of *any substantial ethical commitment* in the judicial review of land use decisions. Instead, the planning decision-making process has led the judiciary, as well as many scholars, to focus on the *mere process* of making planning decisions, rather than on the substantive content of planning.¹¹¹ In my response to this theoretical quagmire, I propose that an ethical framework premised on fairness and sustainability, wherein sustainability stands for fairness between present and future, and between mankind and the environment. In the context of urban planning, fairness would be guided by principles of democracy and transparency, by norms of accessibility, diversity, and density, and by a requirement to preserve a fair ratio between the distribution of burdens and the allocation of benefits. These principles, I argue, articulate an ethical commitment that should guide the next 100 years (or so) of North American land use planning.

While I did not offer here how to advance this ethical commitment in practical or empirical terms, nor did I offer how to design a more ethically grounded system, such work is desperately needed. Indeed, there is a great room for local, community-based advances to be made in this regard. Future work, in academia and in practice, should further think about, and experiment with, how to bring together a working framework that is ethically committed and could be scrutinized by the courts. So much is at stake here.

¹¹¹ Valiante, *supra* note 20 at 108; MacLeod, *supra* note 27 at 55.