

## A Respectful Rejoinder to Two Zoning Legends

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“Humbled” and “honored” are the two words that come to mind when describing my reaction to the responses of Professors Mandelker and Salkin to my recent article, *Zoning Reformed*.<sup>1</sup> Like so many active in the field of land use law, I have long admired their insightful and useful contributions to the literature, seemingly boundless energy, and generous openness to new ideas. This essay provides (1) background information on the origins of *Zoning Reformed*, (2) reactions to the Mandelker and Salkin responses, and (3) some additional thoughts about the prospects of real reform for American zoning.

### I. ZONING HISTORY MEETS COVID-19

The seeds for the *Zoning Reformed* project were planted during the fall semester of 2016, when I developed and taught a law course titled “100 Years of Zoning,” marking a century since the adoption of New York City’s seminal Zoning Resolution in the summer of 1916.<sup>2</sup> Support from the Richard E. Nelson Chair, which I am honored to occupy at the University of Florida Levin College of Law, allowed my students, colleagues, and me to benefit from guest lectures by experts in the fields of law, planning, history, economics, and housing.<sup>3</sup> The presentations and the class discussions and papers that followed exposed many of the weak links in the zoning and planning chain over the past century, some

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1. Michael Allan Wolf, *Zoning Reformed*, 70 U. KAN. L. REV. 171 (2021).

2. David W. Dunlap, *Zoning Arrived 100 Years Ago. It Changed New York City Forever.*, N.Y. TIMES (Jul. 25, 2016), [https://www.nytimes.com/2016/07/26/nyregion/new-yorks-first-zoning-resolution-which-brought-order-to-a-chaotic-building-boom-turns-100.html?\\_r=0](https://www.nytimes.com/2016/07/26/nyregion/new-yorks-first-zoning-resolution-which-brought-order-to-a-chaotic-building-boom-turns-100.html?_r=0) [<https://perma.cc/FC6Y-EAH7>].

3. Speakers included Len Albright, William Fischel, David Freund, Nicole Garnett, Sonia Hurt, Jerold Kayden, Christopher Serkin, Nancy Stroud, and Steven Wernick.

of which I have discussed in class and in scholarship over the past few decades.<sup>4</sup>

During zoning's centennial, I was also working on a project that explored what I called "the common law of zoning," that is, the body of judge-made law designed to fill in the blanks of, and resolve the ambiguities found in, zoning enabling statutes and local ordinances.<sup>5</sup> "A Common Law of Zoning" was published in the *Arizona Law Review* in 2019, and my work on the article convinced me that advocates of the abolition of zoning, who were either unaware or too easily dismissive of judicial modifications, were using the original Euclidean model as an easy foil. Still, because my list of zoning problems was copious, there was a need to stake out a middle position between those in favor of super-zoning at the state level and those in the abolitionist camp.<sup>6</sup>

The opportunity to organize my thoughts and present my ideas about reforming zoning to an important audience came, at least apparently, when I was asked to participate in the 34<sup>th</sup> Land Use Institute (LUI), a notable gathering of experts sponsored by the American Bar Association's Section of State and Local Government Law. The program was scheduled to be held in April of 2020, down the road in Tampa, Florida. One of my two scheduled presentations was on the first 100 years of zoning, in which I planned to demonstrate how zoning needed to be reformed in response to two significant realities of the twenty-first century: the ongoing struggle for social and racial justice and the realities of global climate change. However, the live conference fell victim to COVID-19 restrictions, as did so many activities around the globe.

The nimble organizers reconfigured the LUI as a webinar in May 2020, and I was initially assigned a different topic. After some deep thought about the current crisis, I contacted an old friend, LUI organizer Frank Schmidman, and requested that I change my topic to "The Future of Zoning: The View Through the COVID-19 Lens." The powers-that-be approved the shift and were very encouraging about the interest that would be generated by the topic.

The additional focus of this re-envisioned project—pandemic response and preparation—helped crystallize my thoughts about zoning's

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4. See, e.g., Michael Allan Wolf, *Fruits of the "Impenetrable Jungle": Navigating the Boundary Between Land-Use Planning and Environmental Law*, 50 WASH. U. J. URB. & CONTEMP. L. 5 (1996).

5. Michael Allan Wolf, *A Common Law of Zoning*, 61 ARIZ. L. REV. 771, 772 (2019).

6. Wolf, *supra* note 1, at 175–76 n.8.

weak spots and, I believe, enhanced my findings and the advisability of my suggested reforms. Research on the origins of zoning confirmed my suspicion that the links between disease prevention and this new land use device were strong.<sup>7</sup> The addition of disease prevention to social and racial justice and climate change response illustrates that, increasingly, policy choices regarding zoning and other forms of land use regulation are life-and-death decisions. Likewise, as I have argued in some of my recent scholarship,<sup>8</sup> recent Supreme Court decisions that expand the reach of judicial doctrines, particularly regulatory and physical takings, can actually put lives at risk.

My LUI talk and the comments I received from participants formed the basis for *Zoning Reformed*. In the conclusion of the article, I included a “Zoning and Planning Checklist,” more than forty specific changes that could easily be implemented by state legislators, local officials, or courts without disturbing the basic framework of comprehensive zoning and planning and, it is hoped, without attracting the negative attention of preemptive-minded lawmakers and activist judges.<sup>9</sup> For the convenience of the reader, we have included the Checklist as an Appendix to this essay.<sup>10</sup>

## II. THE ZONING LEGENDS RESPOND I: DANIEL MANDELKER

My major hope when writing and publishing *Zoning Reformed* was that my criticisms and proposals would stimulate serious conversations about retooling zoning for our new world of increasing climate change threats, pandemic awareness, and a renewed commitment to social and racial justice. To see in print the responses of two legendary commentators on the law and policy of zoning and other land use regulations—Professors Mandelker and Salkin—is an author’s dream, despite the fact that (or maybe because) they do not agree with all of my ideas and suggestions. This rejoinder to their thoughtful essays is this author’s humble effort to continue dialogue, not to defend the weakest parts of my far-from-perfect article.

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7. *Id.* at 178–82.

8. *See, e.g.*, Michael Allan Wolf, *Superfluous Judicial Activism: The Takings Gloss*, 91 GEO. WASH. L. REV. (forthcoming 2023).

9. Wolf, *supra* note 1, at 236–41.

10. The Checklist is divided into four sections: “Adapting Euclidean Basics to New Realities: Height, Area and Use Regulation,” “Accommodating and Facilitating Change,” “Updating Comprehensive Plans by Incorporating Pandemic Resiliency and Social Justice,” and “Addressing Governmental Authority and Procedural Gaps.”

Professor Mandelker has taken advantage of this forum to amplify his longstanding concern about the effects of zoning restrictions on housing affordability and opposition to race-based exclusion by ballot-box zoning and other means.<sup>11</sup> It has been my honor to partner with him in an effort to encourage public interest in a reinvigoration of federal efforts to stimulate the supply of new, affordable housing nationwide.<sup>12</sup> Instead of waiting for politicians to move this crucial issue to their front burners, his thoughtful and concrete suggestions for eliminating zoning barriers to the twenty-first-century version of manufactured housing make eminent sense.<sup>13</sup> I regret that I did not include in my list of zoning reforms his wise response to prejudice based on aesthetic snobbery and ignorance of modern construction methods.

Professor Mandelker notes that I was less than crystal clear when it came to my suggestion about broadening the set of incentives that local governments can make available in order to stimulate an increase in affordable housing units via inclusionary zoning.<sup>14</sup> In *Zoning Reformed* I wrote that

public officials should augment the list of incentives by offering to cooperative developers the relief from allegedly onerous land use restrictions about which they often complain. The idea is to reconceive of the development permission resulting from the government approval of discretionary zoning changes as public amenities that are at least as valuable as density bonuses.<sup>15</sup>

What I had in mind was a kind of “reverse engineering” approach to regulatory approval for affordable housing units. First, public officials, in consultation with developers and builders, should develop a checklist of substantive and procedural barriers to the construction of affordable housing. Then, along with providing the “traditional” incentive of density bonuses, inclusionary zoning ordinances and statutes should (1)

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11. See, e.g., Daniel R. Mandelker, *Racial Discrimination and Exclusionary Zoning: A Perspective on Arlington Heights*, 55 TEX. L. REV. 1217 (1977); Daniel R. Mandelker, *The Conflict Between Environmental Land Use Regulation and Housing Affordability*, 15 ZONING & PLAN. L. REP. 1 (1992); Daniel R. Mandelker, *The Affordable Housing Element in Comprehensive Plans*, 30 B.C. ENV'T AFF.'S L. REV. 555 (2003).

12. See Peter Buchsbaum, Daniel Mandelker, Frank Schnidman & Michael Allan Wolf, *A Call for Action: Renewing the Federal Government's Commitment to the Construction of New Affordable Housing*, 30 J. AFFORDABLE HOUS. & CMTY. DEV. L. 117 (2021) [hereinafter *Call for Action*].

13. Daniel R. Mandelker, *A Comment on Professor Wolf's Zoning Reformed*, 71 U. KAN. L. REV. 275, 281–85 (2022).

14. *Id.* at 285–86.

15. Wolf, *supra* note 1, at 215.

allow deviations from *all* height, area, and design restrictions, and from other zoning and land-use controls that otherwise apply to housing developments; (2) reduce or eliminate exactions and impacts fees; and (3) offer streamlined and first-in-line permitting for developers willing to set aside affordable units. Complying with Euclidean and post-Euclidean zoning ordinances and waiting for the bureaucratic wheels to roll costs money and takes time (and for developers who are borrowing funds, time equals money). Even the most socially conscious developer has to keep in mind the bottom line, and this broad inclusionary zoning strategy, like the interest rate subsidies of the past,<sup>16</sup> can have a positive effect on costs, with savings passed on to purchasers and renters.

Professor Mandelker's valuable suggestions warrant enthusiastic endorsement, with one exception. I respect his skepticism about the potential for abuse with special use or conditional use permits generally, and I agree with his assertion that "[d]iscretionary reviews can be used to block affordable housing."<sup>17</sup> Nevertheless, I have come to the conclusion that, rather than eliminating single-family detached housing from the list of permissible zoning classifications, as in Minneapolis, California, and Oregon,<sup>18</sup> local governments should instead consider amending their zoning codes to allow duplexes, triplexes, and quadplexes—that is, missing middle housing—in *all* single-family zones *not as-of-right*, but instead by special or conditional use permit.<sup>19</sup> The ordinance could specify that one condition for securing a permit for multi-family housing would be certification that there are not existing, applicable one-family restrictions that affect the parcel(s) or that the relevant homeowners' association has, by valid means, waived enforcement of such restrictions.<sup>20</sup> Another possible condition would be an objective property appraisal documenting neutral or even positive effects on the values of nearby properties.<sup>21</sup>

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16. See, e.g., *Call for Action*, *supra* note 12, at 117–18.

17. Mandelker, *supra* note 13, at 287.

18. See Wolf, *supra* note 1, at 193–94.

19. See, e.g., *La Rue v. East Brunswick*, 172 A.2d 691, 701 (N.J. Super. Ct. App. Div. 1961) (“The amendment expressly permits multiple dwelling groups (subject, of course, to the mechanics of Board of Adjustment approval) in R-1 districts, and expressly amends the R-2 and R-3 districts to permit them in the same manner as R-1.”).

20. One advantage is that this will eliminate the need to preempt neighborhood covenants mandating single-family units (which is vulnerable to a successful takings challenge if brought before the “right” judge or panel of judges).

21. See Mai Thi Nguyen, *Does Affordable Housing Detrimently Affect Housing Values? A Review of the Literature*, 20 J. PLAN. LITERATURE 15, 16–17 (2005); Lan Deng, *The External Neighborhood Effects of Low-Income Housing Tax Credit Projects Built by Three Sectors*, 33 J.

The use of special or conditional use permits in this way can provide an effective way to study the impact on nearby property values of departing from single-family zoning. It can also ensure that eliminating the single-family zone is not a gentrification scheme that could result in the displacement of economically vulnerable local residents or that could endanger the continued existence of a socioeconomically and racially integrated neighborhood. Communities that employ the special use permit approach without negative effects could one day transition to an as-of-right scheme.

### III. THE ZONING LEGENDS RESPOND II: PATRICIA SALKIN

Professor Salkin's suggestions are equally provocative and useful. She wisely points out that the zoning process must be "nimble enough" not only to respond to pandemics and climate change disasters, but also to cyber and military attacks and to domestic terrorism that "threaten our community infrastructure and basic life necessities such as clean air and clean water, and . . . demand the ability to quickly repurpose the built environment."<sup>22</sup> Government and businesses were able to return to quasi-normal because of widespread computer access. Because our energy grid is vulnerable to attack or overuse, we need to plan now for these technological challenges.

Professor Salkin also places my reform proposals within the historical framework of earlier attempts to modernize Euclidean zoning. The failure of the very ambitious Model Land Development Code to stimulate state zoning and planning changes was in the back of my mind as I compiled my list of suggested, achievable changes. And echoing in my ears were the following words written in the mid-1990s by my late friend and collaborator, Charles Haar:

Zoning in the United States, while remaining surprisingly stable, has displayed considerable flexibility, adapting to changing conditions of urban expansion and development innovations. Throughout its history, it has remained within the admittedly loose confines of the framework spelled out by the two Standard Enabling Acts. And it is most likely to continue in this fashion by way of occasional incremental modifications, representing a limited renewing of the vitality of the

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URB. AFF. 143, 143 (2011) ("Using a difference-in-difference hedonic regression approach, this study finds that almost all the LIHTC [low-income housing tax credit] projects examined have generated significantly positive impacts on nearby property value.").

22. Patricia E. Salkin, *Zoning Reformed: A Conversation with Professor Michael Allan Wolf*, 71 U. KAN. L. REV. 291 (2022).

original conceptions. For the repeal of zoning and other land-use controls, advocated by some groups, does not posit a coherent, intellectually serious alternative. Such a revolutionary change is not in the cards; its lure is but an abstract will-o-the-wisp; perhaps, like the Holmes characterization of the nuisance doctrine as a “benevolent yearning,” the same can be said of the support for revolution as a substitute vision for current controls.<sup>23</sup>

Changes have to be moderate and carefully calibrated to satisfy public needs and desires (and to satisfy competing political agendas). Less, if doable, truly can be more.

Professor Salkin wisely counsels that we accommodate technological developments such as autonomous vehicles, smart buildings, and drones.<sup>24</sup> While building codes and traffic regulations will play the lead role in this accommodation, zoning and planning should not be far behind.

I could not agree more with Professor Salkin’s assertion that “[r]esorting to courts to resolve issues of discrimination in land use decision making represents a failure in the local system.”<sup>25</sup> Indeed, successful zoning and planning lawyers thrive in non-court settings: consultations with planners; meetings with developers, neighborhood associations, and community organizations; and public hearings before planning boards, boards of zoning appeals, and local legislators.

In framing *Zoning Reformed*, I went back and forth regarding the idea of incorporating racial impact assessment into the land use decision-making process.<sup>26</sup> I opted not to include this among my proposals because of the loud voices of citizens whose opposition to public conversations about racial justice has been supercharged by “anti-woke” politicians. My fear remains that calm, sensible deliberation will be hard to maintain should we see a repeat of the shouting matches over mask and vaccination mandates (and the accompanying bullying of public officials and witnesses). Shifting the lawmaking forum from city hall to the state house makes more sense, and that is why Professor Salkin is spot on when she suggests that state environmental review statutes should be amended to incorporate housing and health disparities and

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23. Charles M. Haar, *The Twilight of Land-Use Controls: A Paradigm Shift?*, 30 U. RICH. L. REV. 1011, 1034–35 (1996) (footnotes omitted); see Oliver Wendell Holmes, Jr., *Privilege, Malice, and Intent*, 8 Harv. L. Rev. 1, 3 (1894) (“[E]mpty general propositions like *sic utere tuo ut alienum non laedas* [identified with private nuisance] . . . teach[ ] nothing but a benevolent yearning . . .”).

24. Salkin, *supra* note 22, at 296–97.

25. *Id.* at 297.

26. *Id.* at 297–99.

disaster mitigation within the definition of the term “environment.”<sup>27</sup> For similar reasons, I strongly endorse Professor Salkin’s idea of incorporating environmental justice components into continuing education for land use lawyers and for planners.<sup>28</sup>

Understandable is Professor Salkin’s criticism of my suggestion to make permanent some temporary changes inspired by pandemic response, and I appreciate her concerns about loosening variance and nonconforming use rules to accommodate the realities of health and climate disasters.<sup>29</sup> Still, my inclination would be to allow these experiments to take place and then, should landowners abuse these relief provisions, it will not be difficult to return to traditional rules.

#### IV. THE NEED AND POSSIBILITY OF REFORMING FROM WITHIN

Since the 1960s, the intractability of three groups—neighbors, judges, and state lawmakers—has doomed some of the more ambitious efforts to make zoning more responsive to socioeconomic needs, to persistent bias based on race and caste, and to the serious harms posed by climate change. The judicial activism of the Supreme Court of New Jersey in its first two *Mount Laurel* decisions,<sup>30</sup> like state substantive and procedural changes to combat exclusionary zoning,<sup>31</sup> did not catch on in the overwhelming majority of states. Instead, many state and local lawmakers, with the blessing of the U.S. Supreme Court, have moved full-speed ahead with ballot-box zoning measures.<sup>32</sup> Rather than allowing local governments to experiment with modifications of zoning and other land use restrictions, state lawmakers seem more willing than ever before in the nation’s history to wield preemptive power to stifle experimentation in the laboratory of the municipalities.<sup>33</sup>

The best-laid schemes are subject to the biases and power of all three groups. This does not mean that the modifications proposed by *Zoning Reformed* and by the perceptive responses of Professors Mandelker and

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27. *Id.* at 297.

28. *Id.* at 299.

29. *Id.* at 302.

30. S. Burlington Cnty. NAACP v. Mt. Laurel (*Mt. Laurel II*), 456 A.2d 390 (N.J. 1983); S. Burlington Cnty. NAACP v. Mt. Laurel (*Mt. Laurel I*), 336 A.2d 713 (N.J. 1975).

31. See Mandelker, *supra* note 13, at 279–281.

32. See, e.g., Cuyahoga Falls v. Buckeye Cmty. Hope Found., 538 U.S. 188 (2003); Eastlake v. Forest City Enters., Inc., 426 U.S. 668 (1976).

33. See, e.g., Michael Allan Wolf, *Check State: Avoiding Preemption by Using Incentives*, 36 J. LAND USE & ENV’T L. 121 (2020).



Salkin are doomed to failure. Many of these changes can be made “under the radar” without attracting the attention of naysayers in public hearings, courts, and state legislatures. Even when neighbors, judges, and state lawmakers are made aware of reform efforts, however, clinging to the status quo is not inevitable.

Neighbors opposed to multi-family housing next door, affordable developments close by, or inclusionary units in their subdivisions or condo buildings, often voice genuine concerns about the effect on the property values of their most important investment. Developers and the law and planning officials they employ should be prepared to explain how these economic concerns are not warranted, pointing to numerous studies<sup>34</sup> and, where possible, enlisting the assistance of local real estate appraisers and agents,<sup>35</sup> as well as similarly situated property owners whose fears proved unfounded once the feared units were constructed.

Judges over the last few decades have been bombarded with staunch property rights arguments in party and amicus briefs that advocate extending the reach of the already distended Takings Clause.<sup>36</sup> Counsel representing local governments attempting to make their zoning more responsive to pressing needs should inform judges in their written and oral arguments that there are longstanding common-law and constitutional doctrines, along with statutory modifications such as fair housing acts, that provide strong protections for landowners who are truly victimized by discriminatory and vindictive local government officials.<sup>37</sup> The twelve words of the Takings Clause, which refer to the affirmative exercise of eminent domain, should not be stretched even further beyond their original meaning, not when many other legal protections for landowners are firmly in place.

Local officials who want to reform zoning along the lines proposed by my article and by the responses published here should keep in mind the following refrain: “Reform, don’t make radical changes.” Modifications from within the bounds of Euclidean zoning—a comprehensive regulatory scheme that has weathered more than a

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34. See the studies cited *supra* note 21.

35. See Peter Robison & Noah Buhayar, *The National Association of Realtors Is Sorry About All the Discrimination*, BLOOMBERG (Dec. 21, 2021, 3:00 AM), <https://www.bloomberg.com/news/features/2021-12-21/real-estate-agents-want-to-fix-housing-discrimination-but-keep-their-commission> [<https://perma.cc/7K7K-RN4F>].

36. See *e.g.*, Michael Allan Wolf, *A Reign of Error: Property Rights and Stare Decisis*, 99 WASH. U. L. REV. 449, 509–10 (2021).

37. See Wolf, *supra* note 8.

century of challenges—makes sense and is much less likely to attract the attention of zealous ideologues in the state legislative and executive branches who, in order to impress potential voters, are anxious to frustrate the agendas of local “extremists.” There is no political gain in preempting noncontroversial modifications of run-of-the-mill, traditional local land use ordinances.

It is easy to paint with a very broad brush and label all zoning racist and exclusionary. As one who has studied and written about the history of zoning for four decades, I am well aware of some of the more sordid and distasteful aspects of its origins.<sup>38</sup> I am equally aware that, should a conservative Supreme Court one day accept the libertarian assertion that zoning is unconstitutional because it is confiscatory and arbitrary, any new regulatory model or free-market approach that state and local governments implemented as a replacement for comprehensive height, area, and use regulation would move the affordable housing needle very little, if at all. Zoning is an easy scapegoat for society’s sin of seeking to exclude from our neighborhoods those who don’t look, talk, dress, and believe like we do, and those who are not fortunate enough to have the same earning capacity or inherited wealth as we have. The urge to keep out the other will not disappear should zoning be abandoned or declared unconstitutional. Just look at Houston’s upper-class, gated bastions.<sup>39</sup>

With the endorsement and assistance of universally respected experts such as Professors Mandelker and Salkin, this effort to reform zoning deserves a chance. I am thankful that they have taken the time to share their suggestions for sharpening my ideas, I am excited about the prospect of allying with other zoning law experts to (as Professor Salkin phrases it) “effectively advocate for the needed reforms to ensure the strength of zoning well into the next century,”<sup>40</sup> and I appreciate the decision made by the editors of the *Kansas Law Review* to allow this important conversation to continue. Now it is time to get to work reforming zoning.

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38. See, e.g., MICHAEL ALLAN WOLF, *THE ZONING OF AMERICA: EUCLID V. AMBLER* 138 (2008) (“From its origins, American zoning has been used to exclude and separate supposedly ‘offensive’ uses and people, particularly racial and ethnic minorities.”).

39. See, e.g., *Welcome to Arlington Court!*, (Dec. 2017), [https://www.fsrtx.com/connect\\_cws/docs/ac373\\_ARC\\_Guidelines.pdf](https://www.fsrtx.com/connect_cws/docs/ac373_ARC_Guidelines.pdf) [<https://perma.cc/N2FD-UNPC>].

40. Salkin, *supra* note 22, at 303.

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## Appendix

### Zoning and Planning Checklist<sup>41</sup>

#### ADAPTING EUCLIDEAN BASICS TO NEW REALITIES: HEIGHT, AREA, AND USE REGULATION

- Update or eliminate zoning ordinance provisions defining and listing home occupations and professions allowable in residential districts (SL, LO).
- Redefine and expand accessory uses in residential and commercial districts (CL, LO).
- Allow a meaningful range of accessory dwelling units (ADUs) in single-family residential zones (CL, LO).
- Institute common-sense descriptions of permitted accessory uses (LO).
- Amend the zoning ordinance to allow commercial users to submit plans ahead of time for alternate configurations to allow for contact-free or -reduced customer contact (LO).
- Allow “missing middle” and other forms of affordable housing in erstwhile single-family zones, preempting covenants where they constitute a barrier (SL, LO).
- Augment attempts to eliminate exclusive single-family residential zones by preempting covenants and height and area restrictions that frustrate good-faith efforts to address segregation by class and race and to augment the supply of affordable housing in desirable communities (SL).
- Drastically curtail or eliminate noncumulative zoning in industrial, commercial, and residential districts (SL, LO).

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41. Abbreviations appear for each item on the checklist to identify whether state legislators (SL), local officials (LO), or courts (CT) (or a combination) will be responsible for enacting or implementing the proposed changes.

- Eliminate vestigial provisions banning urban agriculture from residential districts (SL, LO).
- Incorporate pandemic-related health and safety requirements in approvals for vertical mixed-use structures (LO).
- Plug loopholes in floor area ratio, transferable development rights, and other regulations to eliminate pencil towers that look down on neighboring skyscrapers (LO).

#### ACCOMMODATING AND FACILITATING CHANGE

- Eliminate use variances in all zoning ordinances and enabling legislation (SL, LO).
- Allow emergency and medical hardships for area and height variances (SL, LO).
- Permit owners of nonconforming businesses closed for emergency and public health purposes to reopen notwithstanding discontinuance or abandonment language found in state enabling acts or zoning ordinances (SL, LO, CT).
- Apply “the doctrine of natural expansion” to shield businesses that make substantial changes and improvements in order to stay open during an extended public health emergency (CT).
- Stop the amortization clock for nonconformities during the period between the declaration of a state of emergency and the end of that emergency (SL, LO).
- Create an inventory of buildings and campuses that were COVID-19 hot spots and that have been in operation for more than a few years and pass legislation to phase out use of the structures unless owners agree to implement improvements within a relative short time-frame or convert the buildings to a use in compliance with existing land use regulations (LO).
- Rethink inclusionary zoning by enhancing the zoning-related amenities offered to developers and builders of affordable housing units (SL, LO).

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- Reinvalidate and reshape inclusionary zoning, making it economically feasible for developers to include meaningful percentages of affordable units in their construction plans for the expanded categories of essential workers and their families (SL, LO).
- Eliminate ballot-box zoning measures that target affordable housing developments.
- Offer owners proposing new (or newly renovated and expanded) factories and warehouses who seek approval in the form of a rezoning, special use permit, or building permit, the option of receiving private benefits (such as taller or bulkier structures than permitted under the current zoning envelope, thereby “freeing” trapped development rights) in exchange for enforceable agreements to produce or store pandemic-related necessities (SL, LO).
- Require owners of new and renovated buildings with large open spaces that are seeking rezonings, variances, planned unit development or subdivision approval, or special use permits to provide alternative social-distancing blueprints (LO).
- Put on hold adoption of form-based codes and other land use regulatory programs that require precious time, energy, and money to implement, unless there is a direct and tangible connection to climate change adaptation and resiliency, social justice and structural racism, or pandemic prevention and response (SL, LO).
- Eliminate open-ended special use permit provisions and instead craft detailed elements to match the externalities associated with specific, listed uses (LO).
- Update special use permitting for assisted living and senior living facilities to include modifications gleaned from the COVID-19 pandemic experience (LO).
- Use floating zones to process large-scale development proposals for uses such as sports stadiums and arenas, casinos, and theme parks (SL, LO).

- Implement legislative changes to encourage and incentivize retrofitting of existing large structures so that they can be used during quarantine and climate change-related emergencies for the storage of PPE and medical equipment and conversion to medical treatment, testing, and other health-related functions (LO).
- Institute conditional permitting for new large structures that cannot be used during quarantine periods and climate change-related emergencies in order to achieve additional space for the storage of PPE and medical equipment and conversion to medical treatment, testing, and other health-related functions (LO).

#### UPDATING COMPREHENSIVE PLANS BY INCORPORATING PANDEMIC RESILIENCY AND SOCIAL JUSTICE

- Ensure that *all* localities that use zoning (except single- zone communities) have a freestanding comprehensive or master plan with which that zoning will, by law, comply (SL, LO).
- Include pandemic prevention, response, and resiliency into comprehensive plans, ideally by an amendment to state planning legislation (SL, LO).
- Ensure space for accessible pop-up and permanent food banks and testing centers (LO).
- Study infrastructure and other public amenity needs that are generated by certain forms and scales of development and enact and publish a schedule of the types and amounts of reasonable cash exactions (SL, LO).
- Include social-distancing concerns in comprehensive plans in determining the shape of new and renovated public educational and recreational buildings and spaces (LO).
- Explore Pedestrian Oriented Development so that the physical distance between work and home can be reduced for essential workers and others who cannot afford to commute by automobile and who are at risk taking public transportation during a pandemic (LO).

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- Convert abandoned large retail spaces in commercial districts into affordable housing units from which residents can walk to hospitals, offices, nursing homes, and other workplaces (LO).
- Redirect energy and expertise away from growth management, with its focus on the external, toward the reduction of crowding and density inside housing and other structures using housing and sanitary codes as well as occupancy limits (SL, LO).

#### ADDRESSING GOVERNMENTAL AUTHORITY AND PROCEDURAL GAPS

- Study and implement state constitutional fixes for preemption, such as exempting certain local laws from preemption if the state legislature cannot articulate a health and safety justification for its heavy-handedness, or requiring a supermajority vote of the state legislature to negate local measures that are demonstrably designed to protect health and safety (SL).
- Give landowners seeking zoning changes and permits the choice of waiving their rights to in-person hearings or delaying their applications until courts resolve procedural due process issues regarding online proceedings or until live proceedings are reinstated (LO).
- Clarify that any statutory periods for acting on a building permit will be tolled during the course of a pandemic or climate emergency (LO).
- Allow retail and restaurant users to submit provisional plans for drive-through windows and curb service that will be implemented during pandemic and other emergency situations (LO).
- Use virtual charrettes for comprehensive planning engagement with the public (LO).