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Commentary

Urban Green Uses: The New Renewal

Catherine J. LaCroix

After decades in which rapid growth was the planning challenge that grabbed the headlines, we find ourselves at a time when cities across the nation—including many that were growth hot spots even a few years ago—are confronting a different reality. Instead of worrying about how to make growth better or smarter, many cities wonder whether they will see much growth at all. The mortgage crisis and associated collapse of the housing boom has left unfinished projects and excess housing capacity in cities across the nation. In this changed environment, the Rust Belt cities of the Northeast and Midwest find that they have important lessons and guidance to offer. Cities like Cleveland, Detroit, Youngstown, and others have experienced decades-long population decline that has opened great gaps in urban land use; these cities now are leading the way in innovative reuse that has been called “Re-Imagining,” “Cities in Transition,” “Smart Shrinkage” or (perhaps less appealing) “Smart Decline.” The common thread: these cities try to build on their strengths for focused, targeted economic development in key areas, while adopting an array of innovative green uses for vacant and surplus land as a new way to revitalize the city and serve its residents. These green resources include urban agriculture, com-

munity green spaces, alternative energy, and green infrastructure. Perhaps we should call this the “New Renewal.”

Not only is the New Renewal green, but it is a flexible process that typically features extensive community involvement. By and large, the urban green pioneer cities have identified their goals through a community-focused planning process by which they have discerned key challenges and opportunities. While each city’s precise strategy is shaped by its own urban environment, community organizations

Comments or questions regarding this month’s Commentary? Discussion of “Urban Green Uses: The New Renewal” can be found at: <http://blogs.planning.org/policy/?p=465>.

and nonprofits seem to be important contributors everywhere. One of the encouraging features of the urban green movement is the grassroots involvement of community members, who can see visible, bite-sized progress emerging from their own efforts.¹

Although community involvement might blunt the threat of legal wrangling, it is important to recognize that green renewal raises distinct legal is-

sues as familiar concepts and strategies take a new twist. This commentary highlights some of the leading ideas at work in the Rust Belt and their associated legal parameters. Part I describes the typical menu of urban green uses, and Part II focuses on how to implement these uses within the existing legal landscape. Part III touches on some related topics: regionalism, nature conservancies, and mitigation of climate change.

PART I. URBAN GREEN LAND USES

The typical Rust Belt shrinking city includes a politically distinct central city surrounded by relatively more prosperous suburbs. Although the central city has experienced significant population decline, the physical footprint of the city itself remains the same size. It cannot realistically shed some land to a surrounding jurisdiction such as a county; it must figure out how best to use tracts of vacant land over which it has jurisdiction but for which there is no likelihood of traditional redevelopment in the short or medium term.

While useful examples abound in Rust Belt cities, Cleveland provides a particularly robust overview of green renewal options. A few years ago, a coalition of public and private organizations, which included the Cleveland

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Whether vacant properties are developed with buildings and infrastructure, preserved as open space, or put into productive use as agriculture or energy generation sites, they should provide an economic return, a community benefit, or an enhancement to natural ecosystems.

Planning Commission, released an important vision, *Re-Imagining a More Sustainable Cleveland (Re-Imagining)*.² *Re-Imagining* offers a menu of strategies for addressing vacant properties in the city, based on a particular property's long-term development potential. The city seeks to attract new development and foster local engines of economic growth where possible, focusing on areas of the city where growth is most promising. At the same time, it realizes that its long-term health is threatened by vacant and abandoned properties that are not located in pathways of development and that new uses for these properties must be found.³ *Re-Imagining* endorses a vision of vacant land as a resource, not a liability.

Thus, Cleveland envisions "a city with densely-built, mixed-use walkable neighborhoods connected by greenways and complemented by urban gardens and open space amenities."⁴ Consistent with this two-pronged strategy, *Re-Imagining* presents a decision tree for individual vacant sites. Ecologically valuable or sensitive properties might be selected for preservation through a variety of uses: alternative energy generation, stormwater management (such as through bioretention or as a constructed wetland), green space, remediation through bioremediation, phytoremediation, or mycoremediation, or urban agriculture.⁵ Other properties are assessed to determine their long-term development potential. Areas with strong development potential might be designated for a holding strategy: landscaping or bioremediation. For areas with weak development potential, *Re-Imagining* identifies the following menu of possible treatments:

- Community garden
- Bioremediation, phytoremediation, mycoremediation
- Constructed wetland
- Deep tillage/pavement removal
- Basic greening techniques
- Solar field
- Urban agriculture/commodity farming
- Stormwater management: riparian setbacks, stream daylighting⁶

Re-Imagining makes clear that its goal is to put all land in Cleveland to some form of beneficial use:

Given the large and growing inventory of vacant properties in the City of Cleveland, it is unlikely that all of the city's surplus land will be reused for conventional real estate development in the foreseeable future. The alternative land use strategies described in this document are intended to put vacant properties to productive use in ways that complement the city's long-term development objectives.⁷

Thus the report includes urban agriculture, green space, green energy, and ecosystem restoration as beneficial land uses. It lists the following goals:

- **Productive use/public benefit.** Whether vacant properties are developed with buildings and infrastructure, preserved as open space, or put into productive use as agriculture or energy generation sites, they should provide an economic return, a community benefit, or an enhancement to natural ecosystems.
- **Ecosystem function.** Stormwater management, soil restoration, air quality, carbon sequestration, urban heat island effects, biodiversity, and wildlife habitat should be incorporated into future plans for vacant sites in the city.
- **Remediation.** Remove the risk to human health and the environment from environmental pollutants at vacant sites, either with targeted remediation projects or with long-term incremental strategies.⁸

While urban agriculture seems to gather most of the headlines, it is important to emphasize that two other green uses are equally if not more important: bioremediation of contaminated sites (where feasible) and use of green spaces to manage stormwater as an ecologically beneficial way to protect lakes and streams from polluted urban runoff.

The *Re-Imagining* report prompted a series of pilot projects in various areas of the city, exploring a range of green uses. Many were focused on growing food locally,⁹ by both for-profit farms and nonprofit community gardens, such as the Garden Boyz program,

which offers employment for inner-city youths on land leased from the city.¹⁰ Cleveland also features many initiatives related to the *Re-Imagining* vision, even if they are not a direct outgrowth. A large-scale urban greenhouse, run by an employee-owned cooperative, is in the planning stages.¹¹ The Cleveland Botanical Garden has announced an effort to investigate the use of vacant land as green infrastructure, primarily to reduce excess volumes of stormwater flowing into Lake Erie.¹² This project will specifically evaluate the extent to which green uses of vacant land can significantly reduce the looming cost of meeting federal Clean Water Act mandates to combat stormwater-based pollution of waterways.

Cities such as Detroit, Dayton, Toledo, Milwaukee, and Youngstown have similarly embraced the use of vacant land as a green resource to enhance a sense of community, grow crops for residents, mitigate urban runoff, and—where possible—remediate soil contamination.¹³

In some cities, the effort goes beyond using existing vacant property: Detroit and Youngstown have explored moving remaining residents out of sparsely populated areas in order to generate consolidated tracts of land available for green uses and for which some traditional city services need not be provided.¹⁴ While it can be quite controversial,¹⁵ this is a particularly dramatic example of innovative thinking in urban renewal.

PART II. HOW DO WE GET THERE?

A. Land Banks

The first challenge for a city that seeks to make productive use of its vacant land is to gain legal control over the property. Vacant or abandoned properties come in all shapes and sizes, but many of them share two key characteristics: tax delinquency and clouded title. In many jurisdictions, the tax foreclosure process is long and complicated, and offers the opportunity for speculators to purchase tax-delinquent properties at auction. Rights of redemption (the statutory right of previous owners to reacquire a property by paying past-due amounts) may further handicap

The land bank need not wait for tax-delinquent property to trickle into its hands; it can acquire properties, evaluate their best use, rehabilitate or demolish on-site structures at its option, and bundle clusters of properties as needed for future uses.

property transfers.¹⁶ Land banks offer a valuable tool for cities interested in gaining legal control over abandoned or vacant properties within their borders.

In general, a land bank is a governmental entity that takes title to tax-delinquent property, secures the property and perhaps demolishes structures on it, and identifies the best long-term use for the land. It might maintain the property for interim uses, if a transfer is not possible, or it may transfer the property back to private ownership with clear title to ensure that the property can be put to productive (and tax-paying) use.¹⁷ Land banks have been established in cities such as Atlanta, Cleveland, Flint, Louisville, and St. Louis.¹⁸

A city seeking to establish a land bank requires statutory authority from its state legislature, so this is an area where city planners would need to work with state legislators to provide a legal framework.¹⁹ There are various statutory models from which to choose.²⁰ The statute may establish a land bank form that is available to any city or county within the state that chooses to adopt it, or it might design a form specific to a particular metropolitan area. The core powers of the land bank include acquiring, managing, and disposing of property. A land bank needs some form of financing, either from the budget of local government or from an independent source (such as a portion of property tax revenues). The land bank needs to consider the policies that will guide its disposition of properties: It might strategically bank large bundles of properties for future uses or focus on clearing property titles and returning the properties to private ownership. And the bank needs a defined organizational structure: Will it be a department of local government, or will it be a distinct legal entity? Will it be part of a single municipal government, or will it operate on a county-wide or metropolitan area-wide basis? All of these questions and more (e.g., the liability of the land bank for nuisances or harmful conditions on properties in its inventory) should be considered when drafting legislation.²¹

The history of land banking in Cleveland suggests that an effective

land bank is shaped to achieve identified policy goals, has an assured source of funding, is focused on engagement with its community, and is scaled at a metropolitan-area level to assure a diverse real estate market for land bank properties. The City of Cleveland established its land bank in the 1970s as a way to gather and hold tax delinquent parcels. The Ohio legislation authorizing this land bank streamlined the tax foreclosure process and provided that any properties that remained unsold at the end of a mandatory public auction process would be transferred into the land bank. The land bank was then authorized to hold and manage the properties and convey them with marketable title to private parties.²² This bank—which still exists—is a so-called “passive” land bank: It is a department of local government, funded by the city budget, and is essentially a receiving location for tax-foreclosed vacant property.²³

In 2009, as Cleveland was ravaged by the foreclosure crisis that began in 2000, it became apparent that the existing tax foreclosure process, with its mandatory public auction, allowed properties to be transferred to speculators, who failed to maintain the properties and allowed them to deteriorate. Other properties were held by banks, with no prospect of profitable sale.²⁴ These properties were not available to the city land bank.

Consequently, the Ohio legislature approved a new form of land bank that could operate throughout Cuyahoga County, which includes Cleveland and some of the surrounding suburbs. This new land bank is a separate corporate entity, with its own sources of funding, and has the power to acquire tax-delinquent or bank-owned properties and demolish vacant buildings.²⁵ The land bank need not wait for tax-delinquent property to trickle into its hands; it can acquire properties, evaluate their best use, rehabilitate or demolish on-site structures at its option, and bundle clusters of properties as needed for future uses. The Cuyahoga County land bank currently has agreements with the federal Department of Housing and Urban

Development and Fannie Mae to acquire properties from their inventory of foreclosed homes.²⁶ Because the land bank operates at the county-wide level, it has access to a diverse range of properties and a greater likelihood of selling some properties at a profit,²⁷ although the municipality in which the property is located has a “priority right of acquisition” if it desires the property.²⁸

On a cautionary note, the scope of the county land bank’s liability for contaminated property in its portfolio is not entirely clear. The legislation authorizing the land bank exempts it from liability under Ohio’s environmental laws, including the state program governing cleanup of brownfields.²⁹ This grant of immunity was intended to allow the land bank to hold foreclosed commercial or industrial properties until an appropriate use is identified, without running the risk of significant cleanup costs under state law. It is not clear whether the land bank is similarly immune from liability as an owner of property under federal law. The federal Comprehensive Environmental Response, Compensation and Liability Act (known as CERCLA or Superfund) generally is used for cleanup of relatively severely contaminated land, and it imposes strict liability on owners of such property.³⁰ While there is an exemption from liability for state and local government entities that acquire land “involuntarily” through tax delinquency or other circumstances,³¹ the separate corporate status and aggressive acquisition powers of the Cuyahoga County land bank might carry it beyond the scope of this limited protection. The lack of immunity does not make significant liability inevitable, but it introduces the possibility. As the implementation of the land bank is still in its infancy, and the land bank’s portfolio so far includes mostly (if not exclusively) residential properties, the scope of potential environmental cleanup liability has not yet been determined.

The contrast between the Cleveland and the Cuyahoga County land banks illustrates two land bank forms: the passive land bank that is a city department, and the more active

The city seeks to ensure that urban gardens are established as a goal in themselves, not as a holding strategy until it is time for residential or commercial building construction.

land bank that is a separate legal entity. The Cleveland land bank resembles a bank established at about the same time in St. Louis;³² the Cuyahoga County land bank more closely resembles the model used in Kentucky.³³ The land bank legislation adopted in Georgia, prompted by concerns about vacant properties in Atlanta, focuses on “interlocal cooperation” and apparently does not build an inventory of properties.³⁴ A similar interlocal focus is found in the Genesee County, Michigan, land bank.³⁵

The land bank, then, can be an important tool in a community’s strategy for managing vacant land. A city wanting to establish one, however, must have authorizing legislation at the state level.³⁶

B. Downzoning and Repurposing Land

A core concept of the New Renewal is that a city can use its vacant land for productive green uses: growing food, managing stormwater, providing public green space, or providing sites for alternative energy such as wind turbines or solar panels. Considering that the land in question is likely to be zoned for residential, commercial, or industrial use, we can see that these uses might be less intensive than the current zoning allows, or might give rise to possible objections based on their effects on neighboring properties. Some green uses might be permissible without rezoning: A city may allow urban gardens on land it owns, either as parkland or in its land bank, and a for-profit urban greenhouse might be permissible on land zoned for commercial or industrial use. Sometimes, however, a green use might merit specific treatment in local zoning law. Here we should consider two questions: What are the practical advantages and disadvantages to such zoning requirements, and what legal constraints or considerations must a city keep in mind?

Cleveland offers some examples of zoning requirements specifically designed to allow urban gardens and alternative energy. First, Cleveland has several zoning provisions specifically designed to encourage urban agriculture. The city recently amended its residential zoning code to allow urban

gardens and related structures, including sales of food from farm stands as a conditional use.³⁷ It has a distinct Urban Garden zone, where the only permitted use is an urban garden. And it has adopted provisions allowing urban farm animals such as chickens, goats, and bees.³⁸ Second, Cleveland has adopted zoning requirements governing construction of wind turbines.³⁹ The city takes the position that no specific zoning requirements are needed for solar panels or geothermal power.

Zoning in Cleveland: Agriculture in Residential Zones. Recent changes to Cleveland’s residential zoning requirements expressly allow agricultural uses, including keeping farm animals, in residential areas. While it appears that agricultural uses are allowed on either occupied or vacant residential land, more intensive agricultural use is allowed if the land is vacant. A residential lot thus may include “sheds, greenhouses, coops, cages, beehives, hoop houses, cold frames, barns, rain barrels, composting, farm stands . . . , and similar structures not exceeding fifteen (15) feet in height.”⁴⁰ Farmstands selling produce, eggs, or honey are allowed with restrictions, and after a public hearing.⁴¹ Thus, these new zoning provisions allow agricultural use of residential land while it awaits revived demand for housing.

Zoning in Cleveland: The Urban Garden Zone. The Urban Garden zone in Cleveland allows only gardening, with or without on-site sale of crops.⁴² No structures are allowed, except small structures associated with the permitted uses, such as greenhouses, tool sheds, shade pavilions, or “rest-room facilities with composting toilets.”⁴³ The Cleveland Zoning Code explains that the Urban Garden zone—which includes both community gardens and commercial, or “market” gardens—is intended “to ensure that urban garden areas are appropriately located and protected to meet needs for local food production, community health, community education, garden-related job training, environmental enhancement, preservation of green space, and community enjoyment on sites for which urban gar-

dens represent the highest and best use for the community.”⁴⁴

With regard to the Urban Garden zone, Cleveland has concluded that there are practical reasons to zone land specifically for urban agriculture. The city seeks to ensure that urban gardens are established as a goal in themselves, not as a holding strategy until it is time for residential or commercial building construction.⁴⁵ A formal zoning designation reserves particular land for urban gardening; the zoning cannot be changed without rezoning the property through the standard zoning legislative process, including notice to neighbors and a public hearing. Thus, the urban garden zone is a public and transparent embodiment of a city policy in favor of such uses. Possible private owners of land in an urban garden zone include local nonprofit organizations that foster community gardening for civic or educational purposes as well as a for-profit urban farmer.

Zoning in Cleveland: Wind Turbines. Cleveland has adopted zoning provisions allowing wind turbines in any zone as a principal or accessory use. The turbines must comply with location and design requirements and obtain several different forms of city approval. The turbine owner must provide financial assurance that it will be able to demolish the turbine when it is no longer needed or wanted.⁴⁶

Legal Issues: Legislative Discretion. In general, any new zoning requirement for green uses will benefit from the deference extended to rational legislative judgments in the rezoning process: Cities can choose how to regulate to promote the public welfare, and the “concept of the public welfare is broad and inclusive.”⁴⁷ Downzoning for a green use should be well within a city’s police power, as long as the city presents an adequate rational basis for the decision. Re-Imagining, for example, makes clear that Cleveland has a process for evaluating redevelopment potential and assessing the suitability of a tract for urban gardens or other green uses.

Similarly, zoning provisions that allow new uses such as wind turbines

[I]n *Palazzolo v. Rhode Island*, the U.S. Supreme Court held that a taking claim “is not barred by the mere fact that title was acquired after the effective date of the . . . restriction.”

should be permissible as long as the requirements have a rational basis. By now there is extensive expertise in the wind energy industry to guide a municipality in deciding how to regulate wind turbines, and numerous cities and counties have adopted requirements that can serve as a model. Some states have also adopted regulations with respect to wind energy zoning.⁴⁸

Legal Issues: Regulatory Taking.

The Cleveland Urban Garden zone is a particularly clear example of downzoning urban land to disallow uses that traditionally are regarded as more productive. Such downzoning might be challenged as a “regulatory taking”—a restriction on use so onerous that it amounts to a deprivation of property by removing the opportunity for an economic return, in violation of the Fifth Amendment. If a city downzones occupied land, the owner would benefit from the nonconforming use doctrine and thus would be protected from unwanted immediate application of the designation.⁴⁹ A city might downzone vacant land that is either privately held or in its land bank, and at some point the current owner or a new private owner might object to the restrictive zoning and challenge it as a regulatory taking.

One strategy that might seem attractive to avoid a takings challenge is to downzone land in a city’s land bank and then transfer it to private hands with the new zoning restriction already attached. However, in *Palazzolo v. Rhode Island*, the U.S. Supreme Court held that a taking claim “is not barred by the mere fact that title was acquired after the effective date of the . . . restriction.”⁵⁰

Thus the mere transfer of title is not enough to prevent the new owner from bringing a takings challenge. Nothing is simple in this area of law, and the viability of the new owner’s takings challenge depends in part on whether the claim was “ripe” under prior ownership. In *Palazzolo*, the restrictions at issue were adopted before *Palazzolo* took title to the land, but the Court noted that a claim could not be presented (that is, it was not ripe) until the landowner had followed “reasonable and necessary steps” to explore the availability of vari-

ances or waivers allowed by law,⁵¹ that process might not have been completed until after *Palazzolo* became the owner. Thus, in the green zoning context, a new owner of restricted land could challenge green zoning as a taking if he first seeks a use variance and does not get it. The language of *Palazzolo* is sweeping enough to suggest that the claim might survive the transfer of title even if the claim was ripe for the prior owner, although that situation was not clearly presented in the case. Specifically, the Court noted that “Future generations, too, have a right to challenge unreasonable limitations on the use and value of land.”⁵² Although there are recent lower court cases concluding that a ripe claim does not survive a title transfer,⁵³ this conclusion seems inconsistent with the holding and rationale of *Palazzolo*. And there appear to be no cases addressing the specific context of land that is rezoned when it is in public, not private, hands. Thus, the Supreme Court has told us that the transfer of title does not extinguish the opportunity for a taking claim, but many factual and legal factors affect whether any such claim might be presented.

Nonetheless, even if a challenge is possible, a city that engages in green zoning generally should prevail. With regard to urban farming, the zoning allows a use; the land is not zoned in a way that excludes any use at all. In that circumstance, the federal test for a taking is established in *Penn Central Transportation Co. v. New York City*.⁵⁴ *Penn Central* tells us to apply an “essentially *ad hoc*, factual [inquiry]” using several factors: the character of the regulation, the extent to which the regulation diminishes the property’s value (as compared to its value if unrestricted), and the impact of the restriction on the owner’s distinct investment-backed expectations.⁵⁵ The case law at the federal level suggests that downzoning for an urban garden should survive a takings challenge, if it appears that urban farming is a valid economic use.⁵⁶ Several Rust Belt cities have a growing array of urban commercial gardens or urban farms, including projects for urban hoop houses or greenhouses—particularly

well-suited to the cold-winter locations of the Northeast and Midwest.⁵⁷ This track record suggests that urban farming can be sufficiently remunerative to be a viable economic use.⁵⁸

In some states there are additional statutory limits that might make a regulatory taking claim more robust, or might pose a roadblock to restrictive zoning. Texas requires that compensation be paid if regulation reduces the value of land by 25 percent or more, and Florida requires compensation for regulations that impose an “inordinate burden” on private land.⁵⁹ A recent analysis of such state-level restrictions suggests that the requirements in Florida, Oregon, and possibly Arizona are the most significant, and that comparable requirements in a few other states, including Texas, have had little impact on local zoning decisions.⁶⁰ In general, the effect of such legislation is to discourage zoning restrictions that might resist the pressures of development; the impact of such legislation in a setting of low development demand is unclear.

Although zoning for urban agriculture or renewable energy is likely to survive a regulatory takings challenge, it is difficult to see a defense to such a claim if private land is rezoned for green infrastructure such as stormwater management, green space, or wildlife habitat. If the green infrastructure designation affects all of a particular tract—leaving no room for development on any portion—a court would likely find that the use is a regulatory taking.⁶¹ This is thus a strategy best reserved for publicly owned land.

Legal Issues: Spot Zoning and Equal

Protection. Another possible legal challenge to downzoning urban land would be based on spot zoning or equal protection concerns. Cities face a charge of spot zoning when a litigant thinks that one parcel has been singled out for different zoning treatment than the areas around it. Usually the issue arises when a more intensive use is allowed to the detriment of the comfort of the neighbors. But an urban garden zone in the middle of a residential area might look like a spot on a zoning map. Spot zoning is not always unlawful; a court

In general, municipalities do not appear to have an affirmative obligation to provide all services to all locations within their boundaries, in the absence of any resident demand.

will evaluate whether it complies with zoning laws, including the concept that zoning must take place according to a comprehensive municipal plan of some nature.⁶² Thus a city would have to prepare a careful factual and policy justification for rezoning, sufficient to show that the selection of the site is not arbitrary and indeed is consistent with a rational policy making process.

An equal protection challenge would involve similar considerations of perceived unfairness: This tract of land is being treated differently from its neighbors. Ordinarily, however, such challenges are rejected if a municipality can show a rational basis for its zoning decision.⁶³

Legal Issues: Nuisance. A traditional nuisance lawsuit involves a plaintiff landowner who complains that the use of adjacent or nearby land unreasonably affects the owner's enjoyment of his own land; a court can enjoin the offending use and award damages. The precise elements of a nuisance action vary from state to state. Residential plaintiffs who complain of noxious nonresidential uses can gain a court's sympathy.⁶⁴ A use can be vulnerable to challenge as a nuisance even if it is specifically authorized by zoning.⁶⁵

This issue was very much present in Cleveland's consideration of zoning amendments to allow chickens, bees, and other farm animals on sites within the city.⁶⁶ The number of animals permitted in a residential area is based on the square footage of the lot. Coops, pens, or cages must be in the rear yard, and size, design, and setback standards are specified. Roosters, geese, turkeys, and predatory birds are subject to particular restrictions. Goats, pigs, sheep, and "similar farm animals" require considerably more land than do smaller animals. Restrictions for bees are designed to restrict flyways and to assure that the bees have on-site water "to prevent bees from congregating at neighboring swimming pools or other sources of water on nearby properties." Structures housing farm animals require a building permit, and anyone proposing to raise farm animals must receive a license from the Public Health Department.

Other restrictions focus more directly on the nuisance issue. "Farm animals shall be kept only in conditions that limit odors and noise and the attraction of insects and rodents so as not to cause a nuisance to occupants of nearby buildings or properties and not to cause health hazards." Finally, the zoning code specifies that "[i]t shall be unlawful for any person . . . to keep . . . any animal or bird that makes noise so as to habitually disturb the peace and quiet of any person in the vicinity of the premises."⁶⁷

Zoning for wind turbines also raises the possibility of nuisance actions once turbines are built. The neighboring landowners might object to the effects of the turbines: shadow flicker, vibrations, navigational lighting, falling ice, or other effects. Cleveland's wind turbine ordinance addresses wind turbines in all zones, but it is particularly attentive to the effect of wind turbines in residential areas: Setbacks in residential areas are doubled; illumination is prohibited in all areas unless it "enhances the appearance" of the turbine and "will not result in nuisances"; there are aesthetic requirements for the turbines; and signs are restricted in residential areas.⁶⁸ Nothing can prevent a determined plaintiff from filing suit; the point here is that an ordinance allowing turbine construction should be designed to minimize the likelihood that the completed turbine is vulnerable to nuisance claims.

If we assume that all urban green zoning will affect land with limited development potential, the likelihood of an immediate legal challenge to new zoning categories seems fairly remote—particularly where decisions are made with strong community support and the support of a current landowner. But the threat of a legal challenge cannot be ignored, particularly because the right to bring a challenge may survive if the land is transferred into new private hands and a developer seeks to build a structure on land zoned for a green use. This is a scenario that cities must confront as it arises, with care to avoid actions that could be characterized as arbitrary.

C. Consolidating Population

Cities such as Cleveland, Detroit, and Youngstown have plenty of vacant land from which to choose, but it is not necessarily available in large single parcels. Consequently it is possible that a city might want to consolidate a vacant area for relatively large-scale urban agriculture or as a way to reduce infrastructure costs. Cleveland already has two six-acre urban farms in development, and construction of an urban greenhouse on 10 acres of land is in the works.⁶⁹ Youngstown and Detroit have explored the possibility of moving residual population from large tracts in order to reduce the burden of providing public services to scattered residents in largely vacant areas.⁷⁰ Both goals involve a problem familiar in the context of urban redevelopment: How do we assemble a unified tract of land when ownership is fragmented? How do we handle the owners who refuse to move? But they also include potentially new elements: Can we legitimately take a consolidated block of land and announce that, henceforth, we will no longer provide some or all of the traditional municipal services to that area? Can we use our powers in service of un-building rather than re-building?

Abandoning Services and Infrastructure. The first key question, then, is whether cities legitimately may identify swaths of land that the water and sewer lines, the streetlights, and the fire trucks will no longer serve. Here, we must assume that the city does not intend to let existing infrastructure fall into neglected disrepair; this could pose a liability issue if it leads to unsafe conditions. Rather, a city might make a site-by-site determination of which infrastructure and which services to eliminate and which to maintain, depending on the intended ownership and use of the property. Urban farming, for example, requires a source of water.

In general, municipalities do not appear to have an affirmative obligation to provide all services to all locations within their boundaries, in the absence of any resident demand.⁷¹ In the context of growing municipalities, the courts have concluded that a municipality may refuse to extend services to new

A city that abandons and demolishes roadways and utility lines, for example, should be careful not to abandon the easements or other property interests that might allow the improvements to be rebuilt later.

areas within their boundaries when the municipality lacks adequate financial resources or infrastructure capacity. For example, in South Carolina, the state constitution and applicable statutes provide that a municipality “may” provide services, and the South Carolina Supreme Court upheld a municipality’s refusal to provide services to a developer: “The Legislature has recognized that a municipality—for financial or other legitimate reasons—may be able to provide sewer service or other utilities for only part of its residents.”⁷² Similarly, Ohio statutes governing municipalities say that they “may” provide services,⁷³ not that they “shall” or “must.” While each state’s laws bear examination, it is likely that most of them offer the power to supply services without imposing an across-the-board duty in all instances.⁷⁴

In the absence of any affirmative statutory obligation, a municipality may reasonably exercise its discretionary power to allocate services as appropriate: “It is well settled that [a] court will not usually interfere with the details of municipal administration.”⁷⁵ A municipality must be wary of decisions that have an air of discrimination in order to avoid equal protection challenges. It must also ensure that it does not create unsafe conditions by leaving neglected infrastructure in place. And, for the long term, a municipality will need to decide whether it is cheaper to abandon or remove aging infrastructure than to replace it, and whether abandoning it today will impede efforts to reinstall it in the future when the demand for urban development revives. A city that abandons and demolishes roadways and utility lines, for example, should be careful not to abandon the easements or other property interests that might allow the improvements to be rebuilt later.

Consolidation Process. We then must consider how the municipality consolidates a tract of land that is divided into multiple parcels with diverse ownership. Consolidation typically will proceed in stages: A city would address tax-delinquent properties by means of tax foreclosure; it might track down absentee owners and attempt to purchase

their property; and it might contact resident owner-occupants and explore their willingness to sell. The power of eminent domain is available as a disfavored last resort. If we assume that the affected neighborhood is virtually empty of inhabitants, the few remaining residents might be happy to leave if offered comparable property elsewhere in exchange for their homesteads. This can be a relatively low-cost option, particularly if there are sites or properties in a land bank that the municipality could offer. The remaining individuals might be holdouts, tied to their property by sentimental attachments or personal reluctance to be uprooted. Both politically and practically, a city would try to avoid litigation. But if necessary, the city would have to exercise its eminent domain powers.

Eminent Domain. Thus the second major question concerns whether the city may use its power of eminent domain to help it consolidate tracts for green uses.⁷⁶ Eminent domain is the power to take private property for a public use upon payment of just compensation.⁷⁷ It is a power that has been used for centuries to take land for actual public ownership and use (such as to build a road or public building) or for private uses open to the public generally, such as construction of a railroad. Over time, the constitutional requirement of “public use” has been interpreted as a more lenient standard of “public purpose.”

Eminent domain ran into a political buzz saw in recent years, as objections arose to a particular use of the power: the taking of one person’s private property in order to consolidate a tract and transfer that land to a private developer for redevelopment. This is the *Kelo v. New London*⁷⁸ scenario: The municipality promotes the project as a way of boosting tax revenue and generating jobs; local residents protest that they are being moved against their will. The taking is challenged on the ground that it is not for a public use or a public purpose; it is for the private economic advantage of the developer.

Public Purpose. Thus we must consider whether the use of eminent

domain to clear an area of land for green uses serves a valid public purpose within the meaning of the law. In this setting, the new use may or may not be privately owned. At first, the city might own the land and lease it to private parties for urban farming or a field of solar panels or wind turbines. Alternatively, the city might retain it for a use such as publicly owned green space for stormwater management, which might reduce the cost of constructing expensive improvements to handle urban runoff and provide an ecological benefit to nearby waterways. Ultimately, a municipality might prefer to sell the land and get it back on the city’s tax rolls. Some consolidation might be intended specifically to allow a large-scale privately owned urban farm or greenhouse. The long-term economic benefit of all of these projects is to enhance green infrastructure and thus reenergize the city by making it a more sustainable and pleasant place to live, but some of this long-term effect might be relatively difficult to quantify.

Most of the green uses envisioned in this commentary are designed to benefit the public generally, and they do not offer a high level of profit to any particular private developer. Thus they fall within the range of public purpose that can justify eminent domain. Some green uses involve public ownership of property for the public’s benefit; if a city can provide a rational justification for its decision, the use of condemnation should be well within a municipality’s classic eminent domain power. The only use that even closely approximates the *Kelo* setting would be a project that takes private property to allow privately owned large-scale urban agriculture or alternative energy resources. And of course, in *Kelo* the Supreme Court upheld even the taking of private property for transfer to a private developer, as long as it was justified by a rational economic development plan that offered a public benefit.

In *Kelo*, the U.S. Supreme Court emphasized that the concept of public purpose is broad and flexible. The Court cited in particular the decision of *Berman v. Parker*,⁷⁹ which upheld

Food cooperatives, organized market garden distribution systems, regional efforts to encourage alternative energy sources—all of these might involve both the central city and its suburbs in productive regional cooperation that would enhance an overall metropolitan feeling of community.

the government's decision to take the plaintiff's non-blighted property as part of an overall redevelopment plan targeting a broad area of Washington, D.C. In *Berman*, the Court famously noted that "[t]he concept of the public welfare is broad and inclusive It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled."⁸⁰ The *Kelo* Court emphasized the deference owed to a city's determination of whether a particular exercise of the eminent domain power serves a public purpose:

Viewed as a whole, our jurisprudence has recognized that the needs of society have varied between different parts of the Nation, just as they have evolved over time in response to changed circumstances.⁸¹

This broad view of the public interest is more than adequate to justify a rational municipal decision to use its eminent domain power to assemble a tract of land for green uses.

The greatest threat to a city's flexibility is likely to be state law because the *Kelo* case was followed by a wave of state legislation restricting the power of eminent domain, in an effort to combat the abuse of the power in pursuit of economic redevelopment.⁸² Thus, cities seeking to undertake "green takings" must pay careful attention to applicable state restrictions, including restrictive definitions of permissible purposes for eminent domain, or restrictions on the use of eminent domain in situations of "blight."⁸³

Just Compensation. If the power of eminent domain may be exercised (that is, if it serves a valid public purpose), the property owner must receive just compensation. Compensation is based on the fair market value of the property at its best use, based on a valuation of the property by a licensed real estate appraiser.⁸⁴ It is hard to determine the actual fair market value of a property in a virtually defunct neighborhood. As an illustration, a sample property in the Cuyahoga County land bank is listed for sale at \$8,430—a price at which it

remains unsold—but the "auditor's fair market value" is \$58,200.⁸⁵ Certainly the land bank price seems too low, but given actual market conditions the listed "fair market value" seems unrealistically high. Of course, this property is already in the land bank and perhaps is not a good reflection of the value of a non-foreclosed property. In the case of an owner-occupier, one could argue that the city should be willing to offer a higher figure to reflect the resident owner's willingness to stay and be part of the city as contrasted to the many other neighbors who have moved away.⁸⁶ This argument is less compelling if the property is held by an absentee landlord or real estate speculator; in that instance, fair market value arguably should be based on actual market conditions.

Cities interested in consolidating tracts of vacant land, including moving residual residents, are in the early stages of this process. In general, they do not favor using eminent domain; it seems coercive and is thus politically unpalatable, and the legal process can be cumbersome. The issue will likely evolve over the next few years.

PART III. SOME RELATED ISSUES

A. Regional Cooperation

One of the fundamental tenets of the smart growth movement is that we are all in this together: A region thrives best when all of its political jurisdictions cooperate.⁸⁷ Many of the cities with the greatest "luxury of vacant land"⁸⁸ are the centerpieces of a metropolitan area. Cleveland and Detroit, for example, are fringed with relatively prosperous and indeed some very elegant suburbs, all of which feel the chilly draft of the increasingly vacant central city. Yet the urban green movement does not so far seem to play a role in any metropolitan area's regional vision.

Perhaps this lack of a regional buy-in arises because urban green activity is inherently place-based: it is an effort to revitalize the central city, by making it a more forward-looking and sustainable environment. One problem of shrinking cities, for example, is that they tend to be unattractive to young profession-

als and others seeking a vibrant urban scene. The local food movement in Cleveland provides an example of a mobilized and energized community including many younger adults, all of whom are devoted to making Cleveland a better place. But the point remains: Urban green activity makes the central city a better place for those who live there, and is not obviously a source of prosperity for the wider metropolitan area.

And yet a sinking central city can depress an entire metropolitan area; to the extent that regional cooperation can assist the urban-greening process, perhaps there should be greater efforts to develop the regional possibilities of the green movement. Food cooperatives, organized market garden distribution systems, regional efforts to encourage alternative energy sources—all of these might involve both the central city and its suburbs in productive regional cooperation that would enhance an overall metropolitan feeling of community. Perhaps the lack of a glittering and remunerative element is an advantage: It is unlikely to offer the kind of single shiny prize that sometimes—regrettably—induces competition among neighboring communities for a development opportunity.

B. Land Conservancies

Organizations like the Nature Conservancy and the Trust for Public Land seek to protect land and habitat from the pressures of development. Traditionally, they have focused their energy on ecologically significant tracts in rural or undeveloped areas by purchasing conservation easements from landowners or by taking title to the property itself.⁸⁹ These deep-pocket organizations have not focused on urban landscapes, but they might be able to play a role. In cities like Detroit and Cleveland, there are many acres of vacant land that could be used as parkland or wildlife habitat, or—where relevant—restored to their natural condition as wetlands. The Nature Conservancy's Plant a Billion Trees initiative is part of its efforts to combat climate change by capturing carbon resources in trees,⁹⁰

Green space also offers a sustainable way to protect local waterways and the Great Lakes, by allowing constructed wetlands, bioswales, rain gardens, and other stormwater management resources, all of which potentially can reduce the cost of stormwater control by more conventional means.

and a tree captures carbon no matter where it is located. A satellite view of any urban area will reveal acres of blacktop. The urban green movement presents an opportunity to revitalize this desolate scene.

If we assume that urban redevelopment will occur at some point in the future, we have an opportunity now to set aside a core of green space for the future public's benefit. It might be possible to persuade private nonprofits like the Nature Conservancy to view urban green island preservation as part of their mission and thereby put their considerable financial resources to work for the nation's cash-strapped ailing cities.

C. Climate Change

Urban green uses fit neatly within the climate action programs of many cities. By now many observers have written about the ways in which local governments, including local land use decision makers, can help mitigate the impact of climate change.⁹¹ The New Renewal, with its emphasis on more compact development in key areas of the city and green uses in areas that would otherwise be vacant, is fully compatible with this effort.

When the local climate action movement began, the *U.S. Mayors' Climate Action Handbook*⁹² offered advice to local governments that highlighted the climate action value of the New Renewal. It urged cities to protect areas of green space and to develop sources of renewable energy, such as wind, geothermal, and solar energy—all of which are part of the urban green agenda for vacant land. The *Handbook* suggested that the cost of maintaining water systems and waste management—and water use (including inevitable water losses from aging leaking water pipes) can be reduced by decommissioning unnecessary infrastructure. It suggested focusing on dense, mixed use neighborhoods that save green space (thus facilitating carbon capture through tree growth)—and cities such as Cleveland are focusing on compact urban environments for parts of the city where traditional de-

velopment is possible. Finally, agriculture and other green uses can function as carbon sinks, as well as offering a source of local food.⁹³

This link already has been made in Cleveland, where the Office of Sustainability coordinates all of the city's sustainability initiatives, including green uses of vacant land.⁹⁴ Thus an effort to promote green uses fits with a climate change and climate adaptation agenda as well.

CONCLUSION

From the Sun Belt to the Rust Belt, all areas of the United States are now confronted with short-term or perhaps longer term vacancies at their urban cores. The vacancy veterans of the Rust Belt are developing new ways to take advantage of shrinking populations, and the movement to develop a palette of urban green uses provides a new way forward in urban renewal. One key element of this effort is the focus on finding productive uses of the land, such as urban agriculture and alternative energy. Green space also offers a sustainable way to protect local waterways and the Great Lakes, by allowing constructed wetlands, bioswales, rain gardens, and other stormwater management resources, all of which potentially can reduce the cost of stormwater control by more conventional means. Ideally, the concept of a "green" use can thus gain two meanings in a cash-poor and struggling municipality.

ENDNOTES

1. Marc Lefkowitz, *Cleveland's Comeback: Reimagining the City from the Ground Up*, NEXT AMERICAN CITY, available at <http://american.city.org/magazine/article/cleveland-comes-back> (for a discussion of community involvement in Cleveland).
2. *Cleveland Land Lab, Re-Imagining a More Sustainable Cleveland: Citywide Strategies for Reuse of Vacant Land* (2008), available at <http://reimaginingcleveland.org/about/links-and-resources> (hereinafter Re-Imagining). Re-Imagining was prepared by a coalition including the Cleveland City Planning Commission, the Cleveland Land Lab at the Cleveland Urban Design Collaborative of Kent State University, and a nonprofit organization, Neighborhood Progress, Inc., with financial support from the Surdna Foundation. A follow-up report was recently issued to offer specific suggestions for vacant land strategies, Kent State University's Cleveland Urban Design Collaborative and Neighborhood Progress, Inc., *The Ideas to Action Resource Book 2011* (available at the same site, <http://reimaginingcleveland.org/about/links-and-resources>; hereinafter, *Ideas to Action*).
3. See <http://planning.city.cleveland.oh.us/cwp/contents.html> for the current Cleveland City Plan.

4. Presentation of Robert N. Brown, Cleveland City Planning Commission, at the 2010 Reclaiming Vacant Properties conference in Cleveland, October 13–15, 2010. See <http://www.communityprogress.net/2010-reclaiming-vacant-properties-conference-pages-82.php>.
5. Re-Imagining, at 9 (figure 7). Each of the remediation techniques is a way to use natural processes to clean up mildly contaminated sites. Bioremediation uses microbes in soil and groundwater; phytoremediation and mycoremediation work in the same way, using plants and fungi. *Id.* at 24.
6. *Id.* at 9 Figure 7.
7. *Id.* at 5.
8. *Id.*
9. Much energy behind the Re-Imagining initiative comes from the local food movement. See, e.g., Marc Lefkowitz, *Filling in the Local Food Gap*, GREENCITYBLUELAKE (Aug. 11, 2010), <http://www.gcbi.org/blog/marc-lefkowitz/filling-local-food-gap>. Updates on the Re-Imagining projects are available at <http://reimaginingcleveland.org>.
10. Lefkowitz, *supra* note 1.
11. <http://www.evergreencoop.com/GreenCity/greencity.html>.
12. Marc Lefkowitz, *Cleveland Botanical Garden Will Plant \$167K into Regional Green Infrastructure*, GREENCITYBLUELAKE (Jan. 25, 2011), at <http://www.gcbi.org/blog/marc-lefkowitz/cleveland-botanical-garden-will-plant-167k-regional-green-infrastructure>.
13. Many strategies were on display at the 2010 Reclaiming Vacant Properties conference held in Cleveland from October 13 to 15, 2010. See <http://www.communityprogress.net/2010-reclaiming-vacant-properties-conference-pages-82.php>. For a description of urban agriculture zones in the small group of cities that have taken this step, see Mukherji & Morales, *Zoning for Urban Agriculture*, ZONING PRACTICE (March 2010).
14. See, generally, The City of Youngstown 2010 Citywide Plan (2005), available at http://www.cityofyoungstownoh.com/about_youngstown/youngstown_2010/plan/plan.aspx. See also Christine McDonald and Mike Wilkinson, *City Begins Crafting Plan to Downsize*, DETROIT NEWS, Feb. 20, 2010, at A1 (discussing Mayor Bing's consideration of downsizing). In Detroit, there is also a grassroots pattern of suburbanization, as remaining home owners acquire adjacent lots for home and garden expansion. Tobias Ambrorst, et al., *Improve Your Lot!* in CITIES GROWING SMALLER 47 (2008). See also David Streitfeld, *An Effort to Save Flint, Mich., by Shrinking It*, N.Y. TIMES, April 21, 2009, <http://www.nytimes.com/2009/04/22/business/22flint.html?ref=davidstreitfeld> (discussing comparable efforts in Flint, Michigan).
15. Suzette Hackney, *Bing Staff Backs Off Talk About Downsizing Detroit*, DETROIT FREE PRESS, Apr. 29, 2010, at A8, available at <http://www.freep.com/article/20100429/NEWS05/4290435/Bing-staff-backs-off-talk-about-downsizing-Detroit>.
16. Thomas J. Fitzpatrick IV, *Understanding Ohio's Land Bank Legislation*, FEDERAL RESERVE BANK OF CLEVELAND POLICY DISCUSSION PAPERS (January 2009), available at <http://www.clevelandfed.org/Research/PolicyDis/pdp25.pdf>. See also Frank S. Alexander, *Revitalizing Community Assets: Louisiana Land Reform in the Storms' Aftermath*, 53 LOY. L. REV. 727, 752–755 (2007).
17. Samsa, *Reclaiming Abandoned Properties: Using Public Nuisance Suits and Land Banks to Pursue Economic Redevelopment*, 56 CLEV. ST. L. REV. 189, 213–214 (2008).
18. Alexander, *supra* note 16, at 755.
19. See ZONING & PLANNING DESKBOOK § 16:5 (2d ed.) (citing need for statutory authorization).
20. An excellent history of land banks and discussion of the forms of land banks and considerations in establishing one can be found in Frank S. Alexander, *Land Bank Strategies for Renewing Urban Land*, 14 JOURNAL OF AFFORDABLE HOUSING 140 (2005). Current strategies for land banking were presented at the Reclaiming Vacant Properties Conference in Cleveland in 2010. See <http://www.communityprogress.net/2010-reclaiming-vacant-properties-conference-pages-82.php>.
21. One land bank, in Genesee County, was initially established without express statutory authorization, using other mechanisms existing under Michigan law, but the state subsequently adopted additional land bank legislation. Alexander, *supra* note 20, at 150.

22. *Id.* at 147–148.

23. See Fitzpatrick, *supra* note 16, at 2–3; Oh. Rev. Code §§ 5722.01(F) & 5722.02(A) (land bank may acquire “nonproductive land”). The land bank program is housed in the Department of Community Development, Real Estate Division. There is a separate bank of industrial and commercial properties in the Department of Economic Development.

24. The ravages of the foreclosure crisis are detailed in Alex Kotlowitz, *All Boarded Up*, N.Y. TIMES, Mar. 8, 2009, at MM28. For an excellent history of the impact of questionable mortgage lending practices and their resulting waves of foreclosures, see Kermit J. Lind, *The Perfect Storm: An Eyewitness Report from Ground Zero in Cleveland’s Neighborhoods*, 17 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 237 (2008).

25. Ohio Rev. Code §§ 321.261 & 321.341 (funding), 1724.01, 1724.02, 1724.04 & 1724.10. See generally, <http://www.cuyahoga.landbank.org/about.php>.

26. See <http://www.cuyahogalandbank.org>.

27. For an excellent comparison of the Cleveland City land bank with the Cuyahoga County land bank, see Fitzpatrick, *supra* note 16.

28. Ohio Rev. Code § 5722.02(D).

29. Ohio Rev. Code § 5722.22.

30. 42 U.S.C. § 9607(a).

31. 42 U.S.C. §§ 9601(20)(D), 9601(35)(A)(ii).

32. See Alexander, *supra* note 20, at 147.

33. *Id.* at 148–149.

34. *Id.* at 149.

35. *Id.* at 149–150.

36. One issue that has not been fully explored is the extent to which an aggressive land bank strategy might run afoul of the Fifth Amendment. It is possible that an owner who loses his land to tax foreclosure could argue that the land bank’s land-acquisition process fails to satisfy due process or amounts to a taking of private property for public use without just compensation being paid. This possibility must be kept in mind when structuring land bank legislation.

37. Cleveland, Ohio, Codified Ordinances chapter 337.02, 337.23, 337.25 (effective November 3, 2010, Ordinance 814–10).

38. Cleveland, Ohio, Codified Ordinances chapter 347.02. For a detailed look at legal requirements governing backyard chickens, see Patricia Salkin, *Feeding the Locavores, One Chicken at a Time*, ZONING AND PLANNING LAW REPORT (March 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1774023.

39. Cleveland, Ohio, Codified Ordinances chapter 354A.

40. Cleveland, Ohio, Codified Ordinances chapter 337.25.

41. *Id.*

42. Cleveland, Ohio Codified Ordinances chapter 336.03, 336.04(b) & (c).

43. *Id.* 336.04.

44. Cleveland, Ohio, Codified Ordinances 336.01.

45. Re-Imagining, at 26–29.

46. Cleveland, Ohio, Codified Ordinances chapter 354A.

47. *Berman v. Parker*, 348 U.S. 26, 33 (1954).

48. For example, the Ohio Power Siting Board has adopted rules for siting wind farms. See <http://www.opsb.ohio.gov/opsb>.

49. JULIAN CONRAD JUERGENSMEYER & THOMAS E. ROBERTS, LAND USE PLANNING AND DEVELOPMENT REGULATION LAW at § 4.31, page 118 (2d ed. 2007) (“zoning ordinances almost universally permit nonconforming uses to continue”).

50. Palazzolo v. Rhode Island, 533 U.S. 606, 630 (2001).

51. *Id.* at 620–621. The Court did not identify the precise point at which the plaintiff’s claim ripened. See *Id.* at 619–621.

52. *Id.* at 627.

53. The Federal Circuit recently rejected a claim of regulatory taking when the restriction at issue was imposed (and it concluded, presented a ripe claim) before the plaintiff took title to the land (CRV Enterprises, Inc. v. United States, 626 F.3d 1241 (Fed. Cir. 2010)). Similarly, the Ninth Circuit concluded that a facial challenge to a restriction—that is, one that does not depend on seeking a variance or other type of administrative permission before presenting the claim—ripens when the restrictions are imposed and cannot be raised by a subsequent purchaser. *Guggenheim v. Goleta*, 2010 U.S. App. LEXIS 25981 at *19 (9th Cir. 2010). In that case, the dissent observed that this holding is inconsistent with Palazzolo. *Id.* at *44–*45. The majority noted that a subsequent owner could bring an “as applied” challenge to the restrictions at some point in the future. *Id.* at *20.

54. 438 U.S. 104 (1978).

55. *Id.* at 124.

56. See Catherine LaCroix, *Urban Agriculture and Other Green Uses: Remaking the Shrinking City*, 42 THE URBAN LAWYER 225, 250–273 (2010).

57. For an example of a local market for local foods, see Debbi Snook, *Case Western Reserve University Dining Hall Serves Comfort Food Locally Sourced and Made from Scratch*, CLEVELAND PLAIN DEALER, Feb. 15, 2011, available at http://www.cleveland.com/taste/index.ssf/2011/02/case_western_reserve_universit.html. See also, *An urban greenhouse is planned in Cleveland*, <http://www.evergreencoop.com/GreenCity/greencity.html>. There are many examples of the vitality of the urban farming and community garden community in Cleveland. See, e.g., Local Food Cleveland, <http://www.localfoodcleveland.org> and the site of one urban farmer, <http://thegardenlifeand-timesofjustinhusher.blogspot.com/>. The Re-Imagining project is working on other innovative ideas, such as using the foundations of demolished houses to support greenhouses or food storage. Ideas to Action at 30 (“Bio-Cellar”) (2011). Hantz Farms in Detroit is one example of a proposed urban farm, <http://www.hantzfarmsdetroit.com>.

58. The Ninth Circuit’s decision in *Guggenheim v. Goleta* suggests an additional defense: the existence of restrictive zoning when a person acquires property shows that the owner has suffered no loss; “the price they paid for the property, doubtless reflected the burden of the restriction they would have to suffer,” 2010 U.S. App. LEXIS 25981 at *23. The Guggenheim dissent asserts that this “impermissibly picks out only one of the three factors the Court has told us to consider . . . under . . . Penn Central . . .” *Id.* at *33 (referring to Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978)). In the majority’s defense, the court might have concluded that the lack of “investment backed expectations”—the term used in Penn Central—was so significant as to make further analysis unnecessary, although the opinion does not say so.

59. Tex. Gov’t Code Ann. § 2007.002(5)(B) (compensation required if government regulation reduces property value by 25 percent or more); Fla. Stat. Ann. § 70.001 (regulations that impose an “inordinate burden” are a taking). See also La. Rev. Stat. Ann. § 3:3610; Miss. Code Ann. § 49-33-9.

60. John D. Echeverria and Thekla Hansen-Young, *The Track Record on Takings Legislation: Lessons from Democracy’s Laboratories*, 28 STAN. ENVTL. L.J. 439 (2009). “The Florida and Oregon property rights laws have made it essentially impossible for government to regulate land uses unless it is willing to pay regulated owners. Because government officials have proven unable or unwilling to make such payments, the takings laws have effectively neutered the law-making process in relation to land use.” *Id.* at 446.

61. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992). For a reference to the vexing question of how to address a restriction affecting only part of a parcel, see Palazzolo, 533 U.S. at 631.

62. See Juergensmeyer & Roberts, *supra* note 49, at §5.10, p. 148.

63. An equal protection argument might gain greater weight if a plaintiff can allege and show a racial motivation in selecting a particular parcel of land, thereby triggering strict scrutiny of the classification. Juergensmeyer & Roberts, *supra* note 49 at § 10.14.A, p. 466.

64. DANIEL MANDELKER, LAND USE LAW at §4.01 & 4.05 (5th Ed. 2003). The Restatement of Torts defines private nuisance as “a non-trespassory invasion of another’s interest in the private use and enjoyment of land.” AMERICAN LAW INSTITUTE, RESTATEMENT OF TORTS (Second) § 821D (1978). In order to be actionable, the invasion must be either “intentional and unreasonable; or unintentional and otherwise actionable under the rules governing liability for negligent, reckless or ultrahazardous conduct.” *Id.* at § 822.

65. *Id.* at § 4.10.

66. All of the discussion that follows refers to Cleveland, Ohio Codified Ordinances Chapter 347.02.

67. *Id.*

68. Cleveland, Ohio, Codified Ordinances 354A.04(b)(2), 354A.05(a), (c) & (d).

69. See Marc Lefkowitz, *Cleveland Adds Another Six-Acre Urban Incubator Farm*, GREENCITYBLUELAKE (October 27, 2010), <http://www.gcbi.org/blog/marc-lefkowitz/cleveland-adds-another-six-acre-urban-incubator-farm>, and <http://www.evergreencoop.com/GreenCity/greencity.html>.

70. Youngstown’s city plan notes that “Not all infrastructure can be maintained and not all neighborhoods can be returned to their past sustainability.” The City of Youngstown, *supra* note 14, at 37. The current plan reallocates uses: Some abandoned areas of housing and unnecessary commercial zones are re-designated “industrial green”—a new category of “nonpolluting environmentally friendly” industrial use. *Id.* at 49–51. See also *Id.* at 14; Suzette Hackney, *Bing, Strategy, Plan for Detroit is in the Works*, DETROIT FREE PRESS, May 12, 2010, available at <http://www.freep.com/article/20100512/NEWS06/5120305>; Streifield, *supra* note 14 at A12 (discussing comparable efforts in Flint, Michigan).

71. A municipality might have such an obligation if a resident seeks services and there is no practical reason why service would not be available. See, e.g., *Clark v. Bd. of Water and Sewer Comm’rs*, 234 N.E.2d 893 (Mass. 1968).

72. *Sunset Cay, LLC v. City of Folly Beach*, 357 S.C. 414, 426, 393 S.E.2d 462 (S.C. 2004).

73. *E.g.*, Ohio Rev. Code § 715.06 (light, power, and heat), § 715.08 (water supply), §717.01 (general powers).

74. The situation appears to be somewhat different in the case of annexation and deannexation. An annexing city might have a duty to provide services to the area it annexes. *E.g.*, *City of Rockport v. City of Malvern*, 356 Ark. 393 155 S.W.3d 9 (Ark. 2004); N.C. Gen. Stat. § 160A-47, and areas that do not receive services may petition for deannexation. *E.g.*, *Hickory Lane Land and Dev. Co. v. Vill. of Novi*, 372 Mich. 219; 125 N.W.2d 487 (Mich. 1964). In general, deannexation seems to be an option only for tracts of land at the municipal borders, which can then seek to be part of an adjoining municipality or perhaps remain under county jurisdiction. See, e.g., 64 I.L.C.S. §§ 5/7-3-1 5/7-3-6 (disconnection from municipality only if area to be disconnected is at the municipal boundary) (Illinois).

75. *Perazzo v. Lindsay*, 290 N.Y.S. 2d 971, 972 (N.Y. App. Div. 1968), *aff’d*, 244 N.E. 2d 471 (N.Y. 1968).

76. The debate over eminent domain for economic development has prompted interesting ideas concerning alternatives to condemnation. See, e.g., Michael Heller & Rick Hills, *Land Assembly Districts*, 121 HARV. L. REV. 1465 (2008). These are beyond the scope of this commentary.

77. U.S. Const. Amendment V.

78. *Kelo v. City of New London*, 545 U.S. 469 (2005).

79. 348 U.S. 26 (1954).

80. *Id.* at 33.

81. *Kelo*, 545 U.S. at 482.

82. See John J. Costonis, *New Orleans, Katrina, and Kelo: American Cities in the Post-Kelo Era*, 83 *Tul. L. Rev.* 395, 412-420 (2008). For a web link tracking some post-Kelo legislation, see <http://www.ncsl.org/IssuesResearch/EnvironmentandNaturalResources/EminentDomainmainpage/tabid/13252/Default.aspx>.

83. *E.g.*, Pa. Cons. Stat. Ann. §§ 204(a), 205 (barring eminent domain for economic development but authorizing for blight removal); Ohio Rev. Code Ann. §717.01 (including language barring taking for economic development without a demonstration of blight); *Norwood v. Horney*, 853 N.E. 2d 1115 (Ohio 2006) (economic benefit alone does not satisfy public use requirement).

84. Harris K. Weiner, *Eminent Domain and Economic Development: Rhode Island General Assembly Addresses Kelo v. City of New London*, 57 *R.I. BAR JNL.* 13, 16 (2008). Rhode Island adopted legislation requiring that just compensation be set at 150 percent of fair market value for an economic development taking. *Id.* at 44.

85. <http://www.cuyahogalandbank.org/properties.php> (3804 Archwood Ave.).

86. See Beckman, *The Wholesale Decommissioning of Vacant Urban Neighborhoods: Smart Decline, Public-Purpose Takings, and the Legality of Shrinking Cities*, 58 *CLEV. ST. L. REV.* 387, 455-457 (2010).

87. See, e.g., STUART MECK, ED., *GROWING SMART LEGISLATIVE GUIDEBOOK* (2002 Edition) (Amer. Planning Ass'n).

88. This phrase is used by Terry Schwarz, a leading proponent of the Re-Imagining approach, <http://www.cudc.kent.edu/a-WhoWeAre/whoweare3.html>.

89. The Nature Conservancy's website is found at <http://www.nature.org>. A comparable organization serving Northeast Ohio is the Western Reserve Land Conservancy, <http://www.wrland-conservancy.org>. The Trust for Public Land is found at <http://www.tpl.org>.

90. <http://www.plantabillion.org>.

91. John Nolon has contributed to the dialogue in these pages. See John R. Nolon, *Climate Change and Sustainable Development: the Quest for Green Communities*, 61 *PLANNING & ENVTL. L.* (October 2009), and John R. Nolon & Patricia E. Salkin, *Integrating Sustainable Development Planning and Climate Change Management: A Challenge to Planners and Land Use Attorneys*, *PLANNING & ENVTL. L.* (March 2011). See also Catherine LaCroix, *SEPA's, Climate Change, and Corporate Responsibility: The Contribution of Local Government*, 58 *CASE WESTERN RESERVE L. REV.* 1289 (2008).

92. ICLEI- LOCAL GOVERNMENTS FOR SUSTAINABILITY et al., eds. U.S. MAYORS' CLIMATE ACTION AGREEMENT: CLIMATE ACTION HANDBOOK, available at http://www.iclei.org/documents/USA/documents/CCP/Climate_Action_Handbook-0906.pdf.

93. See, e.g., Carmen Gonzales, *Climate Change, Food Security, and Agrobiodiversity: Toward a Just, Resilient, and Sustainable Food System* (2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1756914.

94. See http://portal.cleveland-oh.gov/CityofCleveland/Home/Government/CityAgencies/PublicUtilities/Sustainability?_piref34_138416_34_138357_138357.

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