The Delicate Art Of Balance - Ruminations on Change and Expectancy in Local Land Use

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I. Introduction

When considering the new, it is always important to remember the old. If change is the constant, then wise reactions to change rest on a firm grasp of time and place—a firm hold on perspective. No question exists that much strident debate continues today regarding the Constitution's provision for just compensation and the concept of regulatory takings. Many people see the rise of this debate as being tied to change. Almost all see the Fifth Amendment's Just Compensation Clause as a bulwark in favor of the individual against the admittedly lawful prerogatives of the majority to govern.¹ Some people see the constitutional obligation embodied in the Fifth Amendment as a condition subsequent on the exercise of compensable sovereign power, i.e., an exercise of power creating compensable interference remains valid, so long as the constitutional due (just compensation) is available when required. A few people go even further, seeing the Fifth Amendment's protection as a throttle on the power of the majority to act in the first instance. On the opposite extreme, certain individuals view the just compensation provision as a somewhat anachronistic constitutional redundancy, a rough equivalent of the Due Process Clause.

Although the takings litigator has few luxuries, it is at least true that resolving a particular takings case does not require resolving the broader issues. With the benefit of this observer sta-

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¹ The Just Compensation Clause of the Fifth Amendment states “[N]or shall private property be taken for public use, without just compensation.” U.S. CONST. amend. V.
tus, litigators can see in this policy dialogue the great respect that all of the participants have for our system's broader premise of informed debate. It is not the litigator's function to suggest a more or less desirable view. Others are better informed to do that. This piece will not focus on that policy dialogue, nor will it focus on the takings jurisprudence itself. This author recognizes that other contributors to this symposium are in a better position to provide those insights.

Instead, this Article is a personal reflection on the experiences of local land-use systems. It will view those systems as they have practiced the delicate art of balancing change and expectancy in day-to-day land-use decisions for now over 100 years. The local land-use tools utilized to accommodate change and expectancy include a range of vital and diverse approaches. Those tools reveal a tradition of pragmatic day-to-day dialogue where those individuals who propose use and those who plan use do something extremely simple: they talk. They pursue an accommodation between land-use goals and individual plans. Along the way, this Article highlights cases that both recognize the myriad existing constitutional expectancies and fashion frameworks for measuring the creation of new expectancies.

This Article begins by looking at today's growth challenges, using the Washington, D.C. metropolis as a reference point. From there, the Article reaches backward to trace some of the Supreme Court's major zoning rulings. Here, the Article highlights a few of the cases that cross a broad reach of constitutional provisions and that provide the corner pieces for the land-use puzzle by delineating the broad borders of permissible zoning. Then, the Article turns to the wellspring and residuum of zoning authority: the state and local levels. With these points of reference, the Article moves through enabling statutes, ordinances, and comprehensive plans. As it proceeds, the Article shows that the accommodation of change and expectancy occurs routinely and that it does so with increasing precision as the decision-making body becomes more localized. Finally, arriving at the local level, the Article describes still other tools, ranging from nonconforming uses to variances, which assure balance between community land-use goals and expectancy. Through this approach, the Article will have travelled a terrain marked by day-
to-day challenges and pragmatic innovation; one that features a
tradition of bridging land-use goals and individual expectancy.

This pragmatic environment owes its existence, at least in
part, to the Supreme Court's remarkable judicial sensitivity
when resolving fundamental land-use issues implicating a broad
array of constitutional provisions. With the wider perspective of
constitutional land-use litigation, one gains an even broader
grasp of the Court's land-use remedies. One sees a Court that is
active in assuring constitutional fit in land-use programs. The
Court's decisions indicate that it invokes a strong sense of con-
stitutional place and time, an essential element when gauging
the perception of change or the need for change, even in land use.

Each of these lessons provides comfort. In fact, some portion
of the message of the Supreme Court's recent cases may be sim-
ply to remind the community of the importance of being sensi-
tive to the long-standing tradition of land-use balance.

II. THE CHALLENGE OF LOCAL GROWTH—
A "REAL TIME" SAMPLER

The days of local courts and land-use planners are filled with
activities such as maintaining values, providing ever growing
demands for service, stabilizing the economic base, maximizing a
diminishing resource base, encouraging new investment, restor-
ing the environment, and improving the quality of life. The halls
of legislatures and town councils reverberate daily with the com-
peting demands confronting those individuals bold enough to
attempt to represent the people in these times. People who ad-
vance the cause of land use as well as people who regulate the
use bring goodwill, hard work, and creativity to countless negoti-
atations that attempt to accommodate reasonable expectancies of
use with legitimate public goals. Over the years, the government
has responded to the struggle between these themes by develop-
ing local government land-use regulatory structures. 2

Occasionally, the debate crystallizes enough to make its way
to the Supreme Court and to trigger constitutional dialogue. 3 In

2. See infra Part III.B.
3. See, e.g., Nectow v. Cambridge, 277 U.S. 183 (1928); Village of Euclid v. Am-
earlier times and settings, society managed to find ways to balance the debate. The Court's more recent decisions on local land-use planning concerns demonstrate that society continues to balance competing interests. Given the nature of land-use planning, the constitutional search for balance has been, is, and will be a constant effort.

More frequently, the balance is fashioned in a pragmatic day-to-day world without triggering constitutional tension or court involvement. Balance is fashioned in local legislatures, town councils, zoning boards, land-use planning offices, and local courts in everyday America. Prime among today's planning considerations are transportation, accommodation of growth within existing communities, maintenance of community values, and growth in area revenue bases. The suburbs around the Washington metropolitan area offer an excellent microcosm for studying today's land use and community growth phenomena.

In Charles County, Maryland, comprehensive land-use planners attempt to preserve agricultural ambiance in a way that fosters growth around existing communities. To balance these goals, Charles County has resorted to transferable development rights (TDRs), also used in Calvert and Montgomery counties in Maryland. Development rights for the agricultural lands are transferred, for value, to lands in areas where county managers want to encourage growth, thus channeling the expansion into certain areas. Growth still raises challenges. Residents of northwestern Charles County recently debated a proposal to

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4. See *Euclid*, 272 U.S. at 394-97 (concluding that the city's interest in regulating use trumped the individual's concern over the value of his property); *Dolan v. City of Tigard*, 512 U.S. 374, 396 (1994) (noting that land-use planning although "laudable" can only go so far before it becomes unconstitutional).


7. See id.

8. See Dacek, *supra* note 5, at C8 ("The county must be diligent in promoting local agricultural products, cultivating links between grocery stores, restaurants and other markets for the county's produce and preserving support services needed by farmers. It must balance environmental, health and zoning regulations against the economic needs of the agricultural community.").
convert 2250 acres of forest into a mixed-use development, including retail and commercial space, a golf course, and residential units projected to attract up to 12,000 occupants. Opponents of the growth raised concerns over the impact on local historic sites, on traffic accessibility, and on the ecosystem. Advocates accepted that change and growth would, in any event, occur and stressed the value of utilizing planned growth.

Howard County, Maryland, hosts the planned community of Columbia where county executives continue to struggle with growth along Interstate 270. In that county, after a measure passed in the polls requiring major zoning questions to be submitted to a referendum and a county executive veto, the county's five council members nonetheless voted to exempt "floating zones." These zones included special districts for the town of Columbia, Maryland and rural businesses. In an even more rural area of Maryland, Frederick County, local zoning preserves agricultural lands by providing that no more than three lots may be subdivided from any size farm. At the other end of the spectrum, Calvert County, which utilizes TDRs and has implemented a new acquisition program, is currently buying more land than it is developing.

The struggle for dominion is not always one between the government and the individual. In some instances, governments contend with each other. Poolesville, a city in Montgomery County, Maryland, found itself astride the question of annexing 1177 acres in connection with plans to locate a private educational center in the town. Advocates for the center and for an-

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10. See id.
11. See id.
13. See id. A "floating zone" refers to a zoning technique whereby a locality adopts a zoning district but does not map it until a developer asks to have the "floating zone" applied to his property. See DANIEL R. MANDELKER, LAND USE LAW § 6.63 (3d ed. 1993).
14. See id.
15. See Mayer, supra note 6, at E1.
16. See id.
17. See Louis Aguilar, Poolesville Votes Saturday on the Shape of Its Future,
nexation stressed that the center would spark water supply improvements and the upgrading of public education facilities.\(^\text{18}\)

County officials, however, preferred to maintain the Poolesville acreage as open space.\(^\text{19}\) Poolesville officials responded to the county's efforts by challenging the validity of the county's open space concern, pointing to the county's location of incinerators, police firing ranges, and public golf courses near the town.\(^\text{20}\)

Inside the infamous “Beltway,” already developed communities confront change and demands for further growth. Counties emphasize redevelopment by encouraging growth near transportation centers and existing growth hubs.\(^\text{21}\) One redevelopment technique, “infill,” the development concept of building on lots in long-existing neighborhoods,\(^\text{22}\) brings its own challenges. Today's consumer demands, especially for homes constructed on infill lots, require the use of all of the lot's development potential under existing zoning ordinances.\(^\text{23}\) The resulting structure may stand in stark contrast to homes next door, built years ago, when there was a smaller demand on the building itself.\(^\text{24}\) Even the competition among various environmental goals, a noble struggle, can find distinctly different solutions encouraging distinctly different growth patterns. A few years ago, in response to water quality concerns, planners encouraged low density development.\(^\text{25}\) Later, after some success addressing basic water quality levels, planners began to focus on air quality, only to find that high density development boosted air quality.\(^\text{26}\)

In an area of Fairfax County, Virginia, known as “Difficult Run,” some homeowners lived for nearly forty years without sewer lines.\(^\text{27}\) A developer recently proposed a solution: waiving

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\(^{18}\) See id.

\(^{19}\) See id.

\(^{20}\) See id.

\(^{21}\) See id.


\(^{23}\) See id.

\(^{24}\) See id.

\(^{25}\) See Mayer, supra note 6, at E1.

\(^{26}\) See id.

\(^{27}\) See Ann Mariano, *In Fairfax, a Fight for Sewer Lines*, WASH. POST, Jan. 28,
the one residence-per-acre zoning requirement if the developer provided sewer access to the residents within the zone. On one hand, this proposal raised concerns over the environmentally sensitive area and the need to maintain the neighborhood. On the other hand, acceptance of the proposal would promote public health and safety interests and the opportunity for some development. In Fairfax, the balance between a proposed mixed development (townhouses and single-family residences) and concerns over the historical and archaeological aspects of a certain site triggered a zoning variance on density restrictions. The developer offered to restore a historical house in the development tract and to create recreational areas in exchange for the variance.

In Prince William County, Virginia, the development plan has recently focused on local highways, even though two interstate highways run through the county. The county has adopted rules restricting the size of commercial signs along the highways, requiring tree buffers, and limiting highway entrances on many highways in the jurisdiction. Businesses have opposed these new rules, arguing that they depend on visual access of customers from the roads and that this aesthetic effort imposes a very real economic cost on them. County planners have responded that the rules are less stringent than those of nearby counties and that the rules make an effort to accommodate existing development. That is, the rules are on a sliding scale, stricter restrictions apply along rural road stretches and more flexible burdens govern more developed areas.

Some people see "low density" growth, which usually involves growth along the length of roads and the provision of utilities

28. See id.
30. See id.
32. See id.
33. See id.
34. See id.
primarily to households, as expensive. They reason that low density environmental costs are also high because they are spread over a wide area. In contrast, they may argue in favor of development focusing on existing communities, trying to emulate traditional towns and villages with compact growth and disincentives to other development. For instance, some people have argued that this approach in the Chesapeake Bay watershed has saved some $11 billion in road construction costs and, in Maryland, has saved almost 400,000 acres of farm and forest land.

In Northern Virginia, Loudoun County is currently trying to manage its growth. Recognizing the attraction of its rural lifestyle and less expensive environment, local government representatives have expressed concern that development should not outstrip the community’s ability to provide the related infrastructure. As a result, county supervisors recently deferred development in the western area of the county until sites in the eastern sector, where infrastructure was less expensive, filled out.

Deferral of growth has its own costs. In a county where the population of 109,000 is double what it was in 1980, most of the people live in the eastern sector. That concentration has shifted political influence and, as a result, the historic practice of favoring the agricultural lifestyle of the western half of the county is now coming under fire. Debate has arisen over earlier practices of allowing developers to achieve higher densities in the eastern end of the county if they agreed to purchase land in the western county’s open-space areas. For their part, western county residents worry that the costs of increased infrastructure

36. See id.
37. See id.
38. See id.
39. See Mayer, supra note 6, at E1 (noting that elementary schools cost $10 million, middle schools cost $17 million, and high schools cost $35 million each to build).
40. See id.
42. See id.
43. See id.
for the eastern county will lead necessarily to increased tax rates and that they will not receive added services or benefits for their tax dollar.\textsuperscript{44}

As these examples from the Washington suburbs illustrate, myriad day-to-day issues face those individuals charged with development decisions at the local level. Those issues highlight an important underlying theme in local land use, the constancy of the struggle to balance competing goals and interests. As diverse as these settings are, however, land-use planning does not occur in a legal vacuum.

\section*{III. THE OUTER CONTOURS: LOCAL LAND-USE REGULATION}

\subsection*{A. The Supreme Court's Role in Local Land Use}

The Supreme Court's contribution to the land-use concepts of quality of life and the balance between the majority and the individual traces well into the last century and covers a host of provisions. Several early Court cases addressed the challenge of a changing society by outlining when the state's "police power" could be used to restrict what had come to be seen as "obnoxious" uses.

\subsection*{1. "Police Power" as the Justification for Local Land-Use Planning}

\textit{Fertilizing Co. v. Hyde Park}\textsuperscript{45} dealt with waste transportation through the village limits of Hyde Park, Illinois.\textsuperscript{46} Although holding a franchise to carry offal and animal waste through the town limits, Fertilizing Company found itself subject to a subsequently enacted ordinance prohibiting such transportation.\textsuperscript{47} The village brought criminal charges under the ordinance against a railroad engineer and railroad employees for transportation of the waste.\textsuperscript{48} Sustaining the exercise of the county's police power, the Court focused on "the fundamental

\begin{footnotesize}
44. See id.
45. 97 U.S. 659 (1878).
46. See id. at 664.
47. See id. at 665-66.
48. See id. at 665.
\end{footnotesize}
principle that every one [sic] shall so use his own as not to wrong and injure another. To regulate and abate nuisances is one of the [police power's] ordinary functions."

The often-cited *Mugler v. Kansas* decision also addressed what was thought, by the majority of the day and location, to be an undesirable use. A statute implementing Kansas's constitutional prohibition of liquor sales was invoked against Mugler for the manufacture of liquor at a preexisting plant without a newly required permit. Again sustaining the police power exercise, the Court reasoned:

> The power which the States have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public, is not—and, consistently with the existence and safety of organized society, cannot be—burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain, . . . by a noxious use of their property, to inflict injury upon the community.

Several years later, in *L'Hote v. City of New Orleans*, the Court considered the constitutional implications of an 1897 New Orleans ordinance precluding houses of "ill repute" outside a specified area of the city. L'Hote owned, and with his family resided in, property located within the designated area. He brought suit to enjoin enforcement of the ordinance, contending (as did other property owners and the Church Extension Society of the Methodist Episcopal Church) that the assignment of prostitution to the area reduced property values and portended neighborhood deterioration. The Court first outlined what was not pending before it: no prostitute was challenging the

49. *Id.* at 667.
50. 123 U.S. 623 (1887).
51. *See id.* at 661-62.
52. *See id.* at 653-54.
53. *Id.* at 669.
54. 177 U.S. 587 (1900).
55. *See id.* at 588-90.
56. *See id.* at 590.
57. *See id.* at 590-94.
ordinance's reach; no landowner outside the specified area was challenging the ordinance's economic impact, and the ordinance did not make the enterprise, itself, lawful.\textsuperscript{58} "The question, therefore, [was] simply whether one who may own or occupy property in or adjacent to the prescribed limits . . . can prevent the enforcement . . . on the ground that by it his rights under the Federal Constitution are invaded."\textsuperscript{59}

After framing the question, the Court established the precedent for the use of the police powers stating that:

\begin{quote}
Until there is some invasion of Congressional power or of private rights secured by the Constitution of the United States, the action of the States in this respect is beyond question in the courts of the nation. . . . It is no part of the judicial function to determine the wisdom or folly of a regulation by the legislative body in respect to matters of a police nature.\textsuperscript{60}
\end{quote}

Without challenging the legislature's authority to address the topic, the Court continued: "The truth is, that the exercise of the police power often works pecuniary injury, but the settled rule of this court is that the mere fact of pecuniary injury does not warrant the overthrow of legislation of a police character."\textsuperscript{61}

As for the landowners within the district from which the activity was not precluded, the Court reasoned:

\begin{quote}
Who can say in advance that in proximity to their property any houses of the character indicated will be established, or that any persons of loose character will find near by [sic] a home? They may go to the other end of the named district. All that can be said is that by narrowing the limits within which such houses and people must be, the greater the probability of their near location. Even if any such establishment should be located in proximity, there is nothing in the ordinance to deny the ordinary right of the individual to restrain a private nuisance.\textsuperscript{62}
\end{quote}

\textsuperscript{58} See id. at 595-96.
\textsuperscript{59} Id. at 596.
\textsuperscript{60} Id. at 595-97.
\textsuperscript{61} Id. at 598.
\textsuperscript{62} Id. at 600.
After citing *Hyde* and *Mugler*, the Court sustained the ordinance.⁶³

In *Reinman v. City of Little Rock*,⁶⁴ the Court returned to an enduring object of majoritarian consternation. In *Reinman* the city prohibited the continued operation of a livery stable, a preexisting use.⁶⁵ The Court did not hesitate to embrace the city's authority, concluding that "in particular circumstances and in particular localities a livery stable [is] a nuisance in fact and in law."⁶⁶ Similarly, the Court in *Northwestern Laundry v. City of Des Moines*⁶⁷ sustained a city ordinance which prohibited dense smoke in areas of the city by declaring it "a public nuisance."⁶⁸

*Village of Euclid v. Ambler Realty Co.*⁶⁹ represented a more methodical invocation of the police power. In that case, the village zoning ordinance precluded businesses and apartment houses from locating in designated portions of a residential area.⁷⁰ The Court turned to the law of nuisance to guide its facial analysis of the scheme,⁷¹ finding that a sufficient rational relationship existed between the regulation's health and safety object and its impact to sustain the police power exercise.⁷² *Nectow v. City of Cambridge*⁷³ presented an as-applied challenge to a residential zoning ordinance.⁷⁴ The Court confirmed an earlier finding that the after-enacted ordinance effectively deprived the landowner of all "practical" uses and left "comparatively little

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63. See id. at 598-600.
64. 237 U.S. 171 (1915).
65. See id. at 172-73.
66. Id. at 176.
67. 239 U.S. 486 (1916).
68. Id. at 492-93, 495.
69. Id. at 176.
70. See id. at 379-80. The ordinance created six classes of use districts, three classes of height districts, and four classes of area districts. See id. at 380. The use districts were classified with respect to the types of buildings permitted within such districts. See id.
71. See id. at 387-89.
72. See id. at 395 (citing Thomas Cusack Co. v. City of Chicago, 242 U.S. 526, 530-31 (1917) and Jacobson v. Massachusetts, 197 U.S. 11, 30-31 (1905)).
73. 277 U.S. 183 (1928).
74. See id. at 185.
Balancing the benefit to the city against the burden on expectancies led the Court to conclude that, this time, "the health, safety, convenience and general welfare . . . will not be promoted by the disposition made by the ordinance." In other cases challenging zoning ordinance validity, the Court balanced the competing interests and sustained zoning requirements for reasonable setbacks from streets, height restrictions, and geographical locations of businesses.

2. "Family Needs" as a Justification for Land-Use Regulations

These early police power decisions by the Court only hinted at what would follow when the Court began invoking other constitutional provisions. "A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs." The Court uttered these words in Village of Belle Terre v. Boraas, addressing whether multiple college students could reside on property zoned for family residences. In that opinion, the Court referred both to Euclid, noting that "[t]he main thrust of th[at] case . . . was . . . to keep residential areas free of 'disturbing noises'; 'increased traffic'; the hazard of 'moving and parked automobiles'; [while not] . . . 'depriving children of the privilege of quiet and open spaces for play, enjoyed by those in more favored localities'," and to Berman v. Parker, noting that "[i]t is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled."

Sustaining the ordinance at issue in Belle Terre, the Court

75. Id. at 187.
76. Id. at 188.
77. See Gorieb v. Fox, 274 U.S. 603, 610 (1927).
79. See Williamson v. Lee Optical, Inc., 348 U.S. 483, 491 (1955) (holding valid in part a state law that prohibited eyeglass frame retailers from occupying space in which eye examinations were conducted).
81. Id.
82. See id. at 2-3.
83. Id. at 5 (quoting Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 394 (1926)).
84. Id. at 6 (quoting Berman v. Parker, 348 U.S. 26, 33 (1954)).
concluded that the municipality's definition of family as no more than two unrelated persons intruded on no fundamental right and, as a result, needed only to bear a rational relationship to a permissible state objective. As for the permissible objective, the Court reasoned that: "The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people." Acknowledging that "every line drawn by a legislature leaves some out that might well have been included," the Court nonetheless underscored that the "exercise of discretion . . . is a legislative, not a judicial, function."

Twenty-one years later, the Court, in City of Edmonds v. Oxford House, Inc., addressed still another local ordinance designed to regulate family occupancy. In Oxford House, it did so in the context of the Fair Housing Act's (FHA) prohibition of discrimination against the handicapped. Under the FHA, "discrimination" included "a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations [might] be necessary to afford [handicapped] person[s] equal opportunity to use and enjoy a dwelling." The Oxford House operated a group home for ten to twelve recovering alcoholics and drug addicts. The home was in an area zoned for single-family residences. The city of Edmonds invoked the ordinance and the ordinance's definition of family as the basis for citing Oxford House for a zoning violation. The resulting litigation raised the question of whether the FHA limited the city's

85. See id. at 7-8.
86. Id. at 9.
87. Id. at 8 (citations omitted).
90. See Oxford House, 115 S. Ct. at 1778.
91. Id. at 1779 (quoting 42 U.S.C. § 3604(f)(3)(B)).
92. See id.
93. See id.
94. See id. The ordinance defined family as "persons [without regard to number] related by genetics, adoption, or marriage, or a group of five or fewer [unrelated] persons." Id. at 1778-79 (quoting Edmonds Community Development Code § 21.30.010 (1991)).
discretion or whether, instead, the city's restriction was a statutorily permitted "maximum occupancy restriction" such as a cap on the number of occupants per dwelling in view of available floor space or the number or type of rooms. If viewed as the latter, the ordinance fell within a statutory absolute exemption to the FHA. The Court distinguished maximum occupancy restrictions, viewing them as ordinarily applying uniformly to "all residents of all dwelling units" and seeking to protect health and safety by preventing overcrowding. In contrast, family composition rules were more appropriately seen as land-use restrictions to preserve the character of a neighborhood. Because other provisions tied to floor area concerns existed in the city's code, the Court concluded that the restrictions at issue were primarily land-use related. As such, the ordinance was not exempt from the FHA and the case was remanded for further proceedings to determine whether a violation of the FHA existed.

3. "Quality of Life" as a Justification for Local Land-Use Planning

Quality of life is another factor that the Court has weighed when trying to balance property owners expectancies with majoritarian community concerns. In Young v. American Mini Theaters, Inc., the majority’s evolving concept of quality of life was reflected in Detroit’s efforts to address the neighborhood impact of theaters showing sexually explicit adult movies. The city’s ordinance, instead of concentrating adult theaters in specific zones, scattered them throughout the city with restrictions limiting their proximity to specific regulated uses or residential areas. Adult movie theater owners challenged the ordinances as impermissibly vague under the Fourteenth

95. See id.
98. See id.
99. See id. at 1782-83.
100. See id. at 1783.
102. See id. at 52.
103. See id.
Amendment's Due Process Clause, invalid under the First Amendment as prior restraints on free speech, and violative of the Fourteenth Amendment's Equal Protection Clause.\textsuperscript{104}

The Court had "no doubt that the municipality may control the location of theaters as well as the location of other commercial establishments, either by confining them to certain specified commercial zones or by requiring that they be dispersed throughout the city."\textsuperscript{105} This scatter-zoning thrust, in the Court's view, imposed only a minimal burden on First Amendment expectancies.\textsuperscript{106} The Court held that: "The mere fact that the commercial exploitation of material protected by the First Amendment is subject to zoning and other licensing requirements is not a sufficient reason for invalidating these ordinances."\textsuperscript{107} Although recognizing that "the First Amendment protects communication in this area from total suppression," the Court held "that the State may legitimately use the content of these materials as the basis for placing them in a different classification from other motion pictures."\textsuperscript{108} The Court found that the city's concern that concentrating the target theaters in a particular area tended to encourage crime and cause neighborhood deterioration was a legitimate matter for the police power.\textsuperscript{109}

\textsuperscript{104} See id. at 58.
\textsuperscript{105} Id. at 62.
\textsuperscript{106} See id. at 62-63.
\textsuperscript{107} Id. at 62.
\textsuperscript{108} Id. at 70-71.
\textsuperscript{109} See id. at 71 n.34. In City of Renton v. Playtime Theaters, Inc., 475 U.S. 41 (1986), the Court sustained a Washington town's local ordinance prohibiting adult motion picture theaters from locating within 1000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school. See id. at 43, 54-55. Further, the Court held that so long as the evidence on which the city relied was reasonably relevant to the problem addressed by the ordinance, the city did not need to commission its own study when studies previously completed by other localities existed. See id. at 51; cf. Grayned v. City of Rockford, 408 U.S. 104, 110-11 (1972) (recognizing the legitimate state interest in protecting the environment around schools from disturbing noises).
4. "Historical Value" as the Basis for Land-Use Controls

In *Penn Central Transportation Co. v. New York City*, the Court focused on the evolving majority concern over the preservation of property with historical value or unique architectural attributes. Responding to that concern, New York City enacted a landmarks preservation law in 1965. The City argued that the law would foster civic pride, encourage tourism, stimulate business and industry, strengthen the City's economic base, and promote the historic districts and landmarks. The Court summarized the ordinance's "special restrictions on landmark properties," as assuring landowners "a 'reasonable return' on their investments and maximum latitude to use their parcels for purposes not inconsistent with the preservation goals."

Landmark designation under the ordinance triggered restrictions preserving, for example, exterior facades. Procedures were available both for an owner to obtain permission to alter the landmark and for an owner to obtain a decision that the proposed use was consistent with preservation concerns. To the extent that the restrictions precluded development of full economic potential otherwise available under the zoning laws, the City's zoning structure provided for the TDRs to contiguous parcels in the same city block. Subsequent ordinance amendments liberalized the TDR provisions in order to enhance their economic utility.

Litigation arose over the landmark status assigned to Grand Central Terminal ("Terminal") in New York City and the denial of necessary approvals on the basis of landmark concerns for construction of an office building over the Terminal. The

111. See id. at 107-08.
112. See id. at 108-09.
113. See id. at 109.
114. Id. at 110.
115. See id. at 111-12 (citing N.Y.C. ADMIN. CODE, ch. 8-A, § 207-10.0(a) (1976)).
116. See id. at 112 (citing N.Y.C. ADMIN. CODE, ch. 8-A, §§ 207-5.0,-6.0,-8.0 (1976)).
117. See id. at 113-14. For a discussion of how TDRs can be used, see supra text accompanying notes 7-16.
118. See Penn Central, 438 U.S. at 114-15.
119. See id. at 116-19.
Court's opinion was twofold; the first message was directed at the lawfulness of the ordinance and the second at its implications for compensation.\textsuperscript{120} This Article focuses on the Court's first message.\textsuperscript{121} The Court dismissed the allegation that the ordinance effected spot zoning.\textsuperscript{122} The ordinance was comprehensive because it applied to all historic structures in the City wherever found.\textsuperscript{123} Even though the ordinance applied only to historic properties in the City, the Court did not view that approach as manifesting the kind of arbitrary and discriminatory evil inherent in spot zoning.\textsuperscript{124} Further, the Court accepted the City's conclusion that preservation of landmarks benefitted all New York citizens and structures "both economically and by improving the quality of life in the city as a whole . . . ."\textsuperscript{125} On the matter of preserving economic viability, the Court emphasized that all use had not been denied, even all use of preexisting air rights.\textsuperscript{126} Through TDRs, the rights were made "transferable to at least eight parcels in the vicinity of the Terminal, one or two of which have been found suitable for the construction of new office buildings."\textsuperscript{127}

As a brief aside, consider for a moment what has become of this historic preservation goal in the state courts. In \textit{United Artists' Theater Circuit, Inc. v. City of Philadelphia},\textsuperscript{128} the Pennsylvania Supreme Court entered its second opinion in a case addressing the city's historic designation of a building's interior in Philadelphia without the consent of the building's owner.\textsuperscript{129} The court quickly found that the statute included authority to address historic preservation as a public purpose.\textsuperscript{130}
It took solace in its conclusion that no jurisdiction had disagreed with *Penn Central*\(^{131}\) and that both state and local policy supported governmental authority to address historic preservation.\(^{132}\) The court ultimately concluded that the Philadelphia Historical Commission ("Commission") had exceeded its authority in designating the building's interior as well.\(^{133}\) Because the court could not separate the exterior and interior designation rationales in reviewing the Commission's order, it was "constrained to vacate the entire order."\(^{134}\) Even so, the validity of historical value zoning remains intact.

5. *The Need for "Open Space" as a Basis for Land-Use Regulations*

In *Agins v. City of Tiburon*\(^{135}\) the Court addressed a West Coast land-use planning technique, "the development of local open-space plans [to] discourage the 'premature and unnecessary conversion of open-space land to urban uses'."\(^{136}\) Responding to that concern, Tiburon had adopted a zoning ordinance that sought:

To avoid unnecessary conversion of open space land to strictly urban uses, thereby protecting against the resultant adverse impacts, such as air, noise and water pollution, traffic congestion, destruction of scenic beauty, disturbance of the ecology and environment, hazards to geology, fire and flood, and other demonstrated consequences of urban sprawl.\(^{137}\)

The city adopted this ordinance after Donald Agins and his wife had purchased five acres of unimproved land within the Tiburon

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131. *See id.* at 619.
133. *See id.* at 619-21.
134. *Id.* at 622.
136. *Id.* at 261 (quoting *CAL. GOV'T CODE* § 65561(b) (West 1983)). The state identified concern for "the continued availability of land for the production of food and fiber, for the enjoyment of scenic beauty, for recreation and for the use of natural resources," as the basis for the open-space plan. *CAL. GOV'T CODE* § 65561(a).
137. *Agins*, 447 U.S. at 257, 261 n.8 (quoting Tiburon, Cal., Ordinance 124 N.S. § 1(c) (June 28, 1973)).
city limits. The two ordinances placed the five acre tract in a "Residential Planned Development and Open Space Zone," restricting the property to between one and five single family residences. No indication existed that the ordinances applied only to the particular tracts. As a result, the Court held that the Aginses would "share with other owners the benefits and burdens of the city's exercise of its police power." The Court also held that the ordinances benefitted both the Aginses and the public "by serving the city's interest in assuring careful and orderly development of residential property with provision for open-space areas."

The Court, thus, has developed a strong tradition of sustaining local government efforts to balance the challenges of growth with the desire to define, establish, and maintain a community image or quality of life. Even with this tradition of acceptance by the Court, the local land-use zoning authority still must conform to the fundamental constitutional quality of life contours. Belle Terre, discussed above, stands in contrast to Moore v. City of East Cleveland. In Moore, the ordinance defined "family" in a way that excluded certain relatives from living together. Justice Powell and three other Justices concluded that the result intruded on liberty interests protected by the Due Process Clause of the Fourteenth Amendment and, joined by Justice Stevens, relying on Euclid, the Court invalidated the ordinance.

6. First Amendment Restrictions on Local Land-Use Planning

Even though the police power provides communities with the

138. See id. at 257.
139. See id. Because the plaintiff in Agins failed to apply for development of this property, the case actually may not have been ripe. See id. This defect, however, is not relevant to this Article's focus on the Court's endorsement of the ordinance as advancing legitimate state goals.
140. See id. at 262.
141. Id.
142. Id.
145. See id. at 496 n.2.
146. See id. at 506, 520-21.
right to make land-use decisions, other constitutional provisions, including the First Amendment, also inform the legal framework. *Schad v. Borough of Mount Ephraim*\(^{147}\) offers a contrast to *Young*, also discussed earlier.\(^{148}\) In *Schad*, the property owner was convicted of providing live, nude entertainment in the Mount Ephraim commercial zone.\(^{149}\) The New Jersey courts concluded that the Mount Ephraim Code precluded “live entertainment” (including nude dancing) in any “establishment” in the Borough.\(^{150}\) The Supreme Court stated: “[b]y excluding live entertainment throughout the Borough, the Mount Ephraim ordinance prohibits a wide range of expression that has long been held to be within the protections of the First and Fourteenth Amendments.”\(^{151}\) Further, the Court noted that although “[t]he power of local governments to zone and control land use [is] broad and its proper exercise . . . an essential aspect of achieving a satisfactory quality of life in both urban and rural communities, [it is] not infinite and unchallengeable.”\(^{152}\)

The Court harkened back to *Moore*, underscoring that the power “must be exercised within constitutional limits.”\(^{153}\) The Court articulated the following standard: “[W]hen a zoning law infringes upon a protected liberty [First Amendment speech], it must be narrowly drawn and must further a sufficiently substantial government interest.”\(^{154}\) The Court distinguished the “minimal burden” context of the scatter zoning in *Young* from the preclusive impact of the ordinance now before it.\(^{155}\) Although some forms of live entertainment might create parking problems or demands on police and other city facilities, the Borough failed to meet its burden that no less intrusive means than the overinclusive restriction on protected speech existed.\(^{156}\)

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148. 427 U.S. 50 (1976); see supra Part III.A.3.
149. See *Schad*, 452 U.S. at 62-64.
150. See id. at 64-65.
151. Id. at 65.
152. Id. at 68.
153. Id. (quoting *Moore v. City of E. Cleveland*, 431 U.S. 494, 514 (1977) (Stevens, J., concurring)).
154. Id.
155. See id. at 71-72.
156. See id. at 73-74. The Borough also failed to demonstrate that live enter-
Court remarked that "this ordinance is not narrowly drawn to respond to what might be the distinctive problems arising from certain types of live entertainment, and it is not clear that a more selective approach would fail to address those unique problems if any there are."\textsuperscript{167} The ordinance also failed to fall within an exception as a reasonable "time, place, and manner" restriction on protected speech.\textsuperscript{168} The Court stated that, "[t]o be reasonable, time, place and manner restrictions not only must serve significant state interests but also must leave open adequate alternative channels of communication."\textsuperscript{169}

Another area of land-use contention that implicates the First Amendment is the location of billboards.\textsuperscript{160} In \textit{Metromedia, Inc. v. City of San Diego},\textsuperscript{161} the city promulgated an ordinance imposing serious restrictions on outdoor advertising within the city.\textsuperscript{162} Although a business could post on-site signs, the ordinance prohibited other commercial and noncommercial advertising unless it fell within one of twelve exceptions.\textsuperscript{163} Exceptions included: government signs, signs at bus stops, signs stored in the city, signs within shopping malls, temporary political campaign signs, and so on.\textsuperscript{164} At the time the ordinance was passed, Metromedia owned signs throughout the city having remaining useful lives of over twenty-five years and fair market values ranging between $2500 and $25,000.\textsuperscript{165} The city relied on concerns regarding pedestrian safety and motorist distraction, a public health and safety basis, to justify its decision.\textsuperscript{166} In effect, the ordinance allowed an owner to advertise his own

\begin{thebibliography}{9}
\item The Court has a long history of involvement in this area. \textit{See}, e.g., Packer Corp. v. Utah, 285 U.S. 105 (1932); St. Louis Poster Adver. Co. v. City of St. Louis, 249 U.S. 269 (1919); Thomas Cusack Co. v. City of Chicago, 242 U.S. 526 (1917).
\item 453 U.S. 490 (1981).
\item \textit{See id.} at 493.
\item \textit{See id.} at 494.
\item \textit{See id.} at 495.
\item \textit{See id.} at 496.
\item \textit{See id.} at 493.
\end{thebibliography}
goods or services but not those of others. In addition, it prohibited the display of most noncommercial messages through billboards. Metromedia challenged the prohibition of commercial and noncommercial speech under the First Amendment.

The Court "continue[d] to observe the distinction between commercial and noncommercial speech, indicating that the former could be forbidden and regulated in situations where the latter could not be." It found that the city's ordinance met the four-part test enunciated in *Central Hudson Gas & Electric Corp. v. Public Service Commission* for commercial speech. The Court held that the ordinance did not violate the First Amendment for several reasons. First, the First Amendment protection for commercial speech applied because the speech concerned a lawful activity and was not misleading. Second, the restriction sought to implement a substantial governmental interest. Third, the restriction directly advanced that interest. Finally, the restriction was narrowly tailored. The Court's key inquiry was whether the ordinance directly advanced a substantial government interest. The Court had no difficulty accepting the rationale that billboards could be traffic hazards or that aesthetic concerns were a legitimate purpose of the restriction. Moreover, the Court determined that the distinction between off-site and on-site commercial advertising was reasonable; the commercial enterprise had a particularly significant interest at the location where it provided its products or services.

The regulation of noncommercial speech to promote quality of life was viewed less favorably by the Court. The Court concluded that "[w]ith respect to noncommercial speech, the city may not choose the appropriate subjects for public discourse."

"To allow a government the choice of permissible subjects for

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167. See id. at 495-96.
168. See id. at 497-98.
169. Id. at 506.
171. See Metromedia, 453 U.S. at 507 (citing *Central Hudson*, 447 U.S. at 563-66).
172. See id. at 508.
173. See id. at 507-08.
174. See id. at 508.
175. Id. at 515.
public debate would be to allow that government control over the search for political truth." Because some noncommercial messages may be conveyed on billboards throughout the commercial and industrial zones, San Diego must similarly allow billboards conveying other noncommercial messages throughout those zones.\textsuperscript{176}

The First Amendment's Establishment Clause also implicates land-use planning issues. In \textit{Larkin v. Grendel's Den, Inc.},\textsuperscript{177} the Holy Cross Armenian Catholic Parish was located only ten feet from the back wall of an adjacent restaurant.\textsuperscript{178} In 1977, the restaurant applied for an alcoholic beverage license.\textsuperscript{179} Invoking a state statute that authorized churches or schools within 500 feet of a location to object to, and effectively veto, issuance of the license,\textsuperscript{180} the Parish objected to the restaurant's application.\textsuperscript{181} The restaurant challenged the state's denial of the license, which rested solely on the Parish's objection.\textsuperscript{182} The State defended the statute and the action as a "zoning" law, directed at shielding churches and schools from liquor establishments and at "protect[ing] diverse centers of spiritual, educational, and cultural enrichment."\textsuperscript{183} The Court responded warmly to the valid interest of insulating churches and schools from certain commercial enterprises, including those that sell liquor, and to the power of the state to "regulate the environment in the vicinity of schools, churches, [and] hospitals."\textsuperscript{184}

Consistent with its prior land-use decisions, the Court spoke of the zoning function as a balancing of competing considerations that should not be overturned on review, absent a showing of arbitrariness or irrationality.\textsuperscript{185} It even bolstered that

\textsuperscript{176} Id. (quoting Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 538 (1980)).
\textsuperscript{177} 459 U.S. 116 (1982).
\textsuperscript{178} See id. at 117.
\textsuperscript{179} See id.
\textsuperscript{180} See MASS. GEN. LAWS. ANN. ch. 138, § 16C (West 1991).
\textsuperscript{181} See \textit{Larkin}, 459 U.S. at 118.
\textsuperscript{182} See id.
\textsuperscript{183} Id. at 120.
\textsuperscript{184} Id. at 121.
\textsuperscript{185} See id.
observation by noting the enhanced role of the state in alcohol regulation under the Twenty-First Amendment. In this state statute, however, it saw something quite different. The Court held that the Massachusetts courts interpreted the statute authorizing the church’s action as conferring a power to veto liquor license applications. In this context, the deference normally accorded zoning determinations was not warranted. Pointing out that “the core rationale underlying the Establishment Clause [was] preventing ‘a fusion of governmental and religious functions’,” the Court concluded that:

The Framers did not set up a system of government in which important, discretionary governmental powers would be delegated to or shared with religious institutions. . . . The challenged statute thus enmeshes churches in the processes of government and creates the danger of “[p]olitical fragmentation and divisiveness on religious lines.” Ordinary human experience and a long line of cases teach that few entanglements could be more offensive to the spirit of the Constitution.

Thus, the constitutional requirements of the Establishment Clause trumped the state’s ability to regulate land use in this circumstance.

7. Fourteenth Amendment Constraints on Land-Use Regulation

In City of Cleburne v. Cleburne Living Center, the land-use planning power of the state conflicted with the Equal Protection Clause of the Fourteenth Amendment. The city determined that the applicant’s proposal to house thirteen retarded men and women under constant supervision in a house with

186. See id. at 121-22.
187. See id. at 122.
188. See id.
189. Id. at 126 (quoting Abington Sch. Dist. v. Schempp, 374 U.S. 203, 222 (1963)).
190. Id. at 127 (quoting Lemon v. Kurtzman, 403 U.S. 602, 623 (1971)).
192. See id. at 435.
four bedrooms and two baths constituted a "hospital for the feeble minded." As such, the proposed use did not fall within the permitted uses for the particular zone without issuance of a special use permit. The city denied the permit. The Court concluded that the legislative determination based on mental retardation did not trigger "a quasi-suspect classification calling for a more exacting standard of judicial review than is normally accorded economic and social legislation," but that "legislation that distinguishes between the mentally retarded and others must be rationally related to a legitimate governmental purpose."

Because other care and multiple-dwelling facilities were allowed in the area without requiring a special permit, the Court invalidated the city's rejection of a special use permit. Explaining why, the Court stated: "mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases for treating a home for the mentally retarded differently from apartment houses, multiple dwellings, and the like." The Court dismissed all of the city's arguments. First, a nearby school's student population included mentally challenged students, so the location of the facility hardly could be objectionable. Second, because hospitals and other similar structures were situated in the same area, the city's argument that the facility would be located on a flood plain also failed rationality review. Third, restrictions based on the number of individuals occupying a boarding house would not apply and, as a result, it was not justified to invoke restrictions of that kind against the mentally challenged.

The short of it is that requiring the permit in this case ap-

193. Id. at 435-37.
194. See id. at 436.
195. See id. at 437.
196. Id. at 442.
197. Id. at 446.
198. See id. at 447-48.
199. Id. at 448.
200. See id. at 449.
201. See id.
202. See id.
pears to us to rest on an irrational prejudice against the mentally retarded, including those who would occupy the Featherstone facility and who would live under the closely supervised and highly regulated conditions expressly provided for by state and federal law. 203

Even though the Court rejected the city's action in *Cleburne*, it is important to note that the majority may in fact reserve land-use decisionmaking to itself, placing the instruments of governance at least somewhat to the side. A zoning ordinance may be submitted to referendum review by the public. 204 In *City of Eastlake v. Forest City Enterprises, Inc.*, 205 the role of the referendum in zoning also made its way to the Supreme Court. In *Eastlake*, a real estate developer acquired a parcel zoned for "light industrial" use and then, in 1971, sought a rezoning to permit construction of a multi-family, high-rise apartment building. 205 Before the City Council approved the Planning Commission's recommendation for rezoning, the voters amended the town charter to require that any changes in land use be submitted to referendum and receive a favorable fifty-five percent vote. 207 When the developer subsequently applied for an additional "paring and yard" approval, the application was rejected because the initial rezoning approval had not been submitted to referendum. 208 While litigation was pending, the referendum occurred but failed to muster the fifty-five percent favorable action. 209

The Court rejected the argument that the referendum requirement was an unconstitutional delegation of power. 210 To the contrary, "[a] referendum cannot . . . be characterized as a delegation of power. Under our constitutional assumptions, all power

203. *Id.* at 450.
206. See *id.* at 670.
207. See *id*.
208. See *id.* at 671.
209. See *id*.
210. See *id.* at 672-75.
derives from the people, who can delegate it to representative instruments which they create.\textsuperscript{211} Although the landowner might have raised a challenge, even to the result of the referendum zoning, it failed to do so.\textsuperscript{212} The "direct teaching" of Euclid is that "a property owner can challenge a zoning restriction if the measure is 'clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare'."\textsuperscript{213} The landowner might, under this standard, have challenged the referendum result as unreasonable, clearly "arbitrary and capricious, bearing no relation to the police power."\textsuperscript{214} If found wanting, the referendum result would have failed.\textsuperscript{215} Subject ultimately to the standards of the Fourteenth Amendment, the availability of that remedy under state law was all that the Constitution required.\textsuperscript{216} In contrast, the "absence of standards" due process challenge actually pursued by the landowner failed.\textsuperscript{217} This was not an instance of a "standardless delegation of power to a limited group of property owners" but an exercise of the fundamental decision-making power reserved by the Ohio Constitution to the people.\textsuperscript{218}

The cases in this section have highlighted the judiciary's role in land-use planning as well as the judiciary's sensitivity when establishing the constitutional contours of property expectancies. This sensitivity can be seen throughout the cases discussed above in the careful balancing of interests engaged in by the judiciary. In the main, the courts have proceeded very thoughtfully. In the next section, this Article analyzes land-use planning at the local level.

\textbf{B. Designing Local Land-Use Structures}

With the Court having shaped the constitutional contours, this Article next looks at state courts and the backdrop of local

\textsuperscript{211} Id. at 672 (citing THE FEDERALIST NO. 39 (James Madison)).
\textsuperscript{212} See id. at 676.
\textsuperscript{213} Id. (quoting Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926)).
\textsuperscript{214} Id.
\textsuperscript{215} See id.
\textsuperscript{216} See id. at 677.
\textsuperscript{217} See id. at 675.
\textsuperscript{218} See id. at 678.
zoning structures against which they operate. In general, zoning authorities classify land uses, for instance, residential (single family or multifamily), commercial, and industrial uses.219 "Compatible uses are allowed and incompatible uses are excluded."220 In addition, as exemplified by the New York Zoning Code of 1916,221 this method of classification of permissible land uses both prefers residential development and allows for compatible uses in other areas. To explain, the New York Building Zone Resolution divided New York City into three types of districts, depending on use, height, and land area.222 As a general rule, early use restrictions also ranged from more restrictive to less restrictive.223 That meant that although only residential uses were permitted in residential zones, commercial zones could include residential uses, and industrial zones could include commercial and residential uses.224 Thus residential use was the most protected target of the zoning.225

As a proud citizen of the Commonwealth of Virginia, albeit by adoption, I cannot help but reference my state's zoning structure. In general, in Virginia "zoning" refers to the legislative classification of land within a given jurisdiction into areas or "zones" of use.225 In each zoned area, the jurisdiction will regulate "building and structure designs, building and structure placement and uses to which land, buildings and structures . . .

220. MANDELKER, supra note 13, § 4.16.
221. 1916 N.Y. Laws 497.
223. See id.
224. See id.
may be put.\textsuperscript{227} "Incentive zoning" authorizes the jurisdiction to enhance density or other benefits—beyond the level usually provided by the ordinance—in order to encourage developers to provide additional "features or amenities desired by the locality within the development."\textsuperscript{228} "Special exception[s]" address uses that are not allowable in a particular zone "except by a special use permit."\textsuperscript{229} Conditional zoning also may be employed.\textsuperscript{230} Conditional zoning allows the jurisdiction to impose additional or modified use requirements for particular areas beyond those required by the applicable zoning ordinance.\textsuperscript{231} This Article returns later to a particularly innovative concept of conditional zoning in Virginia.\textsuperscript{232} This section begins with the Virginia judicial review of the purpose and the role of state authorized zoning.\textsuperscript{233} In \textit{Cole v. City Council},\textsuperscript{234} the Virginia Supreme Court described zoning policy as designed to ensure a reasonable predictability of permissible land uses and a comfort that permitted uses would not be subject to sudden or arbitrary change.\textsuperscript{235}

Next, this section details the state legislative perspective. In sketching the Commonwealth's view of "quality of life," the Virginia zoning statute requires zoning officials to give due consideration to concerns of public health, safety, convenience, and welfare in designing and promulgating zoning ordinances.\textsuperscript{236}

\begin{itemize}
\item \textsuperscript{227} Id.
\item \textsuperscript{228} Id. \textsection 15.1-430(t).
\item \textsuperscript{229} Id. \textsection 15.1-430(t).
\item \textsuperscript{230} See id. \textsection 15.1-430(q).
\item \textsuperscript{231} See \textit{infra} notes 299-313 and accompanying text.
\item \textsuperscript{232} See \textit{infra} notes 299-313 and accompanying text.
\item \textsuperscript{233} The authority to zone in the Virginia Code provides for delegations to local officials, \textit{see} VA. CODE ANN. \textsection 15.1-427.1 (Michie 1989), but local city charters are subject to the delegation limitations of the state's zoning ordinance statute related to rezoning. \textit{See}, \textit{e.g.}, Laird v. City of Danville, 302 S.E.2d 21, 24 (Va. 1983) ("T\textsc{he} rezoning of property, no less than the establishment of its original zoning classification, is wholly legislative, requiring action in the form of an amendatory ordinance adopted by the one 'purely legislative body' that exists in the locality involved."). Authorized officials may look to the state statutory structure and their local ordinances for sufficient standards to guide their discretion in making land-use decisions. \textit{See} Byrum v. Board of Supervisors, 225 S.E.2d 369, 373 (Va. 1976) (allowing the Board the opportunity to permit or deny conditional use permits).
\item \textsuperscript{234} 241 S.E.2d 765 (Va. 1978).
\item \textsuperscript{235} See id. at 770.
\item \textsuperscript{236} \textit{See} VA. CODE ANN. \textsection 15.1-489 (Michie Supp. 1996).
\end{itemize}
Among the listed concerns are: adequate light and air; convenience of access; safety from fire, flood, and other dangers; potential traffic congestion; protection against overcrowding of land and undue population density; encouragement of economic development and tax base; preservation of agricultural and forest lands; and provision of adequate police and fire protection.237

The Virginia zoning statute defines “development” as “a tract of land developed or to be developed . . . under single ownership or unified control for any business or industrial purpose or . . . [which will] contain three or more residential dwelling[s].”238 It does not include property “principally devoted to agricultural production.”239 A “mixed use development” is one that includes “two or more different uses, and may include a variety of housing types within a single development.”240 A “planned unit development” (PUD) contemplates a “unified site design for a variety of housing types and densities, clustering of buildings, common open space, and a mix of building types and land uses.”241 In a PUD, project planning and density calculations apply to the entire development rather than to the individual lot.242

Under the statute, “subdivision,” unless otherwise defined by a local ordinance, includes “the division of a parcel of land into three or more lots or parcels of less than five acres each for the purpose of transfer of ownership or building development.”243 When a new street is involved in the division, the term encompasses any division of a parcel of land.244 For “recording of any single division of land into two lots or parcels, a plat of such division [must] be submitted for approval” under Virginia Code section 15.1-475.245 The “site plan” is the “proposal for [the] development or a subdivision.”246 The plan includes “all cove-

237. See id.
238. Id. § 15.1-430(m).
239. Id.
240. Id. § 15.1-430(r).
241. Id. § 15.1-430(s).
242. See id.
243. Id. § 15.1-430(l).
244. See id.
245. Id.; see also id. § 15.1-430(n) (defining “plat of subdivision”).
246. Id. § 15.1-430(o).
nants, grants or easements and other conditions relating to use, location and bulk of buildings, density of development, common open space, public facilities and such other information as required by the subdivision ordinance to which the proposed development or subdivision is subject.  

Virginia's structure includes internal doctrines suggesting limits on invocation of the land-use police power in the service of land-use controls. For instance, when the zoning ordinance solely advances private interests and not the public welfare, it is deemed illegal "spot zoning." Factors may include a comparison of previous zoning to the challenged zoning, relative benefits and burdens of the rezoning from the perspective of the community and the individual, and the symmetry between the challenged zoning and local land-use objectives.

Virginia's system also recognizes the "variance," a residual fine-tuning device to which this Article returns later. Under the Virginia statute, the jurisdiction may afford a "reasonable deviation" from the zoning ordinance's provisions for size, area, or location requirements. The statutory language defines a "variance" as appropriate when "strict application" of the zoning ordinance results in "unnecessary or unreasonable hardship to the property owner," when the "need for a variance [is] not shared generally by other properties," when the requested vari-

247. Id.
248. See infra notes 249-56 and accompanying text.
249. See supra note 122 defining "spot zoning"; see also Board of Supervisors v. Fralin & Waldron, Inc., 278 S.E.2d 859, 864 (Va. 1981) (holding that rezoning from single-family to apartment dwellings was not illegal spot zoning when the issue was fully considered by the Board, the area had little development at the time of rezoning, and the Board reasonably could have concluded that introduction of apartments was in the public interest); cf. Resource Conservation Mgmt., Inc. v. Board of Supervisors, 380 S.E.2d 879, 881 n.2 (Va. 1989) ("Under Dillon's Rule, effective in Virginia, the powers of boards of supervisors are fixed by statute and are limited to those conferred expressly or by necessary implication.") (quoting Board of Supervisors v. Horne, 215 S.E.2d 453, 455 (Va. 1975)). So viewed, Virginia Code section 15.1-486 conferred authority "to prohibit a specific use of land. While the language [did] not specify a landfill as one of the uses that [could] be prohibited, such specificity [was] not necessary even under the Dillon Rule of strict construction." Id. at 882.
250. See POWELL & ROHAN, supra note 222, § 79C.03[3].
252. See infra notes 347-54 and accompanying text.
253. See VA. CODE ANN. § 15.1-430(p).
ance does not run afoul of the "intended spirit and purpose of the ordinance," and when "substantial justice" will be done.  

A "variance" does not address circumstances of "change in use." Those circumstances require "rezoning" or "conditional zoning."  

IV. THE LOCAL COMPREHENSIVE PLAN: DEFINING CONSSENSUS AND SELF-IMAGE AT THE COMMUNITY LEVEL

Again using Virginia's statute as a touchstone, this Article notes that Virginia Code section 15.1-446.1, for example, requires the local zoning commission to "prepare and recommend a comprehensive plan for the physical development of the territory within its jurisdiction." To that end, the commission is to "make careful and comprehensive surveys and studies of the existing conditions and trends of growth, and of the probable future requirements of its territory and inhabitants." In preparing a comprehensive plan, the commission "shall survey and study" the use of the land, preservation of agricultural and forested lands, trends of growth or change, probable future economic growth and population growth, and other factors. In short, the comprehensive plan is the community's description of its self-image—it's plans for population growth, commercial and economic stability, and improved quality of life. In Virginia, the plan's purpose is to "guid[e] and accomplish[ ] a coordinated, adjusted and harmonious development of the territory which will, in accordance with present and probable future needs and resources best promote the health, safety, morals, order, convenience, prosperity and general welfare of the inhabitants." More broadly, it serves the important purpose of guarding against "arbitrary, capricious, and unreasonable exercise[s] of the . . . police power," such as "spot zoning," by rationalizing the

254. Id.
255. Id.
256. Id.
257. Id. § 15.1-446.1.
258. Id.
259. See id. § 15.1-446.1, 15.1-447(A)(1).
260. See id. § 15.1-446.1.
261. Id.
exercise of authority.262

The comprehensive plan "may include but need not be limited to": (1) the designation of areas for public and private development and use such as "residential, business, industrial, agricultural, mineral resources, conservation, recreation, public service, flood plain and drainage, and other areas";263 (2) the designation of a system of transportation facilities ranging from streets and roads to airports;264 (3) the designation of a system of community service facilities such as "parks, forests, schools, playgrounds, public buildings and institutions, hospitals, community centers, waterworks, sewage disposal or waste disposal areas and the like";265 (4) the designation of areas warranting special treatment, such as historical or urban renewal areas;266 (5) attention to groundwater protection concerns;267 (6) "an official map, [as well as] a capital improvements program, a subdivision ordinance, a zoning ordinance and zoning district maps . . . where applicable";268 and (7) the designation of areas for measures to provide affordable housing.269 In Virginia, apparently, the plan is a guideline and is not, itself, a mandatory land-use ordinance.270 The preparation of the plan, however, is mandatory and it must be renewed every five years.271

The subdivision ordinance, or component of the comprehensive plan, must provide for plat details sufficient for recordation under applicable Virginia law, for coordination of streets within

262. POWELL & ROHAN, supra note 222, § 79C.02[1].
264. See id. § 15.1-446.1(2).
265. Id. § 15.1-446.1(3).
266. See id. § 15.1-446.1(4).
267. See id. § 15.1-446.1(5).
268. Id. § 15.1-446.1(6).
269. See id. § 15.1-446.1(7).
270. See Board of Supervisors v. Safeco Ins. Co., 310 S.E.2d 445, 448 (Va. 1983); Board of Supervisors v. Snell Constr. Corp., 202 S.E.2d 889, 894 (Va. 1974). The statute reads: "Whenever the local commission shall have recommended a comprehensive plan or part thereof for the county or municipality and such plan shall have been approved and adopted by the governing body, it shall control the general or approximate location, character and extent of each feature shown on the plan." VA. CODE ANN. § 15.1-456(A). The apparent exception to "guidance" status is for streets, parks, and other public facilities as to which the plan's provisions are mandatory. See id.
and contiguous to the subdivision, for drainage and flood control, for street grading and graveling, and for the dedication for public use of rights of ways such as gutters, streets, and bicycle trails.\footnote{272} Plats of proposed subdivisions and site plans must be submitted for approval and the ordinance may require preliminary submissions, with accompanying timelines for administrative action.\footnote{273} Once approved, a subdivision plat will be valid for not less than five years or such longer period as the local authority concludes appropriate.\footnote{274} Notably, "[a] site plan shall be deemed final once it has been reviewed and approved by the locality if the only requirement remaining to be satisfied in order to obtain a building permit is the posting of any bonds and escrows."\footnote{275} Finally, the subdivision ordinance itself may include a provision for a variance or exception to the general regulations "in cases of unusual situations or when strict adherence to the general regulations would result in substantial injustice or hardship."\footnote{276} These statutory regulations establishing a zoning scheme are only the basic elements of local day-to-day land-use planning. Local planners have a variety of other tools that they can use to balance competing interests and to foster accommodation.

\footnote{272}{See VA. CODE ANN. § 15.1-466(A) (Michie Supp. 1996).}
\footnote{273}{See id. § 15.1-475(A)-(C).}
\footnote{274}{See id. § 15.1-475(D).}
\footnote{275}{Id. The statute continues: For so long as the final site plan remains valid in accordance with the provisions of this section, or in the case of a recorded plat for five years after approval, no change or amendment to any local ordinance, map, resolution, rule, regulation, policy or plan adopted subsequent to the date of approval of the recorded plat or final site plan shall adversely affect the right of the subdivider or developer or his successor in interest to commence and complete an approved development in accordance with the lawful terms of the recorded plat or site plan unless the change or amendment is required to comply with state law or there has been a mistake, fraud or a change in circumstances substantially affecting the public health, safety or welfare. Id. § 15.1-475(F).}
\footnote{276}{Id. § 15.1-466(B).}
V. TOOLS OF LOCAL ACCOMMODATION: COMMUNITY GOALS AND EXPECTANCY

By the time state legislation authorizes translating the majority's concern over local land use into actual regulation, a comprehensive plan is drawn helping to crystallize the local majority's concerns, land-use ordinances are developed at the local level, and those ordinances are brought to bear on proposed land uses through subdivision proposals, site plans, building permits, and so on, the regulated landowners have had several opportunities to participate in the design of the land-use regulatory system. Still, the system has recognized the advantage of encouraging use compatible with the defined community goals, even after the plan has been formulated. The regulatory system has developed many tools to allow "fine-tuning" of the plan and to accommodate development within the community's comprehensive plan. These tools of accommodation are discussed below.

A. Nonconforming Uses

The local zoning structure may simply exempt those uses existing at its effective date. The nonconforming use concept addresses those uses already existing at the time of a change in zoning classification. Virginia's zoning structure provides expressly that it will not be construed to impair vested rights, but it does authorize zoning ordinances to address nonconforming structures "so long as the then existing or a more restricted use continues and such use is not discontinued for more than two years...." To remain within this protection, a changing use must have sufficient connection to the use existing at the time of the ordinance. Changes in the character of use may, for ex-

278. See, e.g., id.
279. Id.
280. See Masterson v. Board of Zoning Appeals, 353 S.E.2d 727, 734-35 (Va. 1987) (stating that under the local ordinance, current zoning was residential and accessory commercial parking was not permitted in the residential district; accordingly, the court held that the parking lot owner had to establish that its nonconforming use was lawful "by proving[ing] that its [commercial] use began before the residential zoning restriction applied").
ample, be measured by the quantity of the increase in use and its effects on the underlying policies of the zoning ordinance. 281

In *Bernardsville Quarry, Inc. v. Borough of Bernardsville*, 282 the plaintiff purchased a quarry in 1987. 283 The quarry had been declared a nonconforming use in 1963 and at that time the previous owner had agreed to a mining depth limitation. 284 The plaintiff initially mined under two temporary certificates of occupancy; the second certificate, however, was suspended when Borough engineers discovered asbestos material at the site. 285

In 1988, the plaintiff filed for an application to mine and excavate down to levels below the earlier stipulated floor. 286 The Borough denied the application. 287 The court concluded that the plaintiff had no reasonable expectation at the time of its acquisition to quarry 10,000,000 metric tons "without being subject to significant governmental restrictions." 288 Under local law, "[a]lthough a nonconforming use protect[ed] a property owner against subsequent zoning restrictions, it clearly [did] not prevent a municipality from regulating the land, pursuant to its police power, in the public interest." 289

**B. Amortization**

Amortization is another mechanism for adjusting the final fit between local land-use policy goals and the individual proposed use. 290 This technique is frequently seen in the context of regul-

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281. See Knowlton v. Browning-Ferris Indus., 260 S.E.2d 232, 237 (Va. 1979) ("Recognizing that a nonconforming use need not remain static, we consider whether the character of the nonconforming use in existence when the zoning restriction was imposed has been continued or changed."). In this case the change was from a small, four truck trucking enterprise hauling random cargoes to a trash collection and disposition business. See id.
283. See id. at 1378.
284. See id. at 1379.
285. See id.
286. See id.
287. See id.
288. Id. "It seems to us that the property owner necessarily expects the use of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police power." Id. (quoting Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1027 (1992)).
289. Id. at 1385.
290. See, e.g., Naegle Outdoor Adver. v. City of Durham, 803 F. Supp. 1068, 1077
lating roadside billboards. For example, *Naegele Outdoor Advertising v. City of Durham* involved an ordinance by the city that regulated billboard style. It prohibited all commercial, off-premise advertising signs after completion of a five and one-half year amortization period. The district court opinion, adopted by the circuit court of appeals without opinion, recognized that amortization periods have been included in zoning ordinances to avoid eminent domain proceedings and to provide an alternative to forbidding nonconforming uses. "For an amortization period to be reasonable it must give the property owner a reasonable opportunity to recoup or minimize the loss of use of his property by the end of the amortization period." *Naegele* recovered substantially more than its investment and, indeed, benefitted during the years in which the litigation was pending.

C. Conditional Zoning and Open Space

Conditional zoning is a key local tool in accommodating changing land-use goals and expectancies. Under Virginia's structure, conditional zoning allows additional or modified use requirements beyond those of the overall zoning ordinance for particular zoning districts. Some intriguing flexibilities exist.

(M.D.N.C. 1992), aff'd, 19 F.3d 11 (4th Cir. 1994).
291. See, e.g., id.
292. Id.
293. See id. at 1070.
294. See id.
295. See *Naegele*, 19 F.3d at 11.
296. See *Naegele*, 803 F. Supp. at 1077.
297. Id. "Reasonableness" factors listed by the court included: the initial cost of, or investment in, the signs, the degree to which the signs have been fully depreciated, the remaining useful life, the replacement cost and salvage value of the signs, the alternative uses for the signs, the loss of revenue as a result of the ordinance, and the percentage of signs affected.

*Id.* at 1077-78.

298. *Naegele* received $1,707,559.18 from the disputed signs during the amortization period. *Naegele* has benefitted from income it earned from the disputed signs for the additional years while this litigation has been pending. The revenue *Naegele* earned from the disputed signs . . . far outweighed its costs.

*Id.* at 1078.

299. See VA. CODE ANN. § 15.1-430(q) (Michie Supp. 1996); see also id. § 15.1-
For instance, in the context of a rezoning or an amendment to a zoning map, the ordinance may apparently provide for "the voluntary proffering in writing, by the owner, of reasonable conditions" relating to the rezoning, but not including cash payments to the county or the municipality or mandatory dedications. If the proffered conditions nonetheless include a dedication of real property of substantial value or construction of substantial public improvement "the need for which is not generated solely by the rezoning," the resulting zoning receives a status protected against change.

An especially intriguing flexibility exists for communities experiencing ten percent or more growth in population since 1980 and for their adjacent communities. In those jurisdictions, ordinances may provide that, in the context of a rezoning or amendment to a zoning map, developers can propose or voluntarily proffer "conditions" having a reasonable relationship to the proposed rezoning. The "proffered" conditions must be attributable to the rezoning itself, must have a reasonable relationship to the rezoning, and must be in conformity with the comprehensive plan.

In these jurisdictions, the proffers may include not only the dedication of property but also the contribu-
tion of cash. If accepted by the jurisdiction as amendments to the zoning ordinance, the conditions generally continue until subsequent amendment. They may be effective even longer if the subsequent amendment becomes part of a "comprehensive implementation of a new or substantially revised zoning ordinance." If the condition includes a dedication of real property of substantial value, or substantial cash payments for (or construction of) public improvements beyond the needs of the rezoning itself:

Then no amendment to the zoning map for the property subject to such conditions, nor the conditions themselves, nor any amendments to the text of the zoning ordinance with respect to the zoning district applicable thereto initiated by the governing body, which eliminate, or materially restrict, reduce, or modify the uses, the floor area ratio, or the density of use permitted in the zoning district applicable to such property, shall be effective with respect to such property unless there has been mistake, fraud, or a change in circumstances substantially affecting the public health, safety, or welfare.

This proffer system seems well-suited to a broad spectrum of community goals and land-use expectancies, including open space and environmental protection. Developers agree to certain restrictions, such as an open space requirement, and in turn if their proffer is deemed substantial enough, receive protection against zoning changes for a number of years. Thus, both sides benefit.

Traditional zoning separated uses and regulated densities and setbacks. Once classified, the spaces were usually developed. Even if space was left at that time, today's redevelopment will frequently consume the maximum capacity of the tract and effectively consume all free space. In the end, traditional zoning faces

305. See id.
306. See id.
307. Id.
308. Id. § 15.1-491.2:1(B).
309. See generally MANDELKER, supra note 13, §§ 5.01 to 5.74 (describing zoning for land use, density, and site development in the United States).
great difficulty in protecting open spaces. Preserving open space, of course, also constitutes the most significant challenge to landowner expectancy.

In new developments, conditional zoning offers a particularly potent tool for bridging that gap.\textsuperscript{310} For instance, a portion of a tract may be developed to a higher than otherwise applicable density on the condition that the remainder of the tract will be committed to open space.\textsuperscript{311} In this way, the landowner's development potential in the property is preserved.\textsuperscript{312} In addition, infrastructure and its costs are concentrated in the developed segment.\textsuperscript{313} This approach serves to reduce both the costs of development and the costs of public services. The enhancement that the open space brings to the smaller "cluster" development lots stands a good chance of also increasing the development's overall value. Cluster open space planning can be triggered in zoning districts where public policy favors preserving certain environmentally sensitive properties, where development may exceed a set proportion of the development potential for a tract, and where large lots are planned for development.

The dynamic that exists among conditional zoning, open space protection, and landowner expectancy appears in the case law as well. In a California case, \textit{Ramona Convent of the Holy Names v. City of Alhambra},\textsuperscript{314} the city declined to sponsor the Convent's proposed project for a 1.97 acre parcel, reasoning that the parcel "would have been too small to be conducive to any of the uses permitted for open space."\textsuperscript{315} Without that sponsorship, the

\textsuperscript{310} Some jurisdictions are even more assertive, requiring open space. \textit{See}, e.g., River Birch Assoc. v. City of Raleigh, 388 S.E.2d 538, 540 (N.C. 1990) (involving a city ordinance requiring 10% of the area of a townhouse development be reserved as open space).

\textsuperscript{311} \textit{See}, e.g., id. at 549-50.

\textsuperscript{312} \textit{See}, e.g., id. at 550.

\textsuperscript{313} In that sense, conditional open space zoning addresses the same concern as TDRs. TDRs, however, also face the additional complication of the need for tracts that can benefit from the TDR, once transferred. \textit{See supra} text accompanying note 8. In conditional open space zoning, the tract itself is developed. \textit{See MANDELKER, supra} note 13, \S 6.64. Voluntary conditional open space zoning also stands in contrast to the involuntary exactions sometimes authorized by land-use planning legislation. \textit{See id.} \S 9.11.

\textsuperscript{314} 26 Cal. Rptr. 2d 140 (App. 1993).

\textsuperscript{315} \textit{Id.} at 142.
developer's density was limited to the existing fifty-nine units and, at that point, it abandoned the project. Distinguishing *Twain Harte Associates, Ltd. v. County of Tuolumne* and *Aptos Seascape Corp. v. County of Santa Cruz* from the case at issue, the appellate court sustained the city's action. It saw the zoning of the 1.97 acre tract as uniform with the larger tract in which it was included. Under existing zoning, previously permitted uses, including open space and educational institutions, remained. The court recognized that "preservation of some open space amidst populated areas [was] a legitimate exercise of the police power, intended to protect area residents from the negative effects of excessive urbanization."

In *American Dredging Co. v. New Jersey*, existing zoning for the landowner's 2500 acre tract limited development to fifty percent. It also required "open space" designation for a portion of the property. As a result, the state's wetland statute, which applied to only eighty acres of the entire tract and left open the possibility for a development permit, created no compensable burden. Lands affected by the wetlands statute easily could be used to meet the separate open space obligation. Classification as "open space," however, is not always a preexisting consideration. In *Taylor v. Village of North Palm*

316. *See id.*
318. 188 Cal. Rptr. 191 (App. 1982).
319. *Ramona Convent*, 26 Cal. Rptr. 2d at 145-46. *Twain Harte* and *Aptos Seascape* involved situations in which the government entity created different zones within a single parcel and restricted development in part of the property. *See id.* In contrast, in *Ramona Convent*, the city did not zone the 1.97 acre tract differently from the rest of the larger parcel. *See id.* at 146.
320. *See id.*
321. *See id.* at 147.
324. *See id.* at 43-44.
325. *See id.* at 43.
326. *See id.* at 44.
327. *See id.*
Beach, the village promulgated a new comprehensive plan changing formerly designated commercial use areas into "conservation/open space." Although the owner resorted to a takings claim, he was unsuccessful. He had sought neither an exception to the new designation nor a development permit.

D. Special Use Permits

Another tool to balance competing interests is the special use permit. In general, special use permits apply to proposed uses which are, overall, in conformance with the applicable zoning requirements but which require some special considerations. They may be of more broad utility than an outright "variance" because the latter relies on meeting a rigorous standard of showing hardship. Depending on the jurisdiction, however, the special exception may not create a continuing entitlement in the face of changing zoning regulations. In O'Donnell v. Bassler, the special exception permit did not protect commercial aircraft operations authorized under previously existing zoning regulations. Similarly, in Rockville Fuel & Feed Co. v. Gaithersburg, a batch plant holding a special exception permit was exposed to the risk of subsequent reclassification of permissible uses in the zone.

329. See id. at 1169.
330. See id. at 1170-74.
331. See id. at 1174.
333. See, e.g., id. § 15.1-430(p) (providing that a variance is appropriate when strict application of the zoning ordinance would result in "unnecessary or unreasonable hardship").
335. See id. at 1010 (holding that the local board had authority to issue a permit, and that the circuit court could not substitute its judgment in setting aside the conditions administratively imposed by the board).
337. See id. at 676-77. Notwithstanding a prior court order that the landowner should have its application for a special exception, the company had not obtained a building permit and had not begun construction before the local municipality placed the batch use into a prohibited category on the basis of public health and safety concerns. See id. at 677. Under Maryland law, a vested expectancy requires a permit or occupancy certificate and action on the permit such that the neighborhood is placed on notice that the land is being devoted to that use. See id. at 676. As these
In Virginia, the zoning statute authorizes local ordinances to include provisions for special exceptions. In *Bell v. City Council*, the court distinguished special use exceptions from variances. The special use exception would not cover a proposed use inconsistent with the local ordinance: the use must conform to the comprehensive plan and have no undue adverse impact on the surrounding neighborhood. Its purpose would be to allow the owner to develop consistently with the ordinance, provided that certain conditions were met. Virginia cases, unlike Maryland cases, indicate that when the special use permit is coupled with good faith reliance and substantial investment, the use will be protected against subsequent zoning reclassification.

**E. Variances**

Unlike conditional zoning and special use exceptions, the local variance is a hardship device. As is true with the other tools, the grant of a variance is discretionary with the local authority. In *Francini v. Zoning Board Appeals*, for instance, a local Connecticut zoning board denied a variance to construct a year-round home inconsistent with lot size limitations.

The board concluded only that construction of such a dwelling on the property would not be in harmony with the other, mostly seasonal, dwellings in the area, and that the plaintiff's conditions had not occurred, the exception conferred no protection against the zoning reclassification. See *id.* at 677.

339. 297 S.E.2d 810 (Va. 1982).
340. See *id.* at 813-14.
341. See *id.* at 814.
342. See *id.*
343. See Board of Supervisors v. Cities Serv. Oil Co., 193 S.E.2d 1, 3 (Va. 1972) (barring rezoning when the defendant had obtained a special use permit for a gas station, purchased property, incurred preparation and site plan expense, and relied in good faith on the current system); see also Board of Supervisors v. Medical Structures, Inc., 192 S.E.2d 799, 801 (Va. 1972) (barring rezoning after the defendant had obtained a special use permit and a site plan and invested substantial sums in the project).
344. 639 A.2d 519 (Conn. 1994).
345. See *id.* at 520.
year round use of a septic system could pose a health hazard to his neighbors. The minutes of the meeting on the plaintiff's application for a variance, however, reflect the board's view that construction of a seasonal home on the property would constitute a reasonable alternative use of the lot in conformity with the existing development of the area. 346

Under Virginia's approach, boards of zoning appeals, which are required for jurisdictions that have zoning ordinances, are authorized to grant variances from the terms of an ordinance when doing so is not contrary to the public interest. 347 A hardship showing is key to making the case for a variance. 348 Even having shown hardship, however, the authorized body is to take care that the "spirit of the ordinance shall be observed and substantial justice done." 349 Variances are an option for properties "acquired in good faith," which by reason of their own unique circumstances or those of adjacent property are ones for which "strict application" of the ordinance would "effectively prohibit or unreasonably restrict the utilization of the property" or where granting the variance would relieve "clearly demonstrable hardship approaching confiscation." 350

Local case law indicates that the zoning board of authority should consider whether the ordinance's strict application will produce an unnecessary hardship, whether that hardship is one not shared by other properties in the zone, and whether granting the variance will be a substantial detriment to adjoining properties. 351 In Bell v. City Council, 352 for instance, the court described a variance as appropriate when the location or shape of the property or other considerations demonstrated the statu-

346. Id. at 523.
348. See id. § 15.1-495(2)(a).
349. Id. § 15.1-495(2).
350. Id.
351. See Prince William County Bd. of Zoning Appeals v. Bond, 300 S.E.2d 781, 782-83 (Va. 1983) (holding that economic impact is not a dispositive concern and that the landowner's limitation of use to one dwelling was not a hardship for variance purposes; as a result, the request in essence was an application for a rezoning—a purely legislative function).
352. 297 S.E.2d 810 (Va. 1982).
torily required hardship. Unlike special exceptions in some states, a variance does not, alone, insulate a permitted use against subsequent change in land-use classifications.

F. Vested Rights

This Article has now touched on the basic premises of an orderly local land-use planning and implementation structure. It has outlined the basic local tools for adjusting remaining tensions between the community consensus and individual land use: conditional zoning, special use permits, variances, nonconforming uses, and amortization. These tools promote accommodation, adjusting the fit between common goals and individual expectancy. In varying ways, they attempt to either reconcile new uses with preexisting planning or afford preexisting expectancies an opportunity to survive changes in majoritarian planning.

Variances, nonconforming uses, and amortization approach the

353. See id. at 813-14 (stating that a variance allows the property owner to do "what is otherwise not allowed under the ordinance"; in contrast, a special exception applies to uses consistent with the ordinance but which require the approval of the zoning authority with regard to the meeting of specified conditions).

354. See id. In another case, Snow v. Amherst County Board of Zoning Appeals, 448 S.E.2d 606 (Va. 1994), the court held that a variance from setback restrictions was not a significant official governmental act for purposes of claiming a vested right to build on property subsequently included in a watershed district, where construction was prohibited by ordinance. See id. at 607-08. The court also found that in Virginia:

a landowner who seeks to establish a vested property right in a land use classification must identify a significant official governmental act that is manifested by the issuance of a permit or other approval authorizing the landowner to conduct a use on his property that otherwise would not have been allowed.

Id. Additionally, and equally importantly, the court held that the landowner had established that he pursued diligently the use that the government permit or approval authorized and that the landowner incurred substantial expense in good faith prior to the change in zoning. See id. To assert a vested property right, a landowner must establish all three elements just listed. See id.

355. See supra Parts IV-V.
356. See supra Part V.C.
357. See supra Part V.D.
358. See supra Part V.E.
359. See supra Part V.A.
360. See supra Part V.B.
concern in different ways but each provides a basis for determining when a preexisting expectancy will be recognized by the local majority as entitled to survive changing planning goals. With the perspectives these tools offer, this Article closes by analyzing their conceptual local sibling, the concept of a "vested right."

In local land-use planning, the concept of a vested right emerges somewhere along a continuum between policies that simply encourage reliance and those that, perhaps more philosophically but no less pragmatically, pursue the integrity of individual right in "property." In Virginia, the land-use statute makes clear that local jurisdictions may not deprive landowners of their vested rights. In determining whether a vested right exists, reliance theory involves a fact-specific inquiry. In general, the courts survey the particular government action, whether the reliance is in good faith, and whether the landowner's investment has been, in light of the overall project, substantial and continuing. Within this matrix, the courts evaluate the public's interests and the landowner's right to use and consider whether the activities were undertaken under the aegis of a valid land-use approval, such as a building permit. This balancing approach used by local courts is similar to the balancing approach used by the Supreme Court in defining the constitutional boundaries of local land-use planning powers.

In Rafferty v. District of Columbia Zoning Commission, landowners acquired no vested right by reason of construction of a townhome in the District of Columbia when they had notice of planned use development limitations through closing and title documents. In Snow v. Amherst County Board of Zoning Ap-

364. See id. at 193. "A purchaser is held to be on inquiry notice where he or she is aware of circumstances which generate enough uncertainty about the state of title that a person of ordinary prudence would inquire further about those circumstances." Id. (quoting Clay Properties, Inc. v. Washington Post Co., 604 A.2d 890, 895 (D.C. 1992)). Estoppel elements in the District are: "(1) expensive and permanent improvements, (2) made in good faith, (3) in justifiable and reasonable reliance upon, (4) affirmative acts of the District government, (5) without notice that the improvements might violate the zoning regulations, and (6) equities that strongly favor the petitioners." Id. at 193 n.1.
The court concluded that a variance that allowed setbacks beyond those that the ordinance permitted did not create a vested right to build a watershed. Subdivision platting and a subdivision itself were not enough to give rise to a vested right in a recent Maryland case. Similarly, in Town of Stephens City v. Russell, the filing of a proposed subdivision plat and site plan, without approval, was not enough to anchor a vested right against downzoning. In another case, a landowner’s reliance on the advice of a state agency to move forward with studies for construction of a nonhazardous waste landfill confronted later county zoning that precluded the landfill. Again, the agency's advice was insufficient to secure a vested right.

Preliminary land-use planning was not enough in Georgia and not enough in South Carolina. Land acquisition was not enough in Town of Vienna Council v. Kohler and preliminary

365. 448 S.E.2d 606 (Va. 1994).
366. See id. at 608.
367. Montgomery County v. Waters Landing Ltd. Partnership, 635 A.2d 48, 59 (Md. Ct. Spec. App. 1994) (“There is nothing in Montgomery County's regulations that give a party a vested right to acquire a building permit simply because the Planning Commission approved the subdivision of property.”); see also Washington Suburban Sanitary Comm’n v. TKU Assocs., 376 A.2d 505, 516 (Md. 1977) (holding that dedication of a right of way did not vest rights against subsequent rezoning absent a showing that an authority knew that a sewer permit would not issue or absent a showing that the county's regulations guaranteed that zoning would not change).
369. See id. at 816.
370. See Notestein v. Board of Supervisors, 393 S.E.2d 205, 207-08 (Va. 1990) (holding that a significant government action was required to permit a use not otherwise allowable).
371. See Cohn Communities, Inc. v. Clayton County, 359 S.E.2d 887, 889 (Ga. 1987) (holding that when a landowner makes a substantial change in position by fronting expenditures in reliance on the probability of the issuance of a permit based upon assurances of zoning officials, a vested right can arise; ultimately, however, the court held that the alleged “representation” was merely a letter from the county planner stating the tract's current zoning).
372. See Whitfield v. Seabrook, 190 S.E.2d 743, 745-46 (S.C. 1972) (holding that expenditures made before the issuance of a building permit were not made in reliance on it).
373. 244 S.E.2d 542, 548 (Va. 1978) (noting, however, that the town’s decision denying rezoning to permit townhouse clusters and instead granting rezoning to single-family residences showed no relationship to the health, safety, and welfare of the community and was thus invalid; accordingly, an injunction was issued to protect the cluster use).
planning that was not directed to actual construction was not enough in Nashua, New Hampshire.\textsuperscript{374} Even the investment of one million dollars in studies and development plans may not be enough.\textsuperscript{375}

\textit{Town of Largo v. Imperial Homes Corp.}\textsuperscript{376} addressed "equitable estoppel vesting." The landowner encountered a density reduction after the town earlier had approved a rezoning allowing for multiple-family zoning, knowing that the developer was relying on the town's determination.\textsuperscript{377} Defining the elements of equitable estoppel for zoning purposes as reliance in good faith on an act or omission of the government accompanied by a substantial change in position or extensive obligations or expenses, the Florida court protected the developer from a reduction to single-family use.\textsuperscript{378} Finally, unauthorized government actions, generally, will not give rise to a vested right.\textsuperscript{379}

Under different factual circumstances, courts have found a vested right. Where a permit was continuously reissued over an eighteen-year period for unrestricted construction with government knowledge of continuing investment, a vested right attached.\textsuperscript{380} Approval of a preliminary and final subdivision plan

\begin{itemize}
\item \textsuperscript{374} See Gosselin v. City of Nashua, 321 A.2d 593, 596 (N.H. 1974) (holding that incurring substantial expenses for planning, architecture, and engineering, where these were not directly related to actual construction of the proposed shopping center, did not create a vested right).
\item \textsuperscript{375} See County Council v. District Land Corp., 337 A.2d 712, 721 (Md. 1975) (stating that possession of a building permit together with spending one million dollars on studies and plans for development of property, in reliance on existing zoning, created no vested right where there was not actual construction).
\item \textsuperscript{376} 309 So. 2d 571 (Fla. Dist. Ct. App. 1975).
\item \textsuperscript{377} See id. at 572.
\item \textsuperscript{378} See id. at 572-573.
\item \textsuperscript{379} Compare Gunkel v. City of Emporia, 835 F.2d 1302, 1304 (10th Cir. 1987) (stating that a building permit issued by mistake conferred no vested expectancy) \textit{with} City of Berea v. Wren, 818 S.W.2d 274, 277 (Ky. Ct. App. 1991) (holding that when a permit was issued as a result of an "honest error" misreading of the official zoning map, the court protected the expectancy because the error was an honest one and was not raised until over a year after the permit was issued and after the property owner had expended substantial monies in site preparation).
\item \textsuperscript{380} See Equity Resources, Inc. v. County of Leon, 643 So. 2d 1112, 1119 (Fla. Dist. Ct. App. 1994) (holding that where a phased project is planned, Florida has "upheld vested rights in the zoning for the entire project without any showing that costs incurred ... in planning and commencing construction [could] be exclusively attributed to each and every part of the overall project").
\end{itemize}
vested a right to develop against a subsequent ordinance amendment and rejection of the site plan.\textsuperscript{381} An approved site plan protected the land use against a prospective moratorium.\textsuperscript{382} Where construction had progressed substantially on the basis of an approved building permit, the permit could not later be cancelled because the structure exceeded maximum lot occupancy.\textsuperscript{383} The court in \textit{Fifteen Fifty North State Building Corp. v. City of Chicago}\textsuperscript{384} sustained a vested right where an architectural contract and expenditures of approximately two hundred thousand dollars had occurred.\textsuperscript{385} In \textit{Board of Supervisors v. Medical Structures, Inc.},\textsuperscript{386} the combination of a site plan, diligent development activities, substantial investment, and a special use permit protected a nursing home against subsequent zoning change.\textsuperscript{387} Similarly, in \textit{Board of Supervisors v. Cities Service Oil Co.},\textsuperscript{388} good faith reliance on existing zoning, preparation and site plan expenses, and a special use permit protected the gas station use.\textsuperscript{389} Finally, where the histories of two parts of a tract differ, differing conclusions can govern each parcel. In \textit{Prince George's County v. Equitable Trust Co.},\textsuperscript{390} issuance of a building permit and the beginning of substantial construction protected .8 acres of a tract but subdivision alone did not protect the remaining 11.2 acres.\textsuperscript{391}

Reliance or equitable vesting, although sensitive to the justice of the particular dispute, provides, at best, rough predictability.


\textsuperscript{382} See Harlow v. Planning & Zoning Comm'n, 479 A.2d 808, 812 (Conn. 1984) (stating that the previously pending application was not a "future" application within the scope of the moratorium on site plan approvals).


\textsuperscript{384} 155 N.E.2d 97 (Ill. 1959).

\textsuperscript{385} See id. at 101-02 (stating that obligations and expenditures incurred in reliance on a building permit under an ordinance authorizing use of land for a 25-story apartment building created a vested right).

\textsuperscript{386} 192 S.E.2d 799 (Va. 1972).

\textsuperscript{387} See id. at 801.

\textsuperscript{388} 193 S.E.2d 1 (Va. 1972).

\textsuperscript{389} See id. at 3.


\textsuperscript{391} See id. at 743.
In that sense, equitable vesting is distinguishable by degree from variances, nonconforming use policies, and amortization. Because of the only rough predictability that equitable vesting provides, some jurisdictions have enacted statutory vesting structures. These statutes pinpoint specific stages of the zoning and development process as sufficient to vest interests. In North Carolina, for example, failure to comply with the requirements of statutory vesting leaves the use exposed to change. Moreover, in some states, the statutory system may provide for a period during which its protection exists and after which it lapses.

VI. CONCLUSIÓN

This Article’s purpose has been to survey the local land-use planning landscape. By referencing the stresses on the Washington metropolitan area, the Article highlighted the continuing challenges of accommodating growth and expectancy. To meet these challenges, local interests have developed a broad menu of devices, from the general to the precise, for attempting to balance change and expectancy. Local courts, council members, zoning officials, planners, and landowners operate within these frameworks in the practical day-to-day world.

As this Article has attempted to illustrate, it is in this day-to-day world that the fundamentals of change and expectancy are played out. Constitutional cases have long provided outer boundaries. Against this backdrop, millions of local land-use decisions have been reached with few disputes sufficiently intense to trigger Supreme Court attention. Even so, the Court has played a

393. See id. §§ 153A-344.1(c), 160A-385.1(c).
394. See id.; see also Nello L. Teer Co. v. Orange County, 810 F. Supp. 679, 688-89 (M.D.N.C. 1992), aff’d in part, rev’d in part, 993 F.2d 1538 (4th Cir. 1993) (unpublished table opinion), available in 1993 WL 177872 (holding that stone quarry use was not protected against zoning change); Simpson v. City of Charlotte, 443 S.E.2d 772, 776 (N.C. Ct. App. 1994) (stating that under the statute, a construction permit was not equivalent to a building permit for purposes of vesting).
vital role in defining constitutional land-use law. The struggle between change and expectancy, while generally handled at the local level, has also been a constant thread running through the Court's cases.

The vitality and primacy of local land-use planning structures, as highlighted throughout this Article, indicates that a broad array of options for addressing still-evolving local land-use concerns remain available for individuals and local planners. This vital local land-use world is comforting. The continuing struggle, it seems, is the norm, not the exception. It has prompted constant change and innovation. One lesson from the Court's recent cases may be simply to remind us of the societal importance of this delicate art of local land-use balancing.