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Varying the Variance

HOW NEW YORK CITY CAN SOLVE ITS HOUSING CRISIS AND OPTIMIZE LAND USE TO SERVE THE PUBLIC INTEREST

INTRODUCTION

Eleven-year-old Dasani's mother named her after the new bottled water entering Brooklyn bodegas on the eve of her birth.¹ The water brand, beyond the reach of Dasani's mother's finances, revealed the upwardly mobile vision that Dasani's mother had for her.² And yet, Dasani, who endured the misfortune of living in one of New York's most notoriously decrepit shelters—The Auburn Family Residence—was also named after an urban phenomenon: new, expensive products for new, wealthy residents.³ Ultimately, what Dasani needed more than anything was a room away from her large, complicated family. A room where she could not only do her schoolwork, but where she could dream of a better life.⁴ Dasani's future was threatened and continues to be threatened by her homelessness.⁵

Dasani's struggles notwithstanding, urban America is back in vogue. Fledgling college-educated professionals are flocking to major cities in droves, seeking career opportunities, diverse cultural experiences, and alternative housing and transportation options.⁶ Television shows like HBO's *Girls* and CBS's *New Girl* glamorize the pleasures of living in a modern, urban utopia where creative people abound, chopped salad shops proliferate, and young, single people are always coming or going from the yoga studio or a "bootcamp"-style workout.

¹ See Andrea Elliott, *Invisible Child, Part I, Girl in the Shadows: Dasani's Homeless Life*, N.Y. TIMES (Dec. 9, 2013), <http://www.nytimes.com/projects/2013/invisible-child/#/?chapt=1> [<http://perma.cc/88XV-7P5J>].

² *Id.*

³ *See id.*

⁴ *See id.*

⁵ *See id.*

⁶ See Vishaan Chakrabarti, *America's Urban Future*, N.Y. TIMES (Apr. 16, 2014), http://www.nytimes.com/2014/04/17/opinion/americas-urban-future.html?_r=0 [<http://perma.cc/CW49-9FVL>].

Though millennials with diverse backgrounds have disproportionately flocked to New York City, Chicago, and San Francisco,⁷ in these cities they face the same force that Dasani has endured her whole life: a wildly unaffordable housing market. This unaffordability has grown in recent years. New York City residents with rent burdens (that is, renters who spend more than 30% of their income on rent) grew from 44% of renters in 2000 to 54% of renters in 2012.⁸ To illustrate the problem another way, in New York City, the median monthly rent citywide rose 11% while the median household income rose by only 2%.⁹ With incomes stagnant,¹⁰ many commentators see increasing the supply of housing and decreasing its cost as a principal means through which governments can equalize income gains and housing cost increases.¹¹ Vacancy rates reached an alarming low of 3.58% in 2012, suggesting that supply is a principal constraint in the New York real estate market.¹² As seen by the surge of millennials to New York, it has become an increasingly attractive place to live and work due to the city's lower crime rates and vast cultural amenities.¹³ Presumably, in a free-market system, investors seeking returns on capital would invest in real estate commensurate with rising demand. But housing in New York is limited by geographical and regulatory constraints.¹⁴ In particular, there is limited land to develop because of building and zoning restrictions, a problem compounded by the inherently limited size of the island of Manhattan.¹⁵ A housing policy that promotes the construction of new units and increases vacancy rates could be the difference between personal economic catastrophe (i.e., homelessness) and a viable path to the middle class.

⁷ See Cody Fuller, *For the Love of Money: Why Millennials Are Moving to Expensive Cities*, ZILLOW (Nov. 14, 2014), <http://www.zillow.com/research/millennials-move-expensive-cities-8257/> [http://perma.cc/6PSJ-UAU5].

⁸ See NYU FURMAN CTR., STATE OF NEW YORK CITY'S HOUSING & NEIGHBORHOODS IN 2013, at 32 (2013), http://furmancenter.org/files/sotc/SOC2013_Renters.pdf [http://perma.cc/EW7U-LCWG].

⁹ *Id.*

¹⁰ See Neil Shah, *Stagnant Wages Are Crimping Economic Growth*, WALL ST. J. (Aug. 25, 2013, 4:19 PM), <http://www.wsj.com/articles/SB10001424127887323980604579028822725730720> [http://perma.cc/KC8K-FNAY].

¹¹ See David Alpert, *Finding the Middle Ground Between Affordable Housing and Land Use Advocacy*, NEXT CITY (May 10, 2012), <http://nextcity.org/daily/entry/finding-the-middle-ground-between-affordable-housing-and-land-use-advocacy> [http://perma.cc/8A25-RG47].

¹² STATE OF NEW YORK CITY'S HOUSING & NEIGHBORHOODS, *supra* note 8, at 36.

¹³ Catherine Rampell, *Why the Rent Is So High in New York*, N.Y. TIMES (Apr. 26, 2013, 10:00 AM), <http://economix.blogs.nytimes.com/2013/04/26/why-the-rent-is-so-high-in-new-york/> [http://perma.cc/6V9E-J5YS].

¹⁴ *Id.*

¹⁵ *Id.*

Urban America requires a solution to its affordable housing crisis, and combined with the above data, Census Bureau reports demonstrate that New York City needs a solution more than most cities.¹⁶ The present land use paradigm—zoning—creates neighborhoods unsullied by incompatible uses. But zoning also limits landowners’ freedom to utilize their parcels as they see fit. From the beginning of modern urban land use regulation, the variance has alleviated this tension by providing a constitutional safety valve—it creates exceptions to zoning restrictions when economic necessity demands it. Unfortunately, New York City’s current zoning and variance system slows affordable housing development and empowers special interest groups who oppose development even when the public clamors for aggressive change.

Because zoning has proved to be the best system yet for managing the conflicting needs of urban development, and affordable housing requires an exception to present zoning restrictions, policymakers should consider an expansion of the variance system. In particular, policymakers should adopt a new version of the variance—in essence, a “public interest variance”—through which municipalities could permit development outside the scope of the zoning rules for a particular property when it would serve an enumerated public interest. This would directly increase housing affordability and indirectly support antipoverty efforts that have been long resistant to government intervention intended to increase the supply of housing and decrease its cost relative to incomes. Ultimately, this note acknowledges the value of highly regulated, modern land use rules but seeks a solution that promotes property rights and the implementation of public objectives (i.e., housing affordability) through an expanded variance system.

This note explores the development of modern land use regulations, legislative responses to constitutional qualms about property rights through the development of the variance, and the empowerment of special interests through the current back and forth between zoning and the variance at the expense of the public interest. It argues that a more flexible variance system

¹⁶ STATE OF NEW YORK CITY’S HOUSING & NEIGHBORHOODS, *supra* note 8, at 32; see also *Population and Housing Narrative Profile 2009-2013 American Community Survey 5-Year Estimates, Geography: New York-Northern New Jersey-Long Island, NY-NJ-PA Metro Area*, U.S. CENSUS BUREAU, http://thedataweb.rm.census.gov/TheDataWeb_HotReport2/profile/2013/5yr/np01.html?SUMLEV=310&cbsa=35620 [<http://perma.cc/HQ5T-URH9>] (last visited Mar. 2, 2016) (describing a large study that many journalists and researchers use for information on household size and housing costs).

would retain the benefits of the zoning system while disrupting the special interests that hurt lower-income urban dwellers.

In Part I, this note explores the origins of modern American planning law, including the 1916 New York planning law, the Supreme Court's embrace of a government's right to zone in *Village of Euclid, Ohio v. Ambler Realty Co.*, and the modern regulatory scheme built upon New York City's 1961 planning law. Part II examines the current state of urban planning in New York City and examines the present housing shortage, the community board review process, recent rezoning efforts, and the effect of entrenched interests on preserving neighborhood character at the expense of the young and economically disadvantaged. It also considers alternatives to zoning and ultimately concludes that smaller changes within the zoning framework would most effectively address affordability concerns without inviting urban disorder seen in cities without zoning. Acknowledging the current, yet imperfect, zoning system, Part III examines in detail the variance process, through which landowners may obtain equitable relief for "economic hardship." Part IV then proposes a new conception of the variance, the "public interest variance," based in part on provisions from telecommunications law, state court decisions, and various "balancing tests" occasionally employed in a limited number of jurisdictions. This note provides a statutory model that facilitates housing development and demonstrates how the public interest variance could be expansive in effect, but limited in scope to very specific development goals, including housing, transportation, sustainability, and other urban issues. In conclusion, the note explores how such a change can come about through community dialogue and public will and how the new system can fairly consider the interests of those who fear development.

I. ZONING'S RISE THROUGH THE AGES AND ITS GROWING CONFLICT WITH PROPERTY RIGHTS

Though formal regulation of land use is standard practice today, its broad, codified form is relatively new to human civilization. Ancient societies preferred after-the-fact solutions to building difficulties, such as by making a failure to reinforce a buckling wall that subsequently kills a person a capital crime.¹⁷ By the twelfth century, the writ of nuisance appeared, protecting a plaintiff's easements and natural rights in land and mirroring

¹⁷ Robert C. Ellickson & Charles DiA. Thorland, *Ancient Land Law: Mesopotamia, Egypt, Israel*, 71 CHI.-KENT L. REV. 321, 348 (1995).

modern zoning in its efforts to harmonize land use among neighbors and communities.¹⁸ Through the centuries, the doctrine further developed to compensate neighbors and the public when a defendant harmed others on the defendant's own land.¹⁹ As the Western world experienced profound urbanization and mechanical development during the Industrial Revolution, conflicts about land use increased, and municipalities sought to exert more control over the location and nature of industries and businesses.²⁰ In the United States, early efforts to control land use consisted of ordinances that created limitations on otherwise legal businesses—especially immigrant-owned businesses.²¹ The U.S. Supreme Court, in *Barbier v. Connolly*,²² upheld a San Francisco city ordinance that made overnight operation of laundry facilities (which were largely Chinese-owned and operated) illegal, because the restrictions were within the municipality's police power.²³ The Court in *Barbier* found that, if such an ordinance was facially applicable to all laundry operators, then the law survived a Fourteenth Amendment equal protection challenge.²⁴

As the urban regulatory apparatus began to pick up steam, businesses and social theorists alike began to reposition the ideal of the self-contained, rural homestead into urban land use. National groups discussed how to encourage the development of single-family residential districts (that is, expel “apartment homes”), and planners obsessed over serving the “desirable citizen” who owned his own detached home.²⁵ This policy reinforced socioeconomic class segregation because low-income families could generally not afford single-family homes.²⁶ Conservative thinkers in the first few decades of the twentieth century often objected to residential-oriented zoning due to its abrogation of property rights and classist implications.²⁷ Building on the racial concerns inherent in *Barbier*, some progressives were similarly critical of residential-

¹⁸ See Jeff L. Lewin, *Boomer and the American Law of Nuisance: Past, Present, and Future*, 54 ALB. L. REV. 189, 192-93 (1990).

¹⁹ *Id.*

²⁰ See Joel Kosman, *Toward an Inclusionary Jurisprudence: A Reconceptualization of Zoning*, 43 CATH. U. L. REV. 59, 64 (1993) (describing how the San Francisco Board of Supervisors attempted to regulate and mold public laundry and wash house operations).

²¹ *Id.*

²² *Barbier v. Connolly*, 113 U.S. 27 (1884).

²³ *Id.* at 32.

²⁴ *Id.* at 31.

²⁵ Kosman, *supra* note 20, at 80.

²⁶ Martha A. Lees, *Preserving Property Values? Preserving Proper Homes? Preserving Privilege?: The Pre-Euclid Debate Over Zoning for Exclusively Private Residential Areas, 1916-1926*, 56 U. PITT. L. REV. 367, 375-76 (1994).

²⁷ *Id.* at 380-81.

oriented zoning, citing the class and ethnic segregation that low-density zoning would inevitably promote and the underlying “irrational animus that upper classes bore against lower classes.”²⁸

Ignoring these concerns, planners across the country grew steadily more insistent on the ideal of an apartment-free municipality. Long before the proliferation of the condominium or co-op, urban theorists thought that, naturally, “[a] city cannot be a city of home owners where the multiple-dwelling flourishes.”²⁹ Put differently, economic growth and urbanization churned aggressively towards a more restrictive and controlled urban landscape that valued single-family home ownership over affordable, multidwelling housing. Looking back, it appears inevitable that changing understandings of urban life would lead to a broad acceptance of zoning laws.

In 1916, New York City accelerated the zoning movement with what many legal scholars consider the first comprehensive and systematic zoning law.³⁰ The New York City law articulated a planned urban landscape with a comprehensive resolution “regulating and limiting the height and bulk of buildings[,] . . . regulating and determining the area of yards, . . . and regulating and restricting the location of trades and industries.”³¹ The law established use districts consisting of “(1) residence districts, (2) business districts, and (3) unrestricted districts.”³² Additionally, the City created the Board of Appeals, which, among other powers, was entrusted with the ability to permit the expansion of existing buildings and the erection of telephone exchanges, garages, and public stables.³³

The 1916 law sought to ameliorate many of the negative effects of urban growth. For instance, the Equitable Building, one of Manhattan’s iconic early twentieth-century buildings, rose 42 stories directly flush with the street.³⁴ Buildings without today’s statutorily required “setbacks” created “canyons” that prevented light and air from reaching the denizens below.³⁵ The 1916 law demanded setbacks at various heights, creating a “wedding cake” configuration that would provide more light and air to the

²⁸ *Id.* at 385.

²⁹ Kosman, *supra* note 20, at 80 (quoting Lawrence Veiller).

³⁰ Lees, *supra* note 26, at 372.

³¹ N.Y.C., BUILDING ZONE ORDINANCE §§ 2, 8, 10 (1916).

³² *Id.* § 2.

³³ *See id.* § 7.

³⁴ Stuart Beckerman, *Zoning in New York City: An Overview*, [Jan.-Feb.] 6 N.Y. Zoning L. and Prac. Rep. 4 (2006).

³⁵ *Id.*

streetscape.³⁶ It also calculated height restrictions for buildings relative to the width of nearby streets.³⁷ Legislators carved an exception into the law, the “tower privilege,” whereby towers were permitted if they had large setbacks and the tall portion of the building occupied less than 25% of the lot.³⁸ These exceptions to the otherwise strict limits, foreshadowing the modern zoning rule and variance system, essentially dictated the shapes of many buildings built after the adoption of the 1916 law.³⁹ But despite its asserted de-densifying objectives, in practice, the 1916 law allowed for very dense and tall development, such as the Empire State Building.⁴⁰

While early court decisions and the 1916 law set the stage for the twentieth-century urban planning paradigm, modern zoning lacked the full embrace of a Supreme Court decision. The Court’s silence allowed further development of comprehensive zoning codes (and further confusion in state courts) for nearly a decade before it formally authorized modern zoning in *Village of Euclid v. Ambler Realty Co.*⁴¹ The village council in Euclid, Ohio, adopted a “comprehensive zoning plan” that sought to separate land uses by neighborhood, provide for the number of dwellings within a housing structure, and specify the permissible location for certain trades.⁴² The appellant landowner sought a repudiation of the law, which prevented Ambler Realty from developing industrial space on the land it owned in a residential district.⁴³

The appellant argued that the ordinance impermissibly restricted it from otherwise lawful uses of its land.⁴⁴ The Court noted that, while such regulations might have been rejected in years past as “arbitrary and oppressive,” zoning rules were appropriate “under the complex conditions of [the] day,” and the new zoning regulations were analogous to traffic signals.⁴⁵ The Court determined that, if a zoning law is debatably reasonable, the “legislative judgment must be allowed to control.”⁴⁶ By upholding the comprehensive zoning plan, the Court ushered in

³⁶ *Id.*

³⁷ N.Y.C., BUILDING ZONE ORDINANCE § 8 (1916).

³⁸ *Id.* § 9; see also Norman Williams, Jr. & John M. Taylor, *The First Period—The New York Law*, 1 Am. Land Plan. L. § 36.8 (2015).

³⁹ CAROL WILLIS, *FORM FOLLOWS FINANCE: SKYSCRAPERS AND SKYLINES IN NEW YORK AND CHICAGO* 72-73 (1995).

⁴⁰ Williams & Taylor, *supra* note 38.

⁴¹ *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); Lees, *supra* note 26, at 372-73.

⁴² *Euclid*, 272 U.S. at 379-80.

⁴³ *Id.* at 365, 382.

⁴⁴ *Id.* at 384.

⁴⁵ *Id.* at 387.

⁴⁶ *Id.* at 388.

nearly a century of municipal land use regulation where zoning law promulgators would have broad license to encourage certain development, discourage incompatible uses, and limit disfavored uses to narrow sectors of the community.

In New York City, the 1916 zoning law developed through two wars, economic ruin, and subsequent economic growth. As a result, the law became a tattered “patchwork” with numerous amendments.⁴⁷ In 1961, the city adopted a new comprehensive zoning plan⁴⁸ that sought to clear urban slums and develop clean, new neighborhoods with greater open space and parking.⁴⁹ This new plan preferred oversized lots with large structures.⁵⁰

This progression towards large-scale urban renewal was not without its critics. The same year the city adopted a new comprehensive zoning plan, Jane Jacobs’s *The Death and Life of Great American Cities* was published.⁵¹ Jacobs unflinchingly stated that her book was “an attack on current city planning and rebuilding.”⁵² Through a New York-centric urban lens, she lamented that her planning contemporaries “have ignored the study of success and failure [of cities] in real life, have been incurious about the reasons for unexpected success, and are guided instead by principles derived from the behavior and appearance of towns, suburbs, tuberculosis sanatoria, fairs, and imaginary dream cities—from anything but cities themselves.”⁵³ After the loss of New York City’s Penn Station to redevelopment, preservation-minded citizens like Jane Jacobs demanded and successfully created the Landmarks Preservation Commission.⁵⁴ Since that time, the zoning code and the landmarks law have conflicted in purpose and application.⁵⁵

New York City’s constantly evolving economic condition necessitated more small changes to the zoning map. It was the practice in many circumstances to require so-called “inclusionary zoning,” where developers would be required to provide community benefits in exchange for a rezoning.⁵⁶ Though the Supreme Court has required that in order to be constitutional,

⁴⁷ Norman Marcus, *New York City Zoning—1961–1991: Turning Back the Clock—But With an Up-To-The-Minute Social Agenda*, 19 *FORDHAM URB. L.J.* 707 (1992).

⁴⁸ N.Y.C., ZONING RESOLUTION § 72 (1961).

⁴⁹ Marcus, *supra* note 47, at 708.

⁵⁰ *Id.* at 709.

⁵¹ JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* (Vintage Books 1992) (1961).

⁵² *Id.* at 3.

⁵³ *See id.* at 6.

⁵⁴ Marcus, *supra* note 47, at 709.

⁵⁵ *Id.* at 710.

⁵⁶ *Id.* at 720.

these “exactions”⁵⁷ must have a “rational nexus” to the community need created by the new development,⁵⁸ this quid pro quo exchange has continued nationwide.⁵⁹ Ultimately, as the next part will demonstrate, this system of comprehensive zoning that demands low density development, landmark protections, and inclusionary community benefits has been responsible for wildly expensive housing that fails to balance the needs of neighborhood residents, landowners, and the broader public.

II. ZONING’S LIMITING EFFECT ON AFFORDABLE HOUSING

Despite the supposed positive effects of modern zoning on the American city, zoning can limit an urban neighborhood’s ability to thrive economically, environmentally, and politically. Although a broad understanding among urban planners that “New Urbanism” provides a strong alternative to sprawling, car-centric suburbs,⁶⁰ the suburb-centric thinking of Jane Jacobs’s contemporaries has remained. Through the frame of affordable housing, it is possible to see zoning’s effect on one neighborhood in particular: the East New York neighborhood in Brooklyn. This neighborhood provides a strong example of the dangers of restrictive zoning and the opportunities that a public interest variance might create.

East New York developed in the nineteenth century as a mix of industrial and residential uses, spurred on by access to the Long Island Railroad and elevated transit lines on Fulton Street (which would later become portions of the New York City subway).⁶¹ Its population peaked in the mid-twentieth-century postwar period, but then the neighborhood experienced divestment and a loss of nearly one-third of its residents.⁶² After a long period during which the area looked “worse than London did after the blitz,” investors have recently reentered the neighborhood, seeking

⁵⁷ Exactions are the aforementioned community benefits a developer provides to secure a rezoning for a particular land use. *See, e.g., Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2597 (2013).

⁵⁸ *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825 (1987).

⁵⁹ For a recent example of the “rational nexus” problem, see *Koontz*, 133 S. Ct. at 2599 (holding that “monetary exactions”—payments in lieu of a grant to the government of land or services—must be related by satisfying “nexus” and “rough proportionality” requirements).

⁶⁰ Timothy Polmateer, *How Localism’s Rationales Limit New Urbanism’s Success and What New Regionalism Can Do About It*, 41 *FORDHAM URB. L.J.* 1085, 1095 (2014).

⁶¹ N.Y.C. DEPT. OF CITY PLANNING, *EAST NEW YORK COMMUNITY PLAN 5* (2015), http://www.nyc.gov/html/dcp/pdf/east_new_york/presentation_092015.pdf?r=1 [<http://perma.cc/PGB2-TLHF>].

⁶² *See id.* at 7.

to ride the “wave” of economic upheaval that many in the academic community and the public at-large describe as “gentrification.”⁶³

Despite the opportunity that increased investment presents to this neighborhood through additional retail, educational, and cultural institutions, zoning limitations cast a pall on those who would modernize and renovate a neighborhood that is ideally suited to tackle the housing crisis. Zoning regulations in East New York prevent much large-scale residential redevelopment, despite the abundance of transit options that pervade the neighborhood and connect it to employment centers.⁶⁴ In large part, the neighborhood is zoned “low-density residential” (what the zoning code calls “R5”).⁶⁵ This low-density provision undermines the growth of affordable housing in this neighborhood, which in turn isolates the public transportation in New York from a great majority of citizens who might otherwise utilize it.

Zoning regulations also establish minimum parking requirements, which make development more expensive by demanding that developers build parking spots along with housing.⁶⁶ This creates housing that is unnecessarily expensive due to the cost of allocating and developing parking space. Further, Atlantic Avenue, one of Brooklyn’s largest traffic corridors, is zoned light industrial (M1-1) and low-density commercial (C8-2) in East New York.⁶⁷ Residential uses are not allowed on that street, despite the neighborhood’s desire for “more diverse housing options so [that] young people can move back to the neighborhood when they become successful.”⁶⁸

New York City’s zoning regulations also limit East New York’s ability to achieve positive economic and social change. Present regulations prevent the development of high-density, modern residential units.⁶⁹ The zoning regulations require front yards and on-site parking and encourage front-of-the-parcel vehicle access that discourages pedestrian activity.⁷⁰ In addition,

⁶³ Andrew Rice, *The Red Hot Rubble of East New York*, N.Y. MAG. (Jan. 28, 2015, 6:00 AM), <http://nymag.com/daily/intelligencer/2015/01/east-new-york-gentrification.html> [<http://perma.cc/WY8B-TUJM>] (quoting Alfred Kazin).

⁶⁴ N.Y.C. DEPT. OF CITY PLANNING, HOUSING NEW YORK: A FIVE-BOROUGH, TEN-YEAR PLAN (2014), http://www.nyc.gov/html/housing/assets/downloads/pdf/housing_plan.pdf [<http://perma.cc/92CA-K8TV>].

⁶⁵ N.Y.C. DEPT. OF CITY PLANNING, EAST NEW YORK AND CYPRESS HILLS SUBAREA 34 (2014), http://www.nyc.gov/html/dcp/pdf/sustainable_communities/east_ny_report/east_ny_cypress_hills_subarea.pdf [<http://perma.cc/3LXX-P5JD>].

⁶⁶ *Id.* at 40.

⁶⁷ *Id.* at 34.

⁶⁸ *Id.* at 34, 39.

⁶⁹ *Id.* at 40.

⁷⁰ *Id.*

there are numerous empty parcels in the areas zoned “industrial” and “commercial,” discouraging mixed-use development by making walking unpleasant.⁷¹ This harmful zoning creates derelict lots that could otherwise improve the neighborhood’s quality of life and serve the public’s need for affordable housing.

This mismatch between the zoning laws on the books and the land use objectives of citizens and property owners might lead policy engineers to believe that zoning simply cannot work. Critics argue that zoning mandates inefficient land uses that limit the freedom of landowners and distort market forces.⁷² While this argument contains some truth, zoning’s opponents cannot champion freedom and market forces without balancing the other important quality-of-life factors that zoning regulations protect. Many commentators cite the city of Houston, Texas, which has no zoning code, as an example of how a city can function without a highly regulated land use regime.⁷³ But cities like Houston have far greater carbon emissions per capita than more densely populated, public transit-oriented and pedestrian friendly cities.⁷⁴ Among other factors, Houston’s car-dependent commutes that reduce pedestrian options encouraged one publication to crown Houston the “Fattest City” in America.⁷⁵ While researchers have determined that restrictive zoning regimes have caused overly expensive housing in New York City,⁷⁶ commentators have argued that Houston’s quality of life (a vague metric, to be sure) is heading in the wrong direction precisely due to problems regarding growth and sprawl.⁷⁷

⁷¹ *Id.*

⁷² Bradley C. Karkkainen, *Zoning: A Reply to the Critics*, 10 J. LAND USE & ENVTL. L. 45, 61 (1994).

⁷³ *Id.* at 45.

⁷⁴ Edward L. Glaeser & Matthew E. Kahn, *The Greenness of Cities: Carbon Dioxide Emissions and Urban Development* (NAT’L BUREAU OF ECON. RESEARCH, Working Paper 14238, 2008), http://www.hks.harvard.edu/var/ezp_site/storage/fckeditor/file/pdfs/centers-programs/centers/taubman/working_papers/glaeser_08_greencities.pdf [<http://perma.cc/K9JZ-CN4Q>] (noting that “the social cost of a new home in Houston is \$550 more per year than the social cost of a new home in San Francisco”).

⁷⁵ Nate Millado & Sara Vigneri, *The Fittest and Fattest Cities in America*, MEN’S FITNESS, <http://www.mensfitness.com/weight-loss/burn-fat-fast/the-fittest-and-fattest-cities-in-america> [<http://perma.cc/JA9J-BAM4>] (last visited Mar. 2, 2016).

⁷⁶ Edward L. Glaeser & Joseph Gyourko, *The Impact of Zoning on Housing Affordability* 21 (HARVARD INST. OF ECON. RESEARCH, Discussion Paper No. 1948, 2002), <http://www.law.yale.edu/documents/pdf/hier1948.pdf> [<http://perma.cc/52RJ-5W73>].

⁷⁷ Clifford Pugh, *No Laughing Matter: Houston Trending in Wrong Direction with Quality of Life Eroding*, Report Says, CULTUREMAP HOUSTON (Feb. 27, 2013, 3:28 PM), <http://houston.culturemap.com/news/city-life/02-27-13-no-laughing-matter-houston-trending-in-wrong-direction-with-quality-of-life-eroding-survey-says/> [<http://perma.cc/4D87-88YN>].

Ultimately, arguments against zoning stand as a reaction to the modern regulatory state more than they propose plausible alternatives that would improve the health, welfare, and economic fortune of urban dwellers. Zoning has a long and legitimate history, and an attempt to solve the housing affordability crisis by deleting zoning from the urban planning toolkit seems unduly radical. Reformers should pursue relatively minor changes in urban land use law that maintain the quality-of-life elements of zoning but incorporate some of the less restrictive development rules of cities like Houston to achieve the “best of both worlds.”

A dearth of affordable housing is not the only effect of an overly dictatorial zoning regime. The American city, whether one considers New York City or Houston, has pursued car-centric zoning models that infringe upon individual autonomy by requiring residents to purchase automobiles and frequent highways to simply have access to employment.⁷⁸ Reimagining the variance not only promises more affordable housing for urbanites, but also promotes foundational American values by granting landowners the liberty to utilize their land as they so desire and granting the public more effective, yet noninvasive, electoral control over that increased liberty.

Though many commentators and citizens have accepted the constitutionality and utility of modern urban zoning, numerous legal writers have found that the present urban land use regulations inhibit economic growth and social progress.⁷⁹ Even cities without zoning schemes still have building codes and regulations that limit, among other activities, high-density development.⁸⁰ The critiques of such cities appear to center on overregulation in general, rather than on concerns with zoning specifically. These critiques, typically in the libertarian vein, provide inadequate solutions to the problems associated with land use regulation because they tend to suggest that market forces

⁷⁸ See generally *supra* Part I.

⁷⁹ See, e.g., Stephen Clowney, *Invisible Businessman: Undermining Black Enterprise with Land Use Rules*, 2009 U. ILL. L. REV. 1061, 1061 (2009) (noting “[l]and use fees, municipal zoning board decisions, and the general insistence on separating residential from commercial uses all impress unique and disproportionate harms on African-American merchants, making it difficult to find affordable business space in suitable locations”); David Schleicher, *City Unplanning*, 122 YALE L.J. 1670, 1675 (2012) (reporting that “[s]trict zoning rules in productive regions not only cause static efficiency losses but can also reduce economic growth. Artificially high housing prices limit employment in . . . fast-growing industries . . . , and they reduce the number of people who can capture the human-capital-enhancing information spillovers”).

⁸⁰ Michael Lewyn, *How Overregulation Creates Sprawl (Even in a City Without Zoning)*, 50 WAYNE L. REV. 1171, 1178-81 (2004).

will foster ideal urban development patterns. But the similarities that libertarian zoning critiques share with urban progressive critiques highlight the public interest variance's potential to resolve modern debates surrounding land use regulation.

The libertarian case against the present land use paradigm in New York City is a predictable one. If a developer wishes to develop property in a manner even somewhat inconsistent with city regulations, the developer must traverse a complex structure of boards and regulatory units for permission. When an amendment or zoning change is proposed, the issue is first heard by one of the city's 59 community boards, which will issue a nonbinding recommendation.⁸¹ The borough president then issues a recommendation and sends the proposal to the City Planning Commission.⁸² The City Planning Commission and the City Council vote on the proposal, which, in order to be approved, must be signed by the Mayor or recertified by two-thirds of the City Council upon the Mayor's veto.⁸³ The entire process takes eight months, on average.⁸⁴ In some cases, developers must include environmental impact statements, which greatly increases the cost of the proposal.⁸⁵

These restrictions simply fan the flame of conservative resentment towards the power of land use regulations. *Euclid* may have authorized zoning, but the present zoning structure does more. Not only does New York City's approach limit the freedom to use land as a landowner sees fit—it requires that an interested party seek the approval of nearly every stakeholder who could ostensibly have an opinion on land use policy before development is permitted. Most concerning is the requirement of the borough president's recommendation. The borough president is an elected official with mostly ceremonial powers, and as such has no real relation to zoning policy. Further, the borough president is not likely to have the expertise necessary to sufficiently address zoning questions. The present structure merely provides opportunities for interested individuals to exercise political influence over land use, rather than a rational process that protects the rights of citizens to petition their government and promotes the public's interest in urban development.

⁸¹ Schleicher, *supra* note 79, at 1706 (reciting the procedures set forth in N.Y.C. Law § 197-c).

⁸² *Id.*

⁸³ *Id.* at 1706-07.

⁸⁴ *Id.* at 1707.

⁸⁵ *Id.*

The state of urban land use rights is equally imperiled in places without zoning or with abrogated zoning regulations. The test case for “free-market” approaches to land use, Houston, is illusory, as even Houston maintains certain restrictions over development.⁸⁶ Houston’s code requires a minimum lot size,⁸⁷ minimum parking allotments,⁸⁸ broad streets (which severely limit pedestrians),⁸⁹ and long blocks.⁹⁰ In addition, by contract, Houston subdivisions create restrictive covenants that emulate the use restrictions of cities with zoning maps.⁹¹ Ultimately, libertarian critiques should be equally suspicious of private land use controls, such as those seen in Houston, as they are of comprehensive zoning regimes, as both create extreme limitations on individuals’ practical power to utilize their property as they desire.

In a country where even those cities most known for permissive land use enforce strict regulatory rules that limit a landowner’s right to use her land, how can property owners serve the public interest through development? Perhaps cities⁹² could better serve broad interests through an expansive vision of equitable municipal land use review. Libertarians could find strange but willing bedfellows in politically progressive affordable housing activists if they recognized the legitimacy of the land use regulatory state but then proceeded to argue for its abrogation through something like a permissive variance system.

III. THE VARIANCE: MITIGATING “HARDSHIP”

New York City’s present zoning law provides a single, clear avenue for redress when zoning regulations prove overly burdensome for the landowner: the variance. Section 72-21 of the Zoning Resolution empowers the Board of Standards and Appeals (Board) to grant relief from the zoning code through a variance.⁹³ In order to do so, the Board must make “each and every one” of the following findings:

- (a) that there are unique physical conditions, including irregularity . . . or other physical conditions . . . and that, as a result . . . unnecessary

⁸⁶ Lewyn, *supra* note 80, at 1178.

⁸⁷ *Id.*

⁸⁸ *Id.* at 1183.

⁸⁹ *Id.* at 1186-87.

⁹⁰ *Id.* at 1189.

⁹¹ *Id.* at 1190.

⁹² This revised variance would likely only be available in cities with actual zoning regimes, meaning that cities like Houston may have to fashion other solutions to the problems outlined in this note.

⁹³ N.Y.C., ZONING RESOLUTION § 72-21 (1961).

hardship arise[s] in complying strictly . . . and that the alleged practical difficulties or unnecessary hardship are not due to circumstances created generally by the strict application of such provisions . . . ;

(b) that because of such physical conditions there is no reasonable possibility that a development . . . will bring a reasonable return, and that the grant of a variance is therefore necessary to enable the owner to realize a reasonable return . . . ;

(c) that the variance . . . will not alter the essential character of the neighborhood . . . ;

(d) that the [difficulties or hardship] . . . have not been created by the owner . . . ; and

(e) that . . . the variance, if granted, is the minimum variance necessary to afford relief⁹⁴

Despite the rigorous demands of 72-21, courts review the Board's variance decision with a light touch; only those determinations with something approximating "illegality, arbitrariness or abuse of discretion" without "a rational basis" or "substantial evidence" will be overturned.⁹⁵ The Board may rely on the findings of the City Planning Commission,⁹⁶ testimony from experts hired by property owners,⁹⁷ and, specifically, property data from outside the neighborhood to calculate possible rates of return that an investment by the property owner might hope to earn.⁹⁸ Expert testimony, though helpful, is not required, and the Board must not rule based on "generalized community objections."⁹⁹

The present conception of the variance heavily depends on a judgment call about what does or does not "alter the essential character of the neighborhood."¹⁰⁰ One might conceive of an alteration either as (1) a *negative* change to a neighborhood, or (2) *any* change to a neighborhood. For example, would an old schoolhouse, converted to a home for the elderly,¹⁰¹ present a change under the standard? Due to the likely decrease in traffic volume in the area from converting the structure from a school to a home for the elderly, the court in *Commco, Inc. v. Amelkin* found there to be no change to the neighborhood under those

⁹⁴ *Id.*

⁹⁵ *SoHo Alliance v. N.Y.C. Bd. of Standards and Appeals*, 741 N.E.2d 106, 107-08 (N.Y. 2000) (quoting *Consol. Edison Co. v. Hoffman*, 374 N.E.2d 105, 109 (1978)).

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Ifrah v. Utschig*, 774 N.E.2d 732, 734 (N.Y. 2002).

¹⁰⁰ N.Y.C., ZONING RESOLUTION § 72-21(c)(1961).

¹⁰¹ *Commco, Inc. v. Amelkin*, 109 A.D.2d 794, 796 (N.Y. App. Div. 1985).

facts.¹⁰² In general, courts appear to reject variances when commercial changes are likely to overwhelm an existing residential area but are amenable to proposals that introduce diverse uses without aggressive changes to neighborhood character.¹⁰³ These outcomes show that the variance is not really based on “economic hardship” but rather, boards grant variances based on the holistic views of the proposed development that they and participating community members hold.

IV. REIMAGINING THE VARIANCE

Urban areas currently face challenges that threaten to undo decades of advances in living standards. Previously, due to the influences of complex regulatory processes, NIMBYism,¹⁰⁴ and statutory limitations, urban land use law had been unable to adequately address the housing affordability crisis. But even those cities like Houston that lack zoning regimes have had negative quality-of-life effects related to zoning-free development.¹⁰⁵ For that reason, a flexible solution that rewards socially beneficial development is needed. Using standards and case law outlined in the 1996 Telecommunications Act¹⁰⁶ and Pennsylvania’s “Curative Amendment,”¹⁰⁷ state legislatures and municipalities can reinvent the variance process so that instead of an “economic hardship” standard, variances will be judged with precision by the way they impact housing availability, traffic, air quality, or other direct legislative objectives as stated in the statute. By reimagining the variance as a tool for achieving civic ends, rather than a narrowly

¹⁰² *Id.*; see also *Rostlee Assocs., Ltd. v. Amelkin*, 121 A.D.2d 725, 726 (N.Y. App. Div. 1986) (distinguishing *Commco* but implicitly accepting its general premise that a neighborhood is not “essentially” altered by a positive change along the lines of vehicular traffic decline).

¹⁰³ See *Taxpayers’ Ass’n of S. E. Oceanside v. Bd. of Zoning Appeals of Town of Hempstead*, 93 N.E.2d 645, 646-47 (N.Y. 1950) (finding “use of the property as a site for a boathouse and dock to test motorboats up and down the creek and the plan to provide parking facilities for thirty to forty automobiles will create conditions distinctly different from those existing in the locality and thus will unquestionably alter the essential character of an otherwise residential neighborhood”); *Fiore v. Zoning Bd. of Appeals of Town of Southeast*, 235 N.E.2d 121, 122-23 (N.Y. 1968) (noting that a barn’s conversion to an antiques business’s storage facility could not have altered the community because the community failed to notice or complain about the change for five years).

¹⁰⁴ An acronym for “not in my backyard,” and a reference to individuals who oppose development near their homes and workplaces. See Christopher Helman, *Nimby Nation: The High Cost to America of Saying No to Everything*, FORBES (July 30, 2015, 6:00 AM), <http://www.forbes.com/sites/christopherhelman/2015/07/30/nimby-nation-the-high-cost-to-america-of-saying-no-to-everything/> [<http://perma.cc/Y2JR-56QR>].

¹⁰⁵ See *supra* Part II for a discussion of the difficulties of unzoned development.

¹⁰⁶ Telecommunications Act of 1996, 47 U.S.C. §§ 332, 609 (2012).

¹⁰⁷ 53 PA. CONS. STAT. § 10609.1 (2002).

tailored relief tool, landowners with projects that serve the public interest can overcome self-interested political mechanisms to better serve a municipality's most urgent needs and further improve the quality of life in American cities.

A. *The Telecommunications Act of 1996*

As a general matter, the federal government has avoided regulating private land use, deferring to state and local governments in accordance with broadly accepted principals of federalism.¹⁰⁸ A notable exception is the Telecommunications Act of 1996,¹⁰⁹ which, among many other functions, prescribes the delicate balance between local land use regulators and telecommunications companies seeking to build wireless communications towers.¹¹⁰ Though the statute acknowledges the plenary power of state and local governments to regulate the telecommunications business,¹¹¹ the statute also provides that

(i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof—

(I) shall not unreasonably discriminate among providers of functionally equivalent services; and

(II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.¹¹²

The law reflects the notion that, though states and their subdivisions may regulate land use, states cannot establish regimes whereby otherwise legal activities are made de facto illegal by limiting the locations where the activity may occur. In other words, the law suggests that boards should grant planning variances based on the public's need—in the case of the Telecommunications Act—for wireless services. The variance could undoubtedly be refashioned to reflect this notion that an otherwise legal development cannot be unreasonably excluded from the community simply because of the zoning rules. And in the process,

¹⁰⁸ Bradley C. Karkkainen, *Biodiversity and Land*, 83 CORNELL L. REV. 1, 57 (1997) (noting that “[a]lthough Congress flirted briefly with proposals to establish a National Land Use Act in the 1970s, the federal government has, for the most part, avoided direct intervention in land use regulation, viewing it as properly a state and local affair”).

¹⁰⁹ Telecommunications Act of 1996 § 332.

¹¹⁰ *Id.* § 332(c)(7).

¹¹¹ *Id.* § 332(c)(7)(A).

¹¹² *Id.* § 332(c)(7)(B).

the variance could ensure that landowners are able to use land in ways that are both lawful and to the benefit of the public.

B. The Pennsylvania "Curative" Amendment

Pennsylvania, sensing the ever-challenging conflict between individual liberty and the value of land use regulation, expanded the equitable power of broad variance-style review. Pennsylvania's Curative Amendment law¹¹³ provides a process through which a landowner may "challenge on substantive grounds the validity of a zoning ordinance or map or any provision thereof, which prohibits or restricts the use or development of land in which he has an interest." The landowner "may submit a curative amendment to the governing body with a written request that his challenge and proposed amendment be heard and decided."¹¹⁴ The municipality must then hold a hearing, after which the government may accept the proposed amendment, adopt a variation of the proposal, or refuse the request on its merits.¹¹⁵

The municipality's determination must rest on

- (1) the impact of the proposal upon roads, sewer facilities, water supplies, schools and other public service facilities;
- (2) if the proposal is for a residential use, the impact of the proposal upon regional housing needs and the effectiveness of the proposal in providing housing units of a type actually available to and affordable by classes of persons otherwise unlawfully excluded by the challenged provisions of the ordinance or map;
- (3) the suitability of the site for the intensity of use proposed by the site's soils, slopes, woodland, wetlands, flood plains, aquifers, natural resources and other natural features;
- (4) the impact of the proposed use on the site's soils, slopes, woodlands, wetlands, flood plans, natural resources and natural features, the degree to which these are protected or destroyed, the tolerance of the resources to development and any adverse environmental impacts; and
- (5) the impact of the proposal on the preservation of agriculture and other land uses which are essential to public health and welfare.¹¹⁶

This regime acknowledges the principle that a municipality must accept its "fair share" of development that will necessarily occur

¹¹³ 53 PA. CONS. STAT. § 10609.1 (2002).

¹¹⁴ *Id.* § 10609.1(a).

¹¹⁵ *Id.* § 10609.1(a)-(c).

¹¹⁶ *Id.* § 10609.1(c).

within a larger urban area.¹¹⁷ In Pennsylvania, courts acknowledge that citizens collectively have a right to housing proportionate “to the extent of the municipality’s fair share of the present and prospective regional need.”¹¹⁸ By adopting this position, the legislature and courts of Pennsylvania have embraced the principle that a landowner should be able to do more than sue for relief from an economically burdensome zoning law. The landowner should be freed from the harshness of the law when public policy warrants abrogation. Pennsylvania’s Curative Amendment, while an admirable attempt to incorporate equitable values into land use law, lacks a clear method for balancing the competing interests it identifies. For example, whether the infrastructure factor (subsection (1)) or the agricultural factor (subsection (5)) should predominate over the other factors seems entirely dependent on the subjective preferences of the reviewer. This method fails to overcome the arbitrary nature of the variance that is common to the bulk of variance reform schemes.

C. *The Proposed “Balancing” Test*

A third strain of zoning reform involves reinventing the variance through a test that balances the burdens on the landowner that exist without the variance and the burdens on the community if the variance is granted. The Supreme Court of Connecticut at one point applied this test,¹¹⁹ but it contains many of the same problems that plague the Pennsylvania Curative Amendment.

To illustrate how the balancing test would work, consider a piece of property zoned for single-family residential use upon which a landowner wishes to build somewhat dense multifamily units. Under the balancing test, zoning boards would have discretion to grant the variance “if the limited ‘alternatives available to the landowner’ and the ‘diminution of the value of the land’ outweigh the ‘degree of public harm to be prevented.’”¹²⁰ Here, the board would consider, among many factors, the type of neighboring land use, the receptiveness of

¹¹⁷ Krystle L. Jackson, *Need for Reform: The Pennsylvania “Curative Amendment” in Light of the National Housing Crisis*, 18 WIDENER L.J. 937, 956 (2009).

¹¹⁸ *Surrick v. Zoning Hearing Bd. of Upper Providence Twp.*, 382 A.2d 105, 109 (Pa. 1977) (adopting and quoting *S. Burlington Cty. NAACP v. Twp. of Mount Laurel*, 336 A.2d 713 (N.J. 1975)).

¹¹⁹ Ann Martindale, *Replacing the Hardship Doctrine: A Workable, Equitable Test for Zoning Variances*, 20 CONN. L. REV. 669, 713-14 (1988) (citing *Chevron Oil Co. v. Zoning Bd. of Appeals of Town of Shelton*, 365 A.2d 387, 391 (Conn. 1976)).

¹²⁰ *Id.* at 714 (quoting *Chevron Oil Co.*, 365 A.2d at 391).

neighboring landowners to the variance, the importance of the project to the community's economic, cultural, and health climates, the degree of difference between the profitability of the land use with or without the variance, and the costs to the government, both directly and indirectly, from the variance.¹²¹

In this example, if the land is near the edge of a suburban community, the analysis would likely weigh in favor of adopting the variance. Increased multifamily housing would be unlikely to negatively affect neighboring land use, as owners of undeveloped nearby property would likely appreciate the increased value that neighboring development would bring to their property. The apartments would provide (relatively) affordable housing in a new neighborhood without the existing structural de-investment seen in other affordable housing proposals.¹²² In addition, the difference in economic value for the landowner between developing single-family and multifamily homes would be extreme, as increased density would inevitably lead to more housing value per square foot of land. As such, the variance would likely succeed.

But the flexibility of this method brings to the forefront its weakness: arbitrariness. Boards are likely to bring unique opinions about land use to their variance-evaluation duties. Those tasked with balancing competing interests would have little guidance in a system where, to an extent, a zero-sum game exists. If neighboring landowners fight against a project, the balance of their interests would likely come down to political power and their ability to organize. In this circumstance, existing communities with more wealth would be able to create legal funds and political action groups and provide consistent firepower at community meetings. Under the balancing test, boards would be more subject to the political winds than they would under a more explicit variance rule, as the limited flexibility associated with a more explicit rule would restrict a board to the explicit thresholds within the applicable statute.

In New York City, permissible land use has been limited for the neighborhood of Park Slope, Brooklyn. Park Slope, historically a middle class, left-leaning community surrounded by lower-income neighborhoods, has been transformed by gentrification and its associated "community fussbudgets, whiny parents, taverns crawling with toddlers, [and] hip watering holes edging out old-

¹²¹ *Id.* at 720-21.

¹²² *See supra* Part II (discussing East New York's struggles with de-investment and complaints phrased in "gentrification" terms).

man bars.”¹²³ Despite the negative reactions to these changes, housing values in Park Slope continue to skyrocket.¹²⁴ With such increasing value, logical markets would dictate increasing housing development to most effectively capture the neighborhood rise. In 2003, however, the Department of Buildings rezoned large swaths of Park Slope, limiting building height to five stories and permitting only minor increases along commercial avenues.¹²⁵ Conversely, on the edge of Park Slope is Fourth Avenue, an arterial street once blanketed with automotive repair shops.¹²⁶ The Department of Buildings also rezoned Fourth Avenue in 2003, but rather than restricting development, it rezoned the area to permit buildings up to 12 stories tall with setbacks.¹²⁷ Since that time, the area has developed into a mixed-use neighborhood with higher density apartment buildings, cafes, and restaurants.¹²⁸

However beneficial housing, cafes, and restaurants can be, observers might question how exactly some areas of Park Slope were “downzoned”¹²⁹ while others were “upzoned”¹³⁰ in ways that led to drastic changes. Some commentators, debating the relative merits of changes in nearby neighborhoods, have even gone further to argue that “the rich upper Slope sold the lower Slope down the river by asking for downzoning.”¹³¹ Whether land use theorists should believe that assertion is, for purposes of this note, irrelevant. Ultimately, the Park Slope rezoning illustrates the dangers of a balancing system: the political process and balancing interests inevitably create losers,

¹²³ Lynn Harris, *Park Slope: Where is the Love*, N.Y. TIMES (May 18, 2008), <http://www.nytimes.com/2008/05/18/fashion/18slope.html?pagewanted=all&r=0> [<http://perma.cc/A7EE-6JKH>].

¹²⁴ For example, the home of New York City Mayor Bill de Blasio, located in southern Park Slope, doubled in worth from \$674,600 to \$1.4 million in seven years. Carl Campanile, *De Blasio’s Property Value Rises Under Bloomberg*, N.Y. POST (Jan. 17, 2014, 3:57 AM), <http://nypost.com/2014/01/17/de-blasios-property-value-rises-under-bloomberg/> [<http://perma.cc/Q5TV-QM6K>].

¹²⁵ Sarah Laskow, *The Quiet, Massive Rezoning of New York*, POLITICO N.Y. (Feb. 24, 2014, 11:10 AM), <http://www.capitalnewyork.com/article/city-hall/2014/02/8540743/quiet-massive-rezoning-new-york?page=all> [<http://perma.cc/6XSA-UBT3>].

¹²⁶ *Special 4th Avenue Enhanced Commercial District—Approved!*, N.Y.C. DEPT. OF CITY PLANNING, <http://www.nyc.gov/html/dcp/html/fourth/fourth2.shtml> [<http://perma.cc/QF5M-T3TA>] (last visited Mar. 2, 2016).

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ Downzoning refers to a change in zoning in which density is restricted. Richard W. Bartke & John S. Lamb, *Upzoning, Public Policy, and Fairness—A Study and Proposal*, 17 WM. & MARY L. REV. 701, 702 n.10 (1976).

¹³⁰ Upzoning refers to a change in zoning in which density is more fully permitted. *Id.*

¹³¹ Clarkson FlatBed, *Are We Being Sold a Bill of Goods? Or Not?*, THE Q AT PARKSIDE (Sept. 4, 2014, 6:04 PM), <http://theqatparksides.blogspot.com/2014/09/are-we-being-sold-bill-of-goods.html> [<http://perma.cc/KZF3-C2QB>].

and those losers are likely to be less politically connected or organized. In this case, it appears that wealthy homeowners pushed rezoning to other neighborhoods so they could protect their own quality of life, exclude future renters, and outsource the challenges that come with increased development (such as strains on school capacity and increased traffic). Therefore, the variance must be reinvented to incorporate the balancing test's flexibility while also ensuring that the interests of the entire public, and not just a select few, are achieved.

D. *Crafting a Compromise for the Public Interest*

The variance, though still nominally tied to “economic hardship,”¹³² has been used to favor developments that the politically active public and zoning boards themselves support to the detriment of developments that, while within the letter of the variance law, are politically unpopular.¹³³ The 1996 Telecommunications Act suggested that variances must be available when zoning law prevents a particular type of necessary telecommunications development. Pennsylvania law demonstrates that the “Curative Amendment,” a variance-like device, can provide relief when the exception positively affects, among other factors, “housing units of a type actually available to and affordable by classes of persons otherwise unlawfully excluded.”¹³⁴ Finally, the so-called “balancing test” provides an opportunity to determine the relative needs of the landowner and the community at large to reach an equitable solution.

Though each variance method discussed has unique advantages, the drawbacks of each method point to a better method that is focused on the potential benefit to the public. The Telecommunications Act lacks teeth; it specifically provides that “nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.”¹³⁵ This premise, as applied to housing policy, suggests that a statute can require municipalities to provide enough zoned density to facilitate affordable housing,

¹³² Jonathan E. Cohen, *A Constitutional Safety Valve: The Variance in Zoning and Land-Use Based Environmental Controls*, 22 B.C. ENVTL. AFF. L. REV. 307, 339 (1995) (noting “[t]he most common standard, derived from the language of many ordinances, allows an area variance to be granted upon a showing of ‘practical difficulties or unnecessary hardship’”).

¹³³ See *supra* Part III.

¹³⁴ Jackson, *supra* note 117, at 948.

¹³⁵ 47 U.S.C. § 332(e)(7)(A) (2012).

but such a requirement could leave a state with no recourse for unreasonable exclusion by the municipality other than commandeering the municipal zoning board and taking control of the city's development. Put another way, a statute that demands that a municipality must pursue affordable housing will fail, because it does not create a procedure that might realistically bring that goal into reality. A more property-right driven law that allows citizens to engage the government and address the suitability of a parcel for development would actually achieve the public ends, rather than just stating them in broad terms.

The Pennsylvania Curative Amendment, though very close in function to a public interest-driven variance, is overly broad and insufficiently specific in its requirements. The provision considers, among other items: roads, sewers, schools, housing, land characteristics, agriculture, public health, and welfare.¹³⁶ While these issues are essential to any public interest-driven variance structure, the statute fails to announce in tangible terms exactly how a variance must benefit or affect the public. An effective variance system must provide clear guidelines for how large a benefit must be, either through a number of housing units, a ratio of housing units, or a standard that considers the landowners' ability to deliver the benefit desired (i.e., affordable housing).

Finally, the balancing test provides extreme flexibility without any safeguards to avoid abuse. For an example of this, one need only look to communities like Park Slope, where in many cases migrants to the community overpower landowners with less political or organizational clout. The ideal public interest variance would allow a landowner to prevail over self-interested neighborhood opposition when the public would benefit from the variance to a degree that dwarfs unreasonable objections from surrounding property owners. Only then would the variance be flexible, yet fair.

E. A Statutory Model

Drawing on current models and principles, this note proposes a model for how a public interest variance can be structured, using both New York City's variance law and its municipal needs as a guide. Of course, land use regulation solutions in various jurisdictions need not and should not be identical. Thus it is surprising how long the "economic hardship"

¹³⁶ 53 PA. CONS. STAT § 10609.1(c) (2002).

conception of variance rules has reigned across jurisdictions. Under the proposed model, a state, and by extension, a municipality, could incorporate its individual public policy into the zoning code. Using the variance this way prevents the entire zoning system from being merely a tool to favor a particular land use. And under the proposed model, the general zoning law would attempt to make various land uses compatible and would align a city's transportation, utility, economic, and social networks. This model would also make the variance a tool for mitigating the harshness of land use engineering and provide avenues for landowners to gain personally from the beneficial development of their property. With those principles in mind, New York City's variance law could read:

Where it is alleged that there are practical difficulties or unnecessary hardship, the Board may grant a variance in the application . . . [when the existing economic hardship doctrine applies]:

(f) or when:

(1) such a residential housing variance would provide access to permanent affordable housing in proportion to the residential impact that the same property would have upon the community in its most developed state under present law, it being the policy of the City of New York to encourage the development of affordable housing; or

(2) such a residential housing variance would provide convenient residential access to public transportation and, it being the policy of the City of New York to pursue ecologically friendly transportation options that decrease traffic congestion and air pollution, encourage such public transportation use by virtue of the property being

(a) within 2,000 feet of a subway station, as measured from the center of the most traveled boarding platform, when such station includes stops for both local and express train services, as defined by the Metropolitan Transit Authority (MTA), or

(b) within 1,000 feet of a subway station, as measured from the center of the most traveled boarding platform, when such station includes stops for local train services, as defined by the MTA, or

(c) within 500 feet of a New York City Transit (NYCT) express bus stop with stops in boroughs other than the borough in which the subject stop exists, or

(d) within 100 feet of a NYCT local bus stop; or

(3) such a residential housing variance would change the land's permitted uses only in so far as to remove the requirements for off-street parking when such a development provides access to permanent affordable housing in one half (50%) proportion to the total number of housing units on the parcel, it being the policy of the City of New York to discourage automobile ownership.¹³⁷

The specific numbers in the proposed law are merely an example of the precise language that would govern the public interest variance. As in Pennsylvania's Curative Amendment, references to infrastructure such as transit use and housing development are useful to show legislative intent, but the drafters must go further.¹³⁸ Drafters must endeavor to state *exactly* what quantifiable standards constitute a circumstance deserving of amelioration. Whether the parcel must be within 1,000 feet of a transit station or 5,000 feet is irrelevant for this model—those are simply sample numbers that show the precision that drafters should seek. What is central is that the public interest variance can be an equitable remedy based on broad principles, but the provisions must be precise in order to avoid the arbitrary outcomes of the above-mentioned balancing tests. In that sense, the public interest variance may be better thought of as “quasi-equitable.”

There are specific details that New York City would need to add to legislation of the kind demonstrated in the proposed law. For example, “affordable housing” would need to be defined. Legislators would likely prefer to measure the affordability of a housing unit by flexible means that take into consideration the prevailing price of housing in a neighborhood, the relative income of a neighborhood, and the cost of living in a municipality. For that reason, legislators could tailor their affordable housing definition to the construct developed for New York State Homes and Community Renewal's 80/20 Housing Program.¹³⁹ In that program, affordability is described as follows:

At least 20% of the units in the project must be affordable to tenants earning no more than 50% of the Area Median Income [], or 40% of the units must be affordable to tenants earning no more than

¹³⁷ N.Y.C., ZONING RESOLUTION § 72-21 (1961) (proposed additions in bold).

¹³⁸ See *supra* Sections IV.B and IV.D for an explanation of how the Pennsylvania Curative Amendment functions and its weaknesses.

¹³⁹ See *generally* 80/20 Housing Program, NEW YORK STATE HOUSING AND COMMUNITY RENEWAL (Mar. 30, 2011), <http://www.nyshcr.org/Topics/Developers/MultifamilyDevelopment/8020HousingProgram.htm> [<http://perma.cc/F8BA-K6FF>].

60% of the Area Median Income, or, in New York City only, 25% of the units to be affordable to tenants earning no more than 60% of the Area Median Income.¹⁴⁰

Ultimately, the specifics of how the statute calculates the magnitude of the benefit are best left to legislators who understand the unique needs of their cities, citizens, and developers.

CONCLUSION

It is a fact of democracy that legislative change requires the organization and engagement of groups of people, often with very different objectives, working to achieve significant changes in public policy. To develop a public interest variance, groups with different interests to protect would have to coalesce around the various gains each group could likely expect from the new variance system. However difficult coalition building may be, the public interest variance contains incentives that diminish opposition and facilitate cooperation.

The traditional variance battle between the landowner and the neighbors presents numerous collective actions problems. Though New York City Mayor Bill de Blasio has called for the creation or preservation of 200,000 housing units within the five boroughs,¹⁴¹ community groups have shown reluctance to embrace development in their neighborhoods, claiming that affordable housing projects “smell[] like gentrification.”¹⁴² As fears of gentrification foster resistance to development, the present system militates against affordable housing.

With the public interest variance, decisions about whether an individual landowner should be permitted to build a larger structure than the zoning law allows would be dictated by the statutory variance provision, long before self-interested parties seeking to prevent development voice their concerns. In effect, the public's expressed desire for affordable housing would be codified to overpower the reluctance by local special interests to develop

¹⁴⁰ LEONARD GRUENFELD, NEW YORK STATE HOMES AND COMMUNITY RENEWAL'S 80/20 HOUSING PROGRAM, <http://www.nyshcr.org/assets/documents/8020TermSheet.pdf> [<http://perma.cc/TV77-CKZ9>].

¹⁴¹ Jennifer Fermino, *Mayor de Blasio Unveils \$41B Proposal to Develop 200,000 Units of Affordable Housing*, N.Y. DAILY NEWS (May 5, 2014, 1:36 PM), <http://www.nydailynews.com/news/politics/mayor-unveils-41b-affordable-housing-plan-article-1.1780018> [<http://perma.cc/F78X-4FCT>].

¹⁴² *Residents Reject Plan to Enlarge Sunset Park Library with Affordable Housing*, BROWNSTONER (Nov. 5, 2014, 9:00 AM), <http://www.brownstoner.com/blog/2014/11/residents-reject-plan-to-enlarge-sunset-park-library-with-affordable-housing/> [<http://perma.cc/DQ64-U5ND>].

affordable housing in specific neighborhoods. And while, upon first glance, the plan might seem antidemocratic, it actually fulfills the purpose of government more than the present system. The government should balance interests and acknowledge that the rights of the few must be occasionally abrogated by the needs of the masses. Those who oppose development still have a voice in the discussion, but that voice would be against the public interest variance at the legislative level, rather than against a specific proposal that benefits many but perhaps inconveniences the opponent. And as an added protection, the Fifth Amendment's Takings Clause would still apply, providing a limitation of reasonableness over the entire system of land use regulation.

In *Euclid*, the Supreme Court noted that “while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation.”¹⁴³ There are constitutional liberties at stake in the public interest variance. By statute, the public, through its legislators, could signal that it intends to divest itself of some degree of power to oppose development projects that the public broadly supports. As a result, property owners have a more powerful right to use their property as they wish through a public interest variance, and the landowner has an expanded property right through the Fourteenth Amendment. The public interest variance could ameliorate regulatory overreach in development, increase personal freedoms, and support efforts by governments and private citizens to increase the supply of affordable housing. Such a change would benefit New York City residents like Dasani by ensuring basic necessities of life are within reach for all New York City families—even those with impossibly low incomes. Policymakers must recognize the public desire for affordable housing, rewrite the law to unlock the ingenuity of private citizens, and ensure that New York City is a place where upwardly mobile dreams can become reality.

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¹⁴³ *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926).

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