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Article 1

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## The Rebirth of the Neighborhood

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# THE REBIRTH OF THE NEIGHBORHOOD

Essay

*J. Peter Byrne\**

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## INTRODUCTION

Since 1972, American cities have lost political power and federal support. Large scale federal programs to reverse urban decline, such as urban renewal, public housing, and the War on Poverty, had at best checkered outcomes and their vestiges were largely dismantled during the Reagan Administration.<sup>1</sup> Legal reforms proposed to strengthen the economic or political position of cities, through such approaches as regionalism and enhanced city authority, also have failed to remedy such decline. Nonetheless, many cities have experienced phenomenal population growth and economic development over the past decade. Washington, D.C. has reversed a population decline dating to 1950,<sup>2</sup> and many other cities, from Boston to San Diego, and from Seattle to Miami, have seen renewed investment in residential, retail, and business real estate, often in areas recently blighted with

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1. See, e.g., ALEXANDER VON HOFFMAN, *HOUSE BY HOUSE, BLOCK BY BLOCK: THE REBIRTH OF AMERICA'S URBAN NEIGHBORHOODS* 8–14 (2003).

2. The population of Washington, DC touched 800,000 in the 1950s, crashed after the 1968 riots, hitting a low of 565,000 in 1998, and rose to 635,000 in 2012. *Population in the U.S.: District of Columbia*, GOOGLE PUBLIC DATA, [http://www.google.com/publicdata/explore?ds=kf7tgg1uo9ude\\_&met\\_y=population&hl=en&dl=en&idim=state:11000](http://www.google.com/publicdata/explore?ds=kf7tgg1uo9ude_&met_y=population&hl=en&dl=en&idim=state:11000) (portraying U.S. Census data).

abandoned warehouses and decaying housing.<sup>3</sup> While such developments have not progressed evenly either within or among cities, they project a hopeful future for urban living and social justice. What has happened?

There is no adequate microeconomic explanation for this development. Decline in industrial economy first drained cities of capital, but then created opportunities for reinvention and redeployment of singular assets. Macroeconomic changes eliminated urban manufacturing and other blue-collar jobs but engendered new employment in service and information industries for educated brain workers.<sup>4</sup> Some of this enlarged class came to seek a new residential form. People began to seek older housing in inner city areas with easier access to work and within walking distance of shops, restaurants, and cultural amenities. Many early ventures into real estate by “pioneers” depended on low prices, small loans, and self-help. Professional workers from large organizations, such as government, corporations, and universities, took over housing built long ago for tradesmen, skilled laborers, and small scale entrepreneurs.<sup>5</sup> In time, developers, architects, and financiers renovated multi-family housing and erected new apartment buildings, including “luxury lofts” evoking manufacturing buildings once converted to artist studios. The demand for urban housing meeting these aesthetic and lifestyle standards now often exceeds supply, pushing prices higher.<sup>6</sup>

What are these new urban residents seeking? This Essay argues that new urban residents primarily seek a type of community properly called a neighborhood. “Neighborhood” refers to a legible, pedestrian-scale area that has an identity apart from the corporate and bureaucratic structures that dominate the larger society. Such a neighborhood fosters repeated, casual contacts with neighbors and merchants, such as while one pursues Saturday errands or takes children to activities. Dealing with independent local merchants and

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3. On contemporary urban economies, see BRUCE KATZ & JENNIFER BRADLEY, *THE METROPOLITAN REVOLUTION: HOW CITIES AND METROS ARE FIXING OUR BROKEN POLITICS AND FRAGILE ECONOMIES* (2013).

4. See JON C. TEAFORD, *METROPOLITAN REVOLUTION—THE RISE OF POST-URBAN AMERICA* 165–84 (2006); J. Peter Byrne, *Two Cheers for Gentrification*, 46 *How. L.J.* 405, 407 (2003).

5. The process in one locale is described in depth in SULEMIN OSMAN, *THE INVENTION OF BROWNSTONE BROOKLYN: GENTRIFICATION AND THE SEARCH FOR AUTHENTICITY IN POSTWAR NEW YORK* (2011).

6. See *infra* note 43 and accompanying text.

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artisans face-to-face provides a sense of liberation from large power structures, where most such residents work. Having easy access to places of sociability like coffee shops and bars permits spontaneous “meet-ups,” contrasting with the discipline of professional life. Such a neighborhood conveys an indigenous identity created by the efforts of diverse people over time, rather than marketing an image deliberately contrived to control the perceptions of customers. At its best, a neighborhood provides a refuge from the ennui of the workplace and the idiocy of consumer culture, substituting for churches (or synagogues), labor unions, and ethnic clubs that structured earlier urban social life.

What changes in land use law have contributed to or supported this transformation to neighborhood-based living? Several legal developments outside land use seem very important. Perhaps the most central legal development has been local government legal protections for gays, who often have been in the vanguard of the revival of urban neighborhoods.<sup>7</sup> Crime reduction has significantly enhanced urban living since the 1970s, but which laws have contributed what to that reduction is a matter of intense debate.<sup>8</sup> Civil rights laws and immigration reform have arguably nurtured a comfort with multi-ethnic urban neighborhoods that has turned discrimination and resentment to a comfort with and even celebration of diversity.

But changes in land use law, broadly understood, also helped provide the context for the revival of neighborhoods. This brief Essay highlights those aspects of land use law that have supported this new urbanization since the founding of the *Fordham Urban Law Journal*. The claim is not that legal reforms caused the revival, but that they contributed to a broader social trend. These reforms have supported neighborhood revival primarily by securing the physical environments people want to live in. The three chief legal tools for neighborhoods have been zoning for urban form, historic district preservation, and environmental protection.<sup>9</sup>

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7. Early neighborhood revitalization by gay pioneers and their subsequent assertions of political power in San Francisco and other cities are described in TEAFORD, *supra* note 4, at 184–89.

8. See, e.g., Steven Levitt, *Understanding Why Crime Fell in the 1990s: Four Factors That Explain the Decline and Six That Do Not*, 18 J. ECON. PERSP. 163, 163–64 (2004).

9. Also contributing to neighborhood focus has been a turn to local influence in development through neighborhood-based community development corporations, see VON HOFFMAN, *supra* note 1, the rise of neighborhood-scale government units,

## I. ZONING FOR URBAN FORM

Zoning constituted the first comprehensive land use regulatory system.<sup>10</sup> Whatever its origins, zoning has been problematic for cities.<sup>11</sup> Its core principle has been separation of uses, which primarily keeps commercial and industrial activities away from residences, and low cost and multi-family residences away from single-family homes. Such zoning, along with front and side setbacks, enshrines the single-family house in a garden as the most protected physical form.<sup>12</sup> Zoning thus played a crucial role in creating Suburbia, with its iconic forms of subdivisions of single-family homes surrounded by lawns, curvilinear lanes off arterial roadways, strip development, shopping centers, and office parks.<sup>13</sup> Suburban zoning discouraged density and created communities dependent on automobiles to move among dispersed homes, stores, and workplaces.<sup>14</sup> It also enabled various degrees of exclusionary practices, keeping lower income citizens, especially those with children, out of affluent, low tax rate suburban jurisdictions.<sup>15</sup> Urban renewal in the 1950s and 60s brought suburban forms into declining cities, which is illustrated by Southwest Washington, D.C. and its rigid separation of uses, anomalous shopping mall, isolated public housing, and an interstate highway.<sup>16</sup>

During the past forty years, the lessons taught by Jane Jacobs about urban form have largely been incorporated into land-use regulation.<sup>17</sup> Zoning continues to perform a central role in such regulation but now most often in the service of promoting walkable, mixed-use neighborhoods connected by transit. Zoning has changed

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such as Washington's Advisory Neighborhood Commissions, and quasi-governmental entities, such as Business Improvement Districts.

10. See ROBERT C. ELLICKSON & VICKI L. BEEN, *LAND USE CONTROLS: CASES AND MATERIALS* 74–75 (3d ed. 2005).

11. Although New York City adopted an influential comprehensive ordinance in 1916, zoning has played its greatest role in shaping suburban jurisdictions developed in reliance on the automobile throughout the twentieth century.

12. The zoning ordinance upheld by the Supreme Court in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), had just this character.

13. See generally DOLORES HAYDEN, *A FIELD GUIDE TO SPRAWL* 7 (2004).

14. See ANTHONY DOWNS, *NEW VISIONS FOR METROPOLITAN AMERICA* 7–9 (1994).

15. See *S. Burlington Cnty. NAACP v. Twp. of Mount Laurel*, 336 A.2d 713 (N.J.), *appeal dismissed*, 423 U.S. 808 (1975).

16. This was the project for which extensive use of eminent domain was upheld by the Supreme Court in *Berman v. Parker*, 348 U.S. 26 (1954).

17. See JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* (1961) (chronicling how urban health was supported by buildings of various uses, sizes, and ages).

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in three distinct ways to play this role. First, cities have sought to deregulate certain uses, simply allowing greater owner initiative to accomplish public planning goals while building for a profit. Significant examples include permitting greater mixing of uses on a single site and reducing off-street parking requirements.<sup>18</sup> This trend now culminates in form-based coding or transect zoning, an approach to land use regulation that substantially relaxes use restrictions in favor of regulating the external form of a building and its relation to public space, with a goal of promoting visual coherence and pedestrian amenity.<sup>19</sup>

Second, traditional zoning with its constraints on urban form has been bargained away to developers eager for greater density through various forms of negotiated development agreements.<sup>20</sup> Savvy jurisdictions have allowed developers to propose alternatives to restrictive as of right zoning that meet revised planning objectives, often exacting significant public amenities in the result.<sup>21</sup> Arlington, Virginia, presents a remarkable example. After persuading the regional Washington Metropolitan Transit Authority to construct a subway under a declining suburban main street (instead of in the middle of a nearby interstate highway), Arlington planned for creating an urban corridor and successfully bargained with developers

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18. Washington, D.C. has been considering such zoning deregulation for a long time now. See David Alpert, *D.C. Looks To the Past to Fix Its Zoning Code*, ATLANTIC CITIES, Feb. 11, 2012, <http://www.theatlanticcities.com/neighborhoods/2012/02/how-dc-used-past-fix-its-zoning-code/1206/>. The eventual result will be less deregulation than proponents sought. See Mike DeBonis, *D.C. Planners Drop Proposal To End Parking Rule for Developers*, WASH. POST, July 14, 2013, [http://www.washingtonpost.com/local/dc-politics/dc-planners-drop-proposal-to-end-minimum-parking-rule-for-developers/2013/07/14/7e80a18e-ecaa-11e2-bed3-b9b6fe264871\\_story.html](http://www.washingtonpost.com/local/dc-politics/dc-planners-drop-proposal-to-end-minimum-parking-rule-for-developers/2013/07/14/7e80a18e-ecaa-11e2-bed3-b9b6fe264871_story.html).

19. See, e.g., Nicole Stelle Garnett, *Redeeming Transect Zoning?*, 78 BROOK. L. REV. 571, 572–74 (2013); Michael E. Lewyn, *New Urbanist Zoning for Dummies*, 58 ALA. L. REV. 257, 268 (2006).

20. Even the U.S. Supreme Court recognizes that bargaining has become “utterly commonplace” in land use regulation. See *Koontz v. St. John’s River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2599 (2013).

21. Examples of bargaining shaping urban character through community benefit agreements are provided in Alejandro E. Camacho, *Community Benefits Agreements: A Symptom, Not the Antidote, of Bilateral Land Use Regulation*, 78 BROOK. L. REV. 355 (2013). Camacho’s scholarship has cogently criticized the processes for regulatory bargaining for not including as stakeholders residents affected by projects. See Alejandro E. Camacho, *Mustering the Missing Voices: A Collaborative Model for Fostering Equality, Community Involvement and Adaptive Planning in Land Use Decisions*, 24 STAN. ENVTL. L.J. 3, 36–46 (2005).

eager to escape restrictive 1950s zoning restrictions, creating a thriving mixed use, transit-oriented corridor.<sup>22</sup>

Third, in some instances, new forms of mandatory regulations have promoted urban form by requiring mixes of uses. Washington, D.C.'s requirement for housing in the downtown area provides a good example. Twenty years ago, developers did not believe there could be a market for housing in downtown Washington. They intended to build only offices, but planners and community activists successfully amended the downtown plan and applicable zoning to require a certain amount of housing downtown.<sup>23</sup> Today, Washington's old downtown has become a twenty-four-hour area with a healthy mix of housing, highly desirable offices, and entertainment. In many areas, requiring retail at ground level or mandatory set asides for affordable housing have promoted attractive urban character.<sup>24</sup> Other amenities, such as arts spaces, have been included within larger development projects because of mandates.<sup>25</sup> Thus, while the embrace of urban form has often been realized legally through deregulation, judicious use of regulatory requirements and incentives also has played a constructive role in recreating urban vitality.

## II. HISTORIC PRESERVATION

Designating an area as a historic district restricts the demolition or alteration of contributing buildings, and also requires that new construction within the district be compatible or appropriate.<sup>26</sup> Such a designation publicly consecrates the identity of a neighborhood, fixing it with a name on an official map, and promulgating a narrative of its importance to the larger city or nation. A city's characteristic

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22. See ARLINGTON CNTY. DEP'T OF CMTY PLANNING, HOUS. & DEV., 40 YEARS OF SMART GROWTH: ARLINGTON COUNTY'S EXPERIENCE WITH TRANSIT ORIENTED DEVELOPMENT IN THE ROSSLYN-BALLSTON METRO CORRIDOR, available at [www.arlingtonva.us/departments/CPHD/planning/powerpoint/rbpresentation/rbresentation\\_060107.pdf](http://www.arlingtonva.us/departments/CPHD/planning/powerpoint/rbpresentation/rbresentation_060107.pdf).

23. See Ellen M. McCarthy, *Creating a Living, Lively Downtown: Lessons Learned from Gallery Place, Washington, D.C.*, 37 REAL ESTATE REV. 71, 74-78 (2008).

24. For example, Washington, D.C.'s zoning regulations for its Downtown Development Overlay District provide that at least fifty percent of street facing ground floors be devoted to "retail, service, arts, and arts-related uses." D.C. MUN. REGS. tit. 11, § 1702.1 (2013).

25. See Mark Jenkins, *Arts Losing Its Toehold in Downtown Washington*, WASH. POST, Feb. 10, 2012, [www.washingtonpost.com/entertainment/museums/art-losing-its-toehold-in-downtown-washington/2011/12/22/gIQA61T4Q\\_story.html](http://www.washingtonpost.com/entertainment/museums/art-losing-its-toehold-in-downtown-washington/2011/12/22/gIQA61T4Q_story.html).

26. See, e.g., D.C. CODE §§ 6-1104-1106 (2006). See generally SARA C. BRONIN & J. PETER BYRNE, *HISTORIC PRESERVATION LAW* 268-335 (2012).

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building types, whether Victorian row houses or early modern auto showrooms, should convey some visual coherence as distinct as a hemlock grove or saltwater wetland from the surrounding landscape. The preservation permitting system for a historic district also gives it a special legal and political culture, including local advocacy groups, overseen by a specialized preservation review board, which makes ongoing decisions about physical changes in the district.<sup>27</sup>

How has historic preservation helped revive neighborhoods? Buildings and streetscapes that are aesthetically distinctive and reflect local history give a neighborhood identity to which residents and visitors can relate. Architecture scholar Vincent Scully writes that historic preservation reflects widespread “yearning to rebuild community.”<sup>28</sup> In a seminal article, Carol Rose identified “community building” as the defining rationale for modern historic preservation.<sup>29</sup> She sought to crystallize the “implicit rationale [that] the chief function of preservation is to strengthen local community ties and community organization.”<sup>30</sup> Rose drew on the work of Jane Jacobs and Kevin Lynch to argue that walkable neighborhoods containing older buildings have “legible” significance that confers psychological and social benefits on residents.<sup>31</sup> “In the legible city, not only can urban dwellers find their way, but the architectural qualities themselves lend drama, interest, an occasion for anecdotes about the past, and thus a framework for identification with the shared experience of the community.”<sup>32</sup> These claims are consistent with the chief legal criteria for designating buildings and sites for preservation protection, which requires that they convey the historical or aesthetic “significance” of the area to contemporary viewers.<sup>33</sup> Rose also highlighted the procedural contribution of

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27. Some historic districts have their own review boards dealing only with permits within that district, but most come under a review board with citywide jurisdiction.

28. Vincent Scully, *The Architecture of Community*, in *THE NEW URBANISM* 221, 223 (Peter Katz ed., 1994).

29. Carol M. Rose, *Preservation and Community: New Directions in the Law of Historic Preservation*, 33 *STAN. L. REV.* 473, 488–94 (1981).

30. *Id.* at 479.

31. *See id.* Psychologists now accept that an imaginative attention to recollection of pleasant memories of one’s own or a group’s past, what may be termed nostalgia, can “counteract loneliness, boredom and anxiety.” John Tierney, *What Is Nostalgia Good For? Quite a Bit, Research Shows*, *N.Y. TIMES*, July 8, 2013, [www.nytimes.com/2013/07/09/science/what-is-nostalgia-good-for-quite-a-bit-research-shows.html?pagewanted=all](http://www.nytimes.com/2013/07/09/science/what-is-nostalgia-good-for-quite-a-bit-research-shows.html?pagewanted=all).

32. Rose, *supra* note 29, at 489.

33. *See* 36 C.F.R. § 60.4 (2013) (providing criteria for listing on the National Register of Historic Places).



historic districts in creating a forum where residents can debate the heritage and character of their community in hearings on permits, stressing the normative point that preservation laws must foster broad and diverse participation in such discussions.<sup>34</sup> Collaborating to preserve a common image of community identity itself fosters a sense of belonging.

In addition to engendering community, historic districts paradoxically also engender a peculiar form of personal freedom. People in a traditional neighborhood can move about freely on foot through a public realm offering choices of activities and interactions from which a distinctive personal identity can be constructed.<sup>35</sup> The older urban neighborhoods that first attracted renovators were built prior to zoning and to the emergence of large vertically integrated homebuilders. Their buildings were constructed piecemeal singly or in small groups by many small firms.<sup>36</sup> Built prior to the dominance of the automobile, they had to be laid out to pedestrian scale, creating visually interesting streetscapes as well as easy access to local merchants and services on foot.<sup>37</sup> The consequence of this was a walkable neighborhood built to human scale, where people could feel removed from the demanding structures of bureaucratic worklife and corporate dictated consumption patterns. Historian Sulemin Osman describes how such historic districts offered new residents of Brooklyn “a ‘real neighborhood,’ an authentic local place where genuine human contact and ethnic folk tradition remained uncrushed by alienating modernity and capitalism.”<sup>38</sup> As such, it shares with

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34. See Rose, *supra* note 29, at 517–22.

35. See generally MICHEL DE CERTEAU, *THE PRACTICE OF EVERYDAY LIFE* (1984) (recounting how individuals find freedom and create personal identity performing daily rounds).

36. See, e.g., OSMAN, *supra* note 5, at 31–33 (discussing the neighborhoods in Brooklyn).

37. Jeff Speck refers to this as their “pre-auto-age provenance.” JEFF SPECK, *WALKABLE CITY: HOW DOWNTOWN CAN SAVE AMERICA ONE STEP AT A TIME* 68 (2012). Scholarship also supports the idea that such neighborhoods generate political movements.

Specifically, we suggest that contexts with greater density, mixed urban uses, connectivity, and walkability generate and offer the possibility of interaction with a diversity of physical destinations, and in so doing permit and encourage encounters with a wide variety of social influences, ideas, and people. These encounters undergird the formation of SMOs.

Brian B. Knudsen & Terry N. Clark, *Walk and Be Moved: How Walking Builds Social Movements*, 49 *URB. AFF. REV.* 627, 631 (2013), available at <http://uar.sagepub.com/content/49/5/627.full.pdf+html>.

38. OSMAN, *supra* note 5, at 103.

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cyberspace contemporary values of autonomy and participation that felt threatened by powerful impersonal forces of control characteristic of the larger society.

The political character of historic preservation is subtle. Local preservation laws are government regulations that restrain private owners. They assert the public's interest in decisions about what owners do with their property; demolition of a contributing building deprives the public of the significance that the building conveys to a viewer from public space. Critics of preservation laws often simply complain that the laws destroy or take private property.<sup>39</sup> But historic district regulations enhance property values by protecting the setting within which any urban property sits and from whence it derives most of its value.<sup>40</sup>

But preservation laws also resist government ordering. The patterns and styles of most historic neighborhoods were created under minimal land use regulation; much protected housing would have been illegal if built under the zoning laws in force for most of the twentieth century. Historic preservation rests on quite different core principles than does zoning. Zoning regulates only use, height, and lot coverage; it does not address demolition and generally ignores aesthetics. Preservation regulates only the exterior appearance of buildings and not their uses; the prohibition of demolition is its core command. Preservation broadly permits mixed uses and change of use.<sup>41</sup> Thus preservation seeks to protect unplanned spatial patterns against efforts to reconfigure them in accord with a plan—whether government approved or not.

The preservation movement was founded in battles against urban renewal and highway construction favored by mid-century planners. Generally preservation laws have been entrusted to review boards separate from urban planning offices and/or zoning boards to protect them against the “growth machine.” Osman describes how early proponents of historic district protections fought plans by the city planning office to develop high rise complexes among and near historic row houses.<sup>42</sup> Opposition to highway construction and

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39. See EDWARD GLAESER, *TRIUMPH OF THE CITY: HOW OUR GREATEST INVENTION MAKES US RICHER, SMARTER, GREENER, HEALTHIER, AND HAPPIER* 262 (2011).

40. See J. Peter Byrne, *Historic Preservation and Its Cultured Despisers: Reflections on the Contemporary Role of Preservation Law in Urban Development*, 19 *GEO. MASON L. REV.* 665, 676–77 (2012).

41. See BRONIN & BYRNE, *supra* note 26, at 342.

42. See OSMAN, *supra* note 5, at 3, 5.

eminent domain is described below. Planning aims for some imagined future. Preservation restrains current development in accord with the unplanned organic growth of an area and to that extent is fundamentally retrospective. Zoning imagines rational citizens maximizing their net benefits; preservation imagines a community evolving over time.

Historic neighborhoods have been successful at drawing new residents. They are viewed as highly desirable because of their buildings, streetscapes, and legal protections. Professor Glaeser, in criticizing historic preservation in New York City, noted that prices have risen faster in historic districts than in the city as a whole.<sup>43</sup> He emphasizes that preservation constricts supply.<sup>44</sup> This is of course true within the district—you cannot build Trump Tower Park Slope in a row house historic district. But you can build next to it, where high rise development is appropriately parasitic on the attractions of the historic district, enjoying enhanced value to which it does not contribute.

Glaeser and critics who share his view that historic districts frustrate density most fundamentally miss that preservation stimulates demand for urban living.<sup>45</sup> The creative industries that he rightly sees as the engines of present and future prosperity can have offices anywhere in the world, but must compete for creative workers. They have an incentive to locate in towns and cities which appeal to such educated employees. Glaeser emphasizes the economic benefits of density for creative contiguity among such workers. But, as he admits, such contacts do not require hyper density but more easy, spontaneous access among the creative class.<sup>46</sup> Urban historic districts have particularly appealed to such highly educated people. Creative enterprises should and seem to try to locate in or near cities featuring traditional neighborhoods that attract the types of workers they hope to employ.

These legal changes in zoning and historic preservation have supported resident preferences for living in pedestrian-oriented

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43. See Edward L. Glaeser, *Preservation Follies: Excessive Landmarking Threatens to Make Manhattan a Refuge for the Rich*, 20 CITY J. no. 2, Spring 2010, [http://www.city-journal.org/2010/20\\_2\\_preservation-follies.html](http://www.city-journal.org/2010/20_2_preservation-follies.html).

44. *Id.*

45. See Byrne, *supra* note 40, at 676–77.

46. See GLAESER, *supra* note 39, at 262 (noting creative exchanges in suburban Silicon Valley). The concept of the creative class was formulated in RICHARD FLORIDA, *THE RISE OF THE CREATIVE CLASS: AND HOW IT'S TRANSFORMING WORK, LEISURE, COMMUNITY AND EVERYDAY LIFE* (2002).

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neighborhoods that convey a sense of community. One may think that these new neighborhoods display a thinner culture of community, with more transient and diverse populations than in older ethnic neighborhoods. Surely many new residents are younger, more highly educated, more affluent, and have fewer children. They may prefer different institutions, which may be caricatured by coffee shops and list serves rather than churches and clubhouses. Most of this reflects large changes in society and the economy rather than the consequences of land use regulation. What we can see is that the new “luxury loft” built above an innovative restaurant reflects the romantic cultural imaginings of today, as the “stockbroker tudor” single-family home on a cul de sac did in the post-war period. While the latter conveyed security, comfort, and continuity with a more ethnically homogenous past, the former implies the imagined bohemian living patterns of an artist.

### III. ENVIRONMENTAL LAW

Developments in environmental and transportation law since the early 1970s have made cities more attractive as residences relative to suburbs. A chief impetus for suburban living for 200 years has been that the suburbs provide a refuge from the noise, pollution, and social disorder of cities.<sup>47</sup> The house in a garden, set in a country village, at commuting distance from urban employment had been seen as the polar opposite of the dirty, smoky, and dangerous tenements, slums, and sweatshops of the city. Ethnic and class aversions catalyzed these environmental preferences, as earlier immigrant groups sought to separate themselves from later, demonized immigrant groups.<sup>48</sup> Cheap, fast transportation provided by inexpensive private automobiles has made possible the development of suburbs at ever greater distances from the city, culminating in the publicly subsidized parkways and interstate highways that opened up vast realms of inexpensive rural land to suburban development.<sup>49</sup> The postwar movement to the suburbs was one of the most consequential demographic migrations of the century.

Highways not only spread a net of development over the region, but penetrated deep into urban neighborhoods and city centers.

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47. See, e.g., PETER HALL, *CITIES OF TOMORROW* 13–46 (1988).

48. See DOLORES HAYDEN, *BUILDING SUBURBIA: GREEN FIELDS AND URBAN GROWTH, 1820–2000*, at 65–70, 146–47 (2003).

49. See KENNETH JACKSON, *CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES* 246–71 (1985).

Seeking to remain competitive in the age of the automobile and enjoying massive supplies of federal money, cities pursued large scale highway construction. Such projects often condemned and demolished traditional neighborhoods, and erected forbidding barriers to traditional social intercourse. As Vincent Scully has written, “The automobile was, and remains, the agent of chaos, the breaker of the city, and Redevelopment tore most American towns apart to allow its free passage through their centers . . . .”<sup>50</sup>

Although the exodus of manufacturing from cities after World War II assaulted the economic bases of cities, it also made them better suited for residential living by lessening pollution and noise. The air and water pollution laws enacted since 1970 significantly improved the quality of urban air and water, with benefits both for health and pleasure.<sup>51</sup> Brownfields programs promoted the remediation of toxic sites and their reuse.<sup>52</sup> Riverfronts that had been stinking threats to public health surrounded by industrial installations became public amenities attracting residential and recreational development.<sup>53</sup> In short, environmental regulation and deindustrialization removed potent deterrents to urban living for those with choices.<sup>54</sup>

Environmental laws decreased the toxicity of motor vehicle emissions but also made it much harder to build new highway capacity in settled areas. Urban dwellers have fought highway construction since at least the 1960s, as exemplified by the successful opposition, led by Jane Jacobs, to Robert Moses’s plan for a Lower Manhattan Expressway, which would have devastated what soon became SoHo and other now vibrant urban districts.<sup>55</sup> Many opposition efforts were unsuccessful.<sup>56</sup> Various federal statutes,

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50. Scully, *supra* note 28, at 222.

51. See RICHARD J. LAZARUS, *THE MAKING OF ENVIRONMENTAL LAW* 251–52 (2004).

52. See generally EPA, OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE, *EVALUATION OF THE BROWNFIELDS PROGRAM* (2012) (calculating cleanup assistance and effects on property values).

53. See, e.g., Christine H. O’Toole, *Pittsburgh’s Three Rivers, Now a Public Attraction*, N.Y. TIMES, Jan. 22, 2013, <http://www.nytimes.com/2013/01/23/realestate/commercial/pittsburgh-seeks-to-expand-riverfront-access-to-the-public.html>.

54. Changes in immigration laws may also have played a part.

55. See ANTHONY FLINT, *WRESTLING WITH MOSES: HOW JANE JACOBS TOOK ON NEW YORK’S MASTER BUILDER AND TRANSFORMED THE AMERICAN CITY* 145–78 (2009).

56. As a Bronx native, I would single out the construction of the Cross Bronx Expressway as barbaric. See ROBERT A CARO, *THE POWER BROKER: ROBERT MOSES AND THE FALL OF NEW YORK* 850–94 (6th ed. 1999).

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however, have made it virtually impossible to construct new highways in urban areas. Prior to enactment of these laws, highway officials would ignore the effects of construction and operation of highways on the urban environment. The National Environmental Policy Act (NEPA) creates lengthy study periods about the effects of new highway construction on the human environment.<sup>57</sup> The regulations also create legal pitfalls that may allow opponents to delay and drive up the cost of highway construction to impossible levels. Section 4(f) of the Transportation Act essentially took off the table use of public parks and historic resources for highway construction.<sup>58</sup> The National Historic Preservation Act greatly complicates driving highways through older neighborhoods, because such projects inevitably will have adverse effects on properties eligible for listing on the National Register.<sup>59</sup>

Professor William Buzbee's insightful study of the legal battle over the highway project Westway explains how such laws created obstacles to construction that a determined group of opponents could use to defeat even proposals with extraordinary political and financial support.<sup>60</sup> The failure of the government to confront the environmental harms from construction, as mandated by NEPA, led courts to stop the project.<sup>61</sup> A similar story can be told about the defeat of the Three Sisters Bridge and Center Leg Freeway in Washington, D.C.<sup>62</sup> Closely tied to taming highway construction has

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57. See 42 U.S.C.A. § 4332(2)(C) (2006).

58. See 49 U.S.C.A. § 303 (2006). Section 4(f) was signed into law the same day as NEPA. It was given a rigorous interpretation in *Citizens to Protect Overton Park v. Volpe*, defeating the construction of a highway through a park. 401 U.S. 402 (1971), *abrogated by* *California v. Sanders*, 430 U.S. 99 (1977).

59. The key provision of the 1966 National Historic Preservation Act is section 106, which requires federal agencies to study and consult about the effect of their undertakings on any resources eligible for listing on the National Register of Historic Places. See 16 U.S.C. § 470(f) (2006). The criteria and procedures for listing on the National Register are found at 36 C.F.R. § 60.4 (2013).

60. See *generally* WILLIAM W. BUZBEE, *FIGHTING WESTWAY: CITIZENS, THE ENVIRONMENT, AND THE ART OF REGULATORY WAR* (forthcoming 2013).

61. See *Sierra Club v. U.S. Army Corps of Engineers*, 772 F.2d 1043 (2d. Cir. 1985) (applying NEPA and section 404 of the Clean Water Act to void a permit for construction of the highway on the basis of an inadequate environmental impact statement).

62. See ZACHARY M. SCHRAG, *THE GREAT SOCIETY SUBWAY: A HISTORY OF THE WASHINGTON METRO* 119–41 (2006).

been the amendment of federal transportation statutes to permit more federal funds to go to public transit and bicycle trails.<sup>63</sup>

Limiting urban highway construction has two intertwined benefits for city living. First, cars are toxic for urban life. Roads built for free flowing traffic make walking and other non-motorized forms more dangerous, difficult, and unpleasant. City living requires walking and public transit, both of which work better with fewer cars.<sup>64</sup> Street designs that advantage pedestrians by slowing car traffic and providing pedestrian amenities make neighborhoods safer and more lively. In recent years, reallocating lanes from cars to bicycles has boosted another form of healthful transportation well suited to dense cities. Generally speaking, people are deeply attracted to the mobility among locales of different characters available in cities. Architects now bring creativity to designing pedestrian areas that promote sociability and safety. The demolition of the Embarcadero Expressway in San Francisco and extension of streetcar service along the reclaimed boulevard is a textbook case of urban improvement.<sup>65</sup>

Second, suburban development generates a demand for geometric increases in roadways, because nearly all movement is auto-dependent. The same laws that make highway construction in city centers virtually impossible make it expensive and difficult in suburbs. Growing highway congestion has made weekday auto commuting and weekend drives to the mall slow and unpleasant. The more difficult travel by car becomes the more attractive becomes living independent of a car. The car has transformed from an icon of liberation and modernity to a nuisance redolent of an unsustainable carbon past. This new image has added to the renewed appeal of city living, where cars play a smaller role. Indeed, opposition to all road construction in suburbs would be a sensible policy for cities.

### CONCLUSION

While this Essay has celebrated the revival of cities and the legal changes that have facilitated that process, the new regime presents its

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63. Cities have made transit more appealing through creative uses of technology, such as electronic notices of when trains and buses will arrive at a station or stop. Car-sharing services also have made it seem less necessary to own an automobile. See Michael M. Grynbaum, *Experimental Clocks Tell Straphangers if the Wait May Soon Be Over*, N.Y. TIMES, Mar. 7 2010, <http://www.nytimes.com/2010/03/08/nyregion/08clocks.html>.

64. See generally SPECK, *supra* note 37.

65. See Sara Karlinsky, *When the Freeways Came Down*, URBANIST, Feb. 2010, [www.spur.org/publications/library/article/when\\_freeways\\_came\\_down](http://www.spur.org/publications/library/article/when_freeways_came_down).

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own distinctive problems. Gentrification may make housing unaffordable for long-term residents who have preserved the neighborhood through hard times.<sup>66</sup> Increased density may overwhelm well-functioning neighborhoods and destroy the charm that stimulated the demand to live there. Historic preservation cannot treat development in living neighborhoods with curatorial nicety, but must accommodate new development appropriate to the character of the district. Planning must sometimes be able to achieve development goals necessary for the larger city despite neighborhood intransigence.

Such issues may engage legal scholars for the next forty years. Nevertheless, in a Symposium like this, it is appropriate to remark how the focus of urban land use law has turned from disinvestment and despair to coping with the excesses of success. No one predicted such a revolution when the *Fordham Urban Law Journal* began studying the distinctive legal challenges of our great cities. But the land use legal developments sketched here have supported significant shifts in economic and social life that have given city life new vitality and reset the agenda for urban legal scholarship.

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66. See Byrne, *supra* note 4, at 412–13.