

RETHINKING URBAN DEVELOPMENT

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There has been much focus in recent years on urban development issues, including economic revitalization, smart and sustainable growth, affordable and stable housing, and quality of life and civic identity. The recent Great Recession, intertwined with turmoil in housing markets, has been a particular challenge to stable communities.

As typically is the case with complex human endeavors, urban development in the United States has been created and regulated without much consensus on an appropriate governing paradigm. Should development stress economic productivity or some definition of individual or community well-being? Should planning for development be impressed by public officials, in top-down fashion, or should it result from the spontaneous ordering flowing from the separate decisions of many individuals attracted to the lure of profits or of the good life?

For simplicity, we might consider three types of actors vying for control of the cityscape. The first would be assertive government, exemplified by strong administrators like Baron Georges Eugène Haussmann, the nineteenth-century shaper of modern Paris,¹ and Robert Moses, the mid-twentieth-century commander of development projects in New York City and State.² The second actor would be the private real estate entrepreneur, such as the creator of innovative real estate financing, William Zeckendorf.³ Finally, the community—to use that amorphous term—has its best known advocate in Jane Jacobs, whose *The Death and Life of Great American Cities* is the iconic manifesto for the spontaneous ordering of urban places.⁴

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¹ See, e.g., Brian Mahler, Note, *Kick Me Out of the Ballgame: The Boston Red Sox, the BRA, and the Taking of Yawkey Way*, 42 NEW ENG. L. REV. 549, 552 (2008) (noting that Haussmann razed quarters of Paris, subsequently integrated railroads, water supply, boulevards, and grand structures, and “compared his transformation of Paris to that of Augustan Rome”).

² See generally ROBERT A. CARO, *THE POWER BROKER* (1974) (definitive biography of Robert Moses).

³ See WILLIAM ZECKENDORF, *ZECKENDORF* 144-48 (1970) (discussing his innovative “Hawaiian Technique” of dividing fees simple into intricate arrays of equity, debt, and leasehold interests, which would be sold to investors, lenders, and operators most attuned to that particular product, with a resulting great increase in aggregate value); see also Peter W. Salsich, Jr., *Thinking Regionally About Affordable Housing and Neighborhood Development*, 28 STETSON L. REV. 577, 592-93 (1999) (describing how the Hawaiian Technique “revolutionized commercial real estate finance”).

⁴ JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* vii-viii (3d prtng. 1993).

In recent decades, government has tried to harness private developers to further its own ends, and vice-versa.⁵ Through so-called public-private partnerships, cities and states have tried to provide carrots, such as tax incentives, to ensure the creation of development they wanted.⁶ This augmented zoning and other regulation that would prevent development they did not want. The Supreme Court's broad endorsement of urban revitalization as a "public use" in *Kelo v. City of New London*⁷ has provided both legal support for public-private partnerships⁸ and a catalyst for legislation in many states rejecting the concept, albeit largely ineffectually.⁹

Supporters of planning long have been inspired by the dictum attributed to the early twentieth-century doyen of City Beautiful and Beaux Arts style, the Chicago architect Daniel Burnham: "Make no little plans: they have no magic to stir men's blood."¹⁰ But the grand visions of one generation often turn out to be problems of the next.¹¹ Imbued with Jane Jacobs's concepts, redevelopment planners gradually shifted from monolithic apartment or office buildings to incorporating diversity—a turn that Jacobs herself rejected as just another variant of top-down planning.¹²

The separation of private residences, apartments, neighborhood shops, and more general commercial uses that is the hallmark of Euclidean zoning means that one needs an automobile to run routine errands and also leads to the typical suburb being alienating to teenagers and impractical for older

⁵ See, e.g., Steven J. Eagle, *Kelo, Directed Growth, and Municipal Industrial Policy*, 17 SUP. CT. ECON. REV. 63, 79-125 (2009) (analyzing the promise and perils of government-directed development); Ilya Somin, *The Politics of Economic Development Takings*, 58 CASE W. RES. L. REV. 1185, 1186-90 (2008) (public-choice analysis).

⁶ See, e.g., George Lefcoe, *Competing for the Next Hundred Million Americans: The Uses and Abuses of Tax Increment Financing*, 43 URB. LAW. 427, 449-67 (2011) (discussing how the diversion of incremental tax funds resulting from development, rechanneled to finance that development, harms communities).

⁷ 545 U.S. 469, 483-84 (2005).

⁸ The New York Court of Appeals, in particular, has been a strident supporter of deference to redevelopment, both before and after *Kelo*. See *Kaur v. N.Y. State Urban Dev. Corp.*, 933 N.E.2d 721, 730-31 (N.Y.), cert. denied sub nom. *Tuck-It-Away, Inc. v. N.Y. State Urban Dev. Corp.*, 131 S. Ct. 822 (2010); *Goldstein v. N.Y. State Urban Dev. Corp.*, 921 N.E.2d 164, 170-73 (N.Y. 2009); *Yonkers Cmty. Dev. Agency v. Morris*, 335 N.E.2d 327, 330 (N.Y. 1975).

⁹ See Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo*, 93 MINN. L. REV. 2100, 2114-48 (2009).

¹⁰ See THOMAS S. HINES, *BURNHAM OF CHICAGO: ARCHITECT AND PLANNER* 401 n.8 (2d ed. 2009) (describing other possible origins of the quoted material, but noting its consistency with Burnham's philosophy).

¹¹ See generally Steven J. Eagle, *The Really New Property: A Skeptical Appraisal*, 43 IND. L. REV. 1229 (2010) (expressing doubt that transforming the structure of property rights in America could substantially affect the quality of life of its residents).

¹² See Steven J. Eagle, *Urban Revitalization and Eminent Domain: Misinterpreting Jane Jacobs*, 4 ALB. GOV'T L. REV. 106, 120, 124-26 (2011). Jacobs noted that "[c]ity processes in real life are too complex to be routine, too particularized for application as abstractions." JACOBS, *supra* note 4, at 576.

adults.¹³ The public housing towers surrounded by green space, conceived as places of light and air that would better the moral condition of the poor, later were deemed a failed experiment and even dynamited into oblivion.¹⁴

While not all changes lead to better outcomes, the four articles presented in this issue on *The Rethinking of Urban Development* approach the subject in innovative and promising ways. Their subject matters and viewpoints are quite different, and sometimes appositional.

In *The Location Market*,¹⁵ Dean Daniel Rodriguez and Professor David Schleicher start by asking why we should have cities at all.¹⁶ City land is more expensive than rural land, and often is bereft of natural amenities, such as beautiful vistas, that would justify the costs. As they quote Economist Robert Lucas, “What can people be paying Manhattan or downtown Chicago rents for, if not for being near other people?”¹⁷ As Rodriguez and Schleicher explain, “agglomeration gains” come from the reduction in transportation costs when closely associated producers are near one another, creating “market-size” effects that provide individuals access to a wide array of specialized jobs, workers, cultural attractions that they favor, or eligible mates. Finally, those whose work involves intellectual creativity are lured to areas where they are in close propinquity to others with whom they could exchange ideas and gain critical insights.

Rodriguez and Schleicher object to land use regulations that would result in the separation of individuals who would gain from mutual association. On a macro-level, they analyze the work of Edward Glaeser and other leading agglomeration economists who argue, among other things, that regulations on development increase the costs of housing in cities, thus discouraging productivity by driving potential collaborators to lower-cost areas. They especially reject the “basic concept of Euclidean zoning . . . that a local government is well-placed to determine the best locations for certain activities.”¹⁸ Whether it is to alleviate potential nuisance or to divert growth to more needy parts of the city, such efforts are too coarse-grained and clumsy to do more good than harm. In short, “redistribution is costly.”¹⁹

¹³ See, e.g., GERALD E. FRUG, CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS 154-61 (1999) (noting that the design of suburbs restricts the movement of teenagers and younger children and isolates the elderly).

¹⁴ See EUGENE J. MEEHAN, THE QUALITY OF FEDERAL POLICYMAKING: PROGRAMMED FAILURE IN PUBLIC HOUSING 66-87 (1979) (discussing the demolition of the Pruitt-Igoe Housing Project and the St. Louis Housing Authority).

¹⁵ Daniel B. Rodriguez & David Schleicher, *The Location Market*, 19 GEO. MASON L. REV. 637 (2012).

¹⁶ *Id.* at 640-41.

¹⁷ *Id.* at 641 (quoting Robert E. Lucas, Jr., *On the Mechanics of Economic Development*, 22 J. MONETARY ECON. 3, 38 (1988)) (internal quotation marks omitted).

¹⁸ *Id.* at 647.

¹⁹ *Id.* at 651.

Professor J. Peter Byrne expresses a quite different view of the city in *Historic Preservation and Its Cultured Despisers: Reflections on the Contemporary Role of Preservation Law in Urban Development*.²⁰ He declares that historic preservation plays a “major role in how property development occurs in communities of all sorts,” and that we “can no longer analyze contemporary urban development and redevelopment without regard to historic preservation.”²¹ As part of an “ongoing effort to make sense of historic preservation law,” Byrne critiques the criticisms of Edward Glaeser and Pritzker Prize-winning architect and cultural theorist Rem Koolhaas.

Byrne first responds to Glaeser’s argument that historic preservation overly restricts development, thus raising prices and sapping the vitality of cities. He asserts (contrary to Rodriguez and Schleicher)²² that historic districts are desirable places to live, which creates value, and that they “spread economic demand to new areas, strengthening the city overall and providing significant windfalls to property owners in the right locations.”²³ Turning around the cry “location, location, location” used by the agglomerationists, Byrne responds that “purchasers value the [assemblage of] buildings.”²⁴ His point is that, just as the propinquity of individual people produces synergies, the propinquity of buildings does as well. Moreover, “Glaeser expresses no curiosity about why people seek to live in or visit historic districts; he seems to view them simply as devices to prohibit virtuous new development.”²⁵

If Byrne finds the economic-agglomeration approach lacking in human feeling, he finds the aesthetic of Koolhaas overly demanding. Koolhaas asserts, as Byrne puts it, “preservation lacks an organizing theory, imposes inauthentic consumer-friendly glosses on older structure, and inhibits architectural creativity.”²⁶ Byrne responds that the process by which “community members identify, articulate, and discuss what physical elements of their neighborhood give it a distinctive identity and how new structures fit in” is complex, and that historic preservation “can never provide an unproblematic image of the past.”²⁷

Byrne acknowledges that historic preservation arguments sometimes are used pretextually by opponents of development and that the formulaic application of preservation criteria can block projects of substantial importance to the community. To remedy the latter problem, he urges the in-

²⁰ J. Peter Byrne, *Historic Preservation and Its Cultured Despisers: Reflections on the Contemporary Role of Preservation Law in Urban Development*, 19 GEO. MASON L. REV. 665 (2012).

²¹ *Id.* at 665-66.

²² Rodriguez & Schleicher, *supra* note 15, at 645.

²³ Byrne, *supra* note 20, at 670.

²⁴ *Id.* at 676.

²⁵ *Id.* at 677.

²⁶ *Id.* at 666.

²⁷ *Id.* at 682.

corporation in historic preservation statutes of “safety valve” provisions that recognize proposed development with “special merit.”²⁸

If Rodriguez and Schleicher approach urban development from an economic perspective, and Byrne with a view towards defining community, the contribution of Professor Peter Salsich looks primarily not to the community or the aggregate of its members, but rather to the least fortunate of its residents.

In *Does America Need Public Housing?*,²⁹ Salsich recites the saga of the often-amended National Housing Act of 1937,³⁰ and what it means for America. He quotes Lawrence Friedman’s observation that, “[I]nfluence flowed not from the destitute, the descendants of the destitute . . . the Negro ghetto dwellers, or the abject poor; it flowed from the submerged and potential middle class.”³¹ It was the temporary poor of the Depression that was Congress’s concern, not what some now call the underclass.

Salsich relates the twists and turns of housing policy that, in general outline, is quickly moving from traditional public housing projects, through financial incentives to affordable housing builders, to housing vouchers for the poor.³² Of particular interest to the present author is the description of the tenant-management movement, whereby residents would take charge of much of their local housing authority-owned premises.³³ Two decades ago, working on that project with the Institute for Justice, this author discovered that liberals wanted the federal government and local housing authorities to provide more and better housing for the needy instead of empowerment, and that conservatives wanted residents to devote their empowerment efforts to obtaining the jobs and family stability that would permit them to move to private housing.

In discussing where we should go from here, Salsich notes that “[p]ublic housing has remained a fixture of American life because a small but substantial, and growing, segment of society lacks the resources to compete for housing in the private market.”³⁴ He adds “voucher programs are woefully underfunded and have their own ghetto-creating propensities because of the longstanding reluctance of residents and landlords in more stable neighborhoods to welcome voucher holders.”³⁵

Perhaps Salsich is right. However, “the resources” that public housing residents lack typically go far beyond money. Poor physical and sometimes

²⁸ *Id.* at 672 (internal quotation marks omitted).

²⁹ Peter W. Salsich, Jr., *Does America Need Public Housing?*, 19 GEO. MASON L. REV. 689 (2012).

³⁰ See generally U.S. Housing Act of 1937, 42 U.S.C. § 1437 (2006).

³¹ Salsich, *supra* note 29, at 692 (alteration in original) (quoting LAWRENCE M. FRIEDMAN, GOVERNMENT AND SLUM HOUSING 106 (Arno Press 1978) (1968)) (internal quotation marks omitted).

³² *Id.* at 691-731.

³³ *Id.* at 699-700.

³⁴ *Id.* at 732.

³⁵ *Id.*

mental health, the lack of job skills, improvident life choices, and the lack of solid working-class social capital loom large as well.³⁶ Given the level of middle-class privation lingering from the Great Recession, it is unlikely that the problems Salsich quite rightly calls to our attention will be ameliorated in any substantial or comprehensive way soon.

Much of the current distress of large segments of the middle class results from negative equity and home foreclosures as the housing boom of the first part of the last decade turned to housing bust. On the theory that this can happen again, Professors Julie Forrester and Jerome Organ, in *Promising to be Prudent: A Private Law Approach to Mortgage Loan Regulation in Common-Interest Communities*,³⁷ set forth a way that common interest communities (“CICs”) could provide members with protection against “foolish financing decisions” by their neighbors.³⁸ They propose that developers include in the covenants of new CICs that buyers may not encumber their homes beyond a specified percentage of appraised value. Certain types of risky loans could be prohibited as well.³⁹ The scheme seems promising, since a principal function of CICs is to constrain nuisance-like activity by errant neighbors.

Forrester and Organ provide an extensive discussion of why a financing restriction covenant would “touch and concern” land so as to bind successors under the traditional *Restatement of Property* approach,⁴⁰ and also meet the more relaxed “reasonableness” standard of the recent *Restatement (Third) of Property*.⁴¹ Potential lenders would be bound through constructive notice, since the covenant is in the seller or refiner’s chain of title.

Prudence is always popular in the abstract, but not when we are exuberant or see ourselves as potentially desperate. As Forrester and Organ note, developers might be reluctant to use a new type of covenant, especially one that might dissuade some potential buyers.⁴² It would be considerably more difficult to amend existing declarations (in which case the restrictions would apply only to new financing).⁴³

Organ and Forrester seem to accept an 80 percent total indebtedness to contemporaneously appraised value standard as an appropriate measure of

³⁶ See generally GERTRUDE HIMMELFARB, *THE DE-MORALIZATION OF SOCIETY: FROM VICTORIAN VIRTUES TO MODERN VALUES* (1995) (asserting that the dissolute rich could buy their way out of trouble, but the poor had to adhere to social norms such as marriage, honesty, and industriousness to hope to survive the vicissitudes of life).

³⁷ Julie Patterson Forrester & Jerome Michael Organ, *Promising to be Prudent: A Private Law Approach to Mortgage Loan Regulation in Common-Interest Communities*, 19 GEO. MASON L. REV. 739 (2012).

³⁸ *Id.* at 746.

³⁹ *Id.* at 755.

⁴⁰ *Id.* at 760 (citing RESTATEMENT OF PROPERTY § 535 (1944)).

⁴¹ *Id.* at 762 (citing RESTATEMENT (THIRD) OF PROPERTY § 5.2 (2000)).

⁴² *Id.* at 767-68.

⁴³ Forrester & Organ, *supra* note 37, at 768-71.

prudence.⁴⁴ This would discourage buyers who cannot muster a substantial down payment, possibly with fair housing law ramifications. It also might deter buyers who see their house not as the proverbial ATM machine, but as a source of cash for medical emergencies or children's college educations. While the covenant would not provide total protection against the combination of boom-time unrealistic prices and overinflated home appraisals, it would provide considerable help. The legal problems do not seem insurmountable. The real test might be how developers, realtors, title companies, and lenders perceive the advantages and disadvantages of this prudent approach. This is an idea well worth considering.

⁴⁴ *Id.* at 771.