Revitalizing Land Use Law: The Burdens-Benefits Ratio Principle

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Abstract As a way of celebrating its centenary, I sketch out a vision of how to revitalize land use and zoning law. Such a vision is called for not merely because of the marking of 100 years of zoning. Due to the immense impact land use laws have on human lives and their surroundings, it is crucial to regenerate the land use law system and to ground it within an ethical foundation. A land use law system should be based on an ethical commitment to fairness and sustainability. It should be guided by principles of democracy and transparency; by norms of accessibility, diversity, and density; and by a requirement to preserve a fair ratio between the distribution of burdens and the allocation of benefits. This chapter's focus is on the latter principle, which is demonstrated by two examples: on how to substantiate development agreements, and on how to analyze the distributive effect of eminent domain.

1 Land Use Law in Search for a Narrator[1]

There is probably no need for another historical review of how zoning started in particular, and land use law more generally. Mumford (1961), Hall (2002), and Wolf (2008), for instance, offer a few such investigations into the past. When marking the first 100 years of zoning, the reference is to the first comprehensive zoning plan. That plan was implemented in New York City in 1916 (Makeilski, 1966; Toll, 1969). "The Zoning Resolution," as it was officially called, regulated and restricted the location of different kinds of uses, such as industries and residential housing, the lot area to be built on, and the size and height of buildings (Fischler, 1998). Its model was soon to be followed by many other local communities in the United States and in Canada. The Zoning Resolution came after some 30 years of pioneering building restrictions which were imposed throughout North America, including Canada (Fischler, 2007; Valiante & Smit, 2016). Nonetheless, it was the first comprehensive attempt to do so, and for that, it gained its glory. Its lingering influence on other jurisdictions is evident, arguably, from the close legal ties that exist

[1] This Section is based on Levine-Schnur (in press-a).

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between, for example, Canadian and American land use jurisprudence despite the many legal and cultural differences between the two countries (Levine-Schnur & Ferdman, 2015; Metcalf, 2015; Morgan, 2012).

But there are at least two other competing milestones to mark the emergence of modern land use law. The first is the planning initiatives of late ninetieth century's architects, such as Ebenezer Howard, with his plans for utopian "Garden Cities," a detailed model for planned-from-above towns (Howard & Osborn, 1965). Or Frederick Law Olmsted with his successful efforts in the mid-nineteenth century to convince decision-makers in New York to fund what would later be known as the Central Park (Olmsted, [1870] 2013). Olmsted correctly predicted that such an urban park would have positive externalities on its surroundings, and that these could be used to secure high property taxes (Crompton, 2001). Howard and Olmsted advanced, in different ways, the idea that zoning and city planning can produce wealth, health, and prosperity, especially when they are binding and centrally directed. Distributional concerns were not their central interest, if an interest at all.

The second milestone in land use law was achieved in the year 1926, when two legal advancements occurred: The United States Supreme Court delivered its decision in *Village of Euclid v. Ambler Realty Co.* (1926), and the Standard State Zoning Enabling Act (SZEA) (1926) was enacted. In *Euclid v. Ambler*, the U.S. Supreme Court upheld, for the first time, a comprehensive zoning ordinance, in that case of the Village of Euclid, a suburb of Cleveland, Ohio. The Supreme Court affirmed the constitutionality of zoning ordinances, and ruled that a zoning ordinance must be "clearly arbitrary and unreasonable, and without substantial relation to the public health, safety, morals, or general welfare," before it can be declared unconstitutional. The federal government's recognition of the zoning practice—with the enactment of the SZEA in 1926, and the Standard City Planning Enabling Act in 1928—was another important step towards the legal institutionalization of zoning. Thus, by the early part of the 20th Century, local governments had guaranteed their power to have full, almost unhindered, discretion over zoning and urban planning decisions (Fischel, 2000).

Planning and zoning laws are usually explained as a modern response to the genesis of industrial cities and the resulting social challenges (Fainstein & DeFilippis, 2016; Hall, 2002; Valiante, 2016). In this sense, arguably, government officials in New York City, and elsewhere were inspired by ideas such as those developed by Howard, when they aimed to promote the public's interest by providing safe, healthy, well organized, top-down, controlled spaces (Campbell & Marshall, 2002). Alternatively, the development of zoning might be explained as reflecting the politics of interest groups (Shoked, 2011). Property owners and land developers realized Olmstead's predictions in their broader sense and urged city politicians to protect and enhance the value of their assets by separating uses, and regulating the density, shape, and size of buildings in order to secure higher land values and to preserve the local tax base (Henderson, 1985; Wheaton, 1993). These two background stories may stand in conflict, as they offer different justifications and goals for land use law systems. They might, however, be conceived as complementary explanations, since either way, whether intentionally or uninten-

tionally, zoning laws are correlated with racial and wealth-based segregation (Boustan, 2016, p. 105; Pendall, 2000; Rothwell & Massey, 2009).

As said, this is not an historical project. The empirical question of how zoning came to be is not our focus here. I do wish, however, to point out that the existence of two narratives about the purposes of zoning, two different views about the driving forces behind its birth, and the *tension* between them, is in fact ongoing and remains at the core of land use law (Levine-Schnur & Ferdman, 2015). On the one hand, zoning is a way to progress towards idealized forms of living. On the other hand, zoning is an externalities-management mechanism to advance particular interests of the more powerful segments of a given society, in particular—a means to influence on land prices and subsequent property taxes (Fischel, 2005; Hamilton, 1975).

In a related paper (Levine-Schnur, in press-a) I have argued that the problem with zoning and land use law, and particulary with judicial review in this field, is not in the tension between these two approaches, which could be summarized as efficiency versus social planning. The problem is that because of the existence of this tension, and as set from its genesis by the *Euclid* Court, zoning and land use law provides a framework for decision-making but *lacks any substantial ethical commitment*. In the larger picture of planning, the multiplicity of interests involved in the planning decision-making process has led the judiciary, as well as many scholars, to shy away from a focus on the substantive content of planning to the *process* of making planning decisions (MacLeod, 2012; Valiante, 2016, p. 108). In other words: there is no narrator for land use law; it operates under "an appeal to reason and logic, through a strong claim to objectivity and certain knowledge, through a voice that claims objectivity and authority" (Wetlaufer, 1990, p. 1565). The omission of an ethical commitment in zoning is especially striking given the deeply important distributive justice considerations that are determined in the planning process, and that planning has been described as having ethical issues at heart (Campbell, 2012; Lennon & Fox-Rogers, 2016, p. 15).

Following previous attempts to address an ethical foundation for justice in planning (Beatley, 2012; Fainstein, 2010), I offered to ground land use law's ethical commitment on principles of democracy and transparency; on norms of accessibility, diversity and density, and on a requirement to preserve a fair ratio between the distribution of burdens and the allocation of benefits (Levine-Schnur, in press-a). In this short contribution, I wish to explicate more on the burdens-benefits ratio principle.

I argue that an ethical land use law system should be committed to identifying how to fairly correlate between the allocation of burdens and benefits. A planning practice may be considered as creating inequality, unfair treatment, if those targeted by harmful regulation, such as eminent domain or the location of unattractive uses, "are systematically different from those benefiting from public use projects and the benefits of public projects do not sufficiently compensate" (Chen & Yeh, 2012). The future of land use law, is in identifying new regulatory models on how to mitigate these concerns. This should rely on empirical, methodological, and theoretical work that would uncover the patterns of inequalities, and support innovative ways to over-

come it (Du, Thill, Feng, & Zhu, 2016). In the remainder of this chapter, I present two examples for the need to position the burdens-benefits ratio principle at the core of land use law ethics.

2 Benefits: Development Agreements

It is a very common practice for property owners to seek developing their land in a manner incompatible with existing land use regulations or zoning plans (Kaplinsky, Tucker, Muir, & Ziff, 2012; Knesset Research and Information Center, 2007; Serkin, Ellickson, Been, & Hills, 2013). To do so, developers are required to obtain the approval of the relevant local government organ (whether zoning board, planning board, or other) (Rose, 1983). While proposed development that accords with existing land use regulations is not (usually) subject to local governments' discretion, even though it requires permission, incompatible changes are subject to a discretionary process conducted by the relevant governmental organ. Zoning boards generally enjoy broad discretion concerning the approval or denial of such applications (sometimes referred to as spot zoning), and their decisions are usually beyond substantial judicial review (MacLeod, 2012; Ostrow, 2008). When local governments are required to exercise discretion and make a decision, the option of negotiating with the property owner arises.

Anglo-American legal systems have been hotly debating whether local governments should have the power to negotiate and arrive at agreements with owners over the conditions under which development projects may be approved. For example, is the local government allowed to condition its grant of approval for a proposed development on the developer's *acceptance* of the local government's expectation that she contribute one million dollars for the construction of a new football stadium ("Koontz, 133 S. Ct. 2586, Transcript of Oral Argument", 2013), or on the developer's *voluntary consent* to purchase a new piece of art for the local art museum? (Kmiec, 1996)[2]; The U.S. Supreme Court provided a few years ago a disapproving answer to this question in light of the constitutional protection against the taking of private property rights without just compensation,[3] while in 2011 the Israeli Supreme Court ruled out the legality of such agreements (Levine-Schnur, 2013).[4] In Ontario, Canada, bargaining and extracting concessions from property owners—referred to

[2] Such a requirement was discussed in Ehrlich v. City of Culver City, 911 P.2d 429, 450–51 (Cal. S.C. 1996). The California Supreme Court held that the City's imposition of a "fee in lieu of art" to support art in public places to be a requirement that is akin to traditional land-use regulations. In CC [HP] (TA) 1115/96 the Constructors and Builders Association in Tel Aviv Yafo v. The Tel Aviv-Yafo Municipality (4.5.1997) (Isr.), an Israeli District Court denied the local government's directive according to which the planning board will not grant approval for public or large-scale residential projects unless artistic elements valued at the equivalent of 1 per cent of the total value of construction are provided, as a requirement that the local municipality was not authorized to pose.

[3] Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586 (2013).

[4] CA 7368/06 Dirot Yokra, Inc. v. The Mayor of the Municipality of Yavne (27.6.2011) (Isr.).

as agreements under Section 37 of the Ontario Planning Act, 1990 (Ca.)—is a common practice which has been at the focus of academic and public debate in recent years (Makuch, 2016; Metcalf, 2015; Moore, 2013a, 2013b; Morgan, 2012). In these three jurisdictions the debate over bargaining for land development is far from resolved: to the contrary—it is at a high heat.

There are different types of agreements between local governments and private developers concerning the development pattern of private properties. One way to catalog agreements is with regard to the question of how standard the arrangements they include are, namely to what extent they are the result of real negotiations between the parties or merely reflect a pre-existing template into which only the specifics of the project were inserted. The question is whether with regard to the main elements of the agreement (and not only with regard to peripheral matters such as the details of an insurance scheme demanded by the local government), it is in fact a standard form that is based on instructions that were predetermined by the local government and are now applied to the circumstances of the particular developer. Such *standard agreements* might include, for instance, an obligation for the developer to construct on-site facilities, e.g., utilities and a certain amount of parking lots, etc., where the obligations are required as a by-product of applying the governmental authority's requirements per relevant unit, and in return the authority in charge approves the development project or waives the relative share of the demand for impact fees that would otherwise be required under local law. In this case, the agreement is predictable, does not reflect the specific characteristics of the site or the negotiation abilities of the parties, and is not a result of a concrete assessment of the current needs of the city and the effect of the proposed project on them.

Another type of agreements is one which contain a unique arrangement that reflects the results of direct negotiations between the parties, where the core arrangements vary from one agreement to another. Such agreements will be termed *non-standard agreements*. For example, a non-standard agreement might include an obligation for the developer to preserve certain buildings of architectural-historical value that are off-site of the project, while the authorities approve her development proposal that is different than the usual type of development for that area, in its height, shape, use or aesthetic design. This is a one-time, unique arrangement that results from a specific negotiation between the parties.

The American legal doctrine does not seem to distinguish between the two types of agreements, and would probably refer to both of them as exactions. Exactions are unilaterally determined in-kind or cash contributions for public goals that are required by the local government from a land-owner wishing to develop a private property as a precondition for approving the proposed development[5] (Been, 1991, pp. 478–483). The two-pronged exactions doctrine established in the last decades holds that a permit condition that requires the dedication of physical rights to land (such as right of way) must bear an "essential nexus" between the purpose of the condition and the governmental purpose for withholding the benefit,[6] as well as

[5] Lingle v. Chevron U.S.A. Inc., 544 U.S. 528 (2005).

[6] Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987).

"rough proportionality" between the harms created by the project and the condition imposed upon the owner.[7] The analytical basis for the exactions doctrine set out in *Nollan* and *Dolan* is the Unconstitutional Conditions Doctrine, according to which "the government may not deny a benefit to a person because he exercises a constitutional right".[8] *Nollan* and *Dolan* "involve a special application" of this doctrine that protects the Fifth Amendment right to just compensation for property the government takes when owners apply for land-use permits (*Koontz*, 133 S. Ct. at 2606; *Dolan*, 512 U.S. at 385).[9] Thus, the *Nollan* and *Dolan* tests, as was recently noted in *Koontz*, "prevent the government from exploiting the landowner's permit application to evade the constitutional obligation to pay for the property" (*Koontz*, 133 S. Ct. at 2604).

The exactions doctrine sets the substantive limitation on the obligations the government can impose on a land developer to mitigate the direct effects of his development. As applied by the U.S. Supreme Court, this doctrine could be seen as demanding a relatively high level of correlation between the development project and the contributions that can be demanded from the developer. Opposing views have been proposed with regard to the question whether the exactions doctrine applies to bargained land development as well (Callies & Tappendorf, 2000; Callies, Curtin, & Tappendorf, 2003, p. 113; Fenster, 2011, pp. 628–630; Starritt & McClanahan, 1995).

Two issues arise: first, whether the local government and the developer can agree that the developer will make highly correlated contributions to the public in a format that is a bit different than that prescribed under the local law, while the regulatory change required to the existing regulatory scheme is minor and the developer's contributions are highly correlated to the project's direct effects (Type 1 agreements). Second, whether the local government and the developer can agree that the developer will make contributions which are not highly correlated with the project's direct effects in return for meaningful discretionary changes to the regulatory scheme, such as additional land use rights (Type 2 agreements). Type 1 agreements are usually standard ones, while Type 2 agreements are not.

A few years ago, in the *Lingle* case, the Supreme Court found that in the context of the Constitutional Taking Clause (U.S. Const. Amend. V.) each regulatory action enjoys its own test for judicial scrutiny, therefore the *Nollan/Dolan* balancing test is restricted to the specific circumstances in its text (Fenster, 2006). In other words, it allegedly applies only to in-kind dedications of land and only to adjudicated requirements that are *mandatory* conditions for rezoning application approvals, and therefore bargaining arrangements are excluded from the doctrine's application with regard to either Type 1 or Type 2 agreements. However, this issue has recently been reopened following the Supreme Court's decision in the *Koontz* case.

Coy Koontz, the owner of a property designated as a riparian habitat protection zone, requested a permit from the local Water Management District, which under

[7] Dolan v. City of Tigard, 512 U.S. 374 (1994).

[8] Regan v. Taxation with Representation of Wash., 461 U.S. 540, 545 (1983).

[9] Lingle v. Chevron U.S.A. Inc., 544 U.S. 528 (2005).

the local law requires permit applicants that wish to build on wetlands to offset the resulting environmental damage. The District's attempts to negotiate with Koontz over the terms under which the application would be approved failed because he refused to discuss offsite mitigation, such as replacing distant culverts and plugging drainage canals on other properties or paying a certain amount of money for those purposes, noting that the proposal he submitted was "as good as it can get." Soon afterwards, Koontz's permit application was denied, in consistence with the District's view that the application failed to satisfy Florida law.

In its 2013 decision, the Supreme Court applied the *Nollan/Dolan* tests to this case, hence a case where the government simply denied a permit until the owner met the condition imposed in the permit process. The decision left scholars and practitioners in much confusion, specifically with regard to the legality of voluntary agreements (Clodfelter & Sullivan, 2014; Echeverria, 2014; Fennell & Peñalver, 2014; Mulvaney, 2016; Nolon, 2015). Some scholars contend that the decision has no bearing on contracts negotiations between local governments and land developers, although they warn of the chilling effect it would bring about (Saxer, 2016; Selmi, 2015; Serkin, 2016).

Based on a theory of urban agglomeration and capitalization of urban amenities I developed elsewhere, I argue that Type 2 agreements should be permitted as long as we are able to substantiate them on an ethical ground which is substitutive to the Nollan/Dolan test (Fennell, 2014, p. 134; Levine-Schnur, 2014). Such an ethical ground should be based on the burdens-benefits ratio approach. Development agreements should be evaluated under a *commensurability substantive criterion*. It should apply for the assessment of negotiations strategies, provided that the bargaining scheme adheres to the accepted public policy orientation of the community and that any contribution granted by the developer is of a "public nature." The proposed commensurability criterion is the first to refer to both sides to the bargaining. Instead of determining whether there is rough proportionality between the harm created by the project and the condition imposed upon the owner (as the *Dolan* test asks), the question of commensurability refers to:

1. the extent to which the regulation was changed to meet the developer's request, including the extent to which the regulatory process was changed; and
2. the extent to which this change enabled the developer to internalize and to benefit from urban surpluses and the positive and negative effects of the proposed development on urban values.

If there was no change in the existing regulation (where change denotes any material deviation from substance or procedures) then such agreements should not be advanced. Why should someone be required to pay for something that no one else is paying for and was not the outcome of his or her active engagement? If there is a major change to the regulatory scheme then, under certain circumstances, not paying for it might be unjust. The fact that some people derive more benefit than others from governmental activities or from regulation raises questions of distributional justice. I share these concerns. But even before we implement a total system of givings' taxing (Bell & Parchomovsky, 2001) of out-of-the-blue benefits generated

from regulatory changes, we can accept that there is moral difference between (1) land-owner "A" who, so it happens to be, benefits more than land-owner "B" from a change in regulation from a regulatory scheme "R" to a regulatory scheme "R1," in which case "A" should not be required to pay an extra share of taxes over "B"; and (2) land-owner "C," who engaged with the government to bring about "R1," a regulatory scheme which betters him more than "R," in which case it seems fair that "C" should pay an extra share for the benefits resulting from the shift between "R" and "R1." When the change enables the developer to extract urban surpluses, and they are the reason for the superiority, for him, of "R1" over "R," then the case for requiring the developer to pay for these benefits seems to be a stronger one.[10]

Let's illustrate with an example. Anne is a landowner who owns a piece of land that is zoned for residential use. Over the years since the zoning ordinance was approved, properties surrounding that land were purchased by the local government, which established a variety of cultural activities there, creating a viable urban environment. Anne now wishes to benefit from the surpluses created by the land's proximity to this thriving urban environment by constructing a luxury building that would be utilized for both residential and commercial uses. In order to make this happen, a change is required in the zoning ordinance. This change is not immaterial (it involves a change in the permitted use as well in the type and character of the residential use). The contributions negotiated with the landowner would meet the requirement for commensurability if the added value will be fairly and efficiently divided between the community and the developer. Efficient allocation in this regard is Pareto optimality (Calabresi & Melamed, 1972, pp. 1094–1095). If the developer is about to benefit from the proposed development, but not because of the urban condition but rather, for instance, because of a new green technology she intends to use for construction on the site, then there is no justification for conditioning changes to the regulatory scheme on the developer's contributions.

The first condition of the proposed criterion targets the level of discretion that the local government applies in order to reach a consensus with the developer. If the government did not bring about a meaningful change in the pre-agreement regulatory state of affairs then, in essence, it didn't "give" anything of value. If that is the case then for it to "get" anything from the developer in return is not justified. The second condition of the proposed criterion targets the utility function of the developer, inasmuch as it is affected by the capture of positive urban spillovers and the interrelations between this and the effects on the city. The idea of urban price capitalization can be summarized as follows. There is a good deal of empirical support for the connection between land prices and local amenities. Certain urban amenities or goods have a positive effect, which is captured by property owners when their real estate goes up in value. Property owners gain from positive externalities that are not by-products of their investment or actions. The urban environment, with its

[10] I refer here to a benefit principle which is different from the one suggested by Thomas Beatley (Beatley, 1988, p. 84) ("The benefit principle states that those who reap the benefits of public projects ought to bear their costs in direct proportion to the level of benefits received").

infrastructure and social and cultural life, the creation of multiple unidentified parties, contributes to the value of urban properties.

Since there are justifications for not propertizing some of the externalities created by property-owners in order to leave open the possibility of third-party productivity and inventory behavior (which would lead to greater social benefit) (Frischmann & Lemley, 2007; Parchomovsky & Siegelman, 2012), the result is that urban property owners internalize urban surpluses they did not create in a way that might be beneficial to the public's interest. Up to a certain point this internalization might have a "spillover effect": given the urban surpluses, property owners develop their land in an innovative way that further promotes the urban-amenity value. Take, for example, a café located at a central location. Ideally, the owners will earn greater profits as a result of the cafe's proximity to the desired environment, and the general public will benefit by the existence of the café as one of the elements that make the location a popular place.

If a proposed development that requires a regulatory change not only intends to benefit from urban surpluses but also, or alternatively, positively or adversely affect urban values, inasmuch as we can assess that in advance and given the broad meanings that any attempt to define urbanity yields, then those effects should be taken into consideration. Assessing the effects on abstract notions such as urban values cannot be done with predetermined formulas. We must employ concrete judgments about the desirability of such development projects, taking into account a range of possible interactions between the developer and the development and the government and the city. Thus, the internalization of urban amenities by the property owner might, at a certain point, have a negative effect on social benefits in terms of creativity, innovation, accessibility, equality, and the like. For example, if the café owners' building design includes high walls around their place in order to promise their visitors maximum privacy, they will be denying one of the elements that give an urban place its vitality: accessibility and an open feeling. When property rights are too liberal or too loosely defined, social benefit, such as that created by the features of urbanity, might be adversely affected. This is the case where there are urban costs to the internalization of external surpluses. If a development project doesn't internalize urban surpluses or—overall after calculating the positive effects—adversely affects urbanity, then the commensurability demand is not fulfilled and therefore conditioning a regulatory change on a developer's contribution may be considered a threat.

It is argued that certain costs are not realized in the current understanding of the mechanism of property rights; the value of the urban environment has no standing in decisions regarding the use of urban lands. I therefore suggest that a property owner's internalization of the fruits of others' activities ought to be limited to the level at which this internalization advances the development of urban amenities. Ignoring social harms caused by over-internalization (internalizing urban benefits in a way that creates an urban harm) might lead to a social waste. The concrete optimal level of internalization should be determined on a case-by-case basis.

Bargaining should therefore take into consideration the extent to which the developer's request for spot zoning, if approved, would benefit from urban amenities, and, if so, require him or her to share the added value with the community. It is

necessary to develop a procedural mechanism to assist in deciding what level of urban surpluses the new development would enjoy, e.g., an "urban impact assessment," along the lines of environmental and social impact assessments (Gramling & Freudenburg, 1992; Karkkainen, 2002; Revesz & Livermore, 2008). The need to individually analyze the relationships between the regulatory change and the level of enjoyment of urban surpluses justifies the use of development agreements as the relevant means—contrary to an impact levy or betterment taxes. Fixed formulas cannot replace the need to employ human evaluation, discussed in a democratic way, about the wisdom of the development proposal, its interactions with its surrounding environment, and the extent and weight of the regulatory changes required.

Each of the conditions for the commensurability criterion could be classified at one of the following three levels of intensity—low, mid, and high. For example, if the regulation was intensively changed to meet the developer's request, then it would be described as a "high" level of regulatory change; if the desired change enables the developer to internalize a very minimal level of urban surpluses, then it would be categorized as "low." Each instance of regulatory bargaining should be analyzed in light of the combination between the levels of both conditions. The higher the aggregate the broader the discretion of the local government to extract more public contributions that are not directly related to the proposed development.

This can be visualized in the following manner (Table 1):

It is necessary to match these levels of discretion with the appropriate types of legitimate contributions that can be asked from a developer in the negotiation stage. For example, one of the relevant factors is the public nature of the contribution. A developer's contribution that serves the needs of the proposed development would reflect a low (the lowest) level of discretion. A developer's contribution that serves the needs of the nearby neighbors should be regarded as reflecting a mid-low level of discretion. Contributions can be listed in accordance with the following factors:

- Who would enjoy the contribution: for example, only the proposed development's users; the immediate neighbors; residents from all over the city; all urban users, including commuters and tourists;

Table 1 Typology of levels of local government's discretion in pursuing development agreements

Level of surpluses capitalized	Level of regulatory change		
	Low	Mid	High
Low	Low level of discretion	Mid-low level of discretion	Mid level of discretion
Mid	Mid-low level of discretion	Mid level of discretion	Mid-high level of discretion
High	Mid level of discretion	Mid-high level of discretion	High level of discretion

- Whether payment would be required: for instance, if a developer is required to build a public parking area which he would manage and determine and collect fees for the use thereof, then that fact must be explicit and calculated when deciding whether to approve the project;[11]
- Whether there is a correlation between the essence of the proposed development and the contribution: for example, if the development serves the elderly, whether or not the contribution is useful for the needs of the elderly; if the proposed development is a commercial construction, whether or not the contribution is related to a commercial cause, etc.;
- Whether the contribution is on-site or off-site;
- How much control the developer would have on the actual formation of the contribution: whether the developer is involved in constructing the public utility, in maintaining it over time, or in controlling who will use it. Consider a park as a contribution, for instance. If the developer develops the park and then places it under the sole control and maintenance of the city, that is one thing. But if the park remains subject to ongoing maintenance by the developer then his or her control of areas that serve the public may be considered as the privatization of the public sphere, which stands in opposition to urban values;
- Whether the contribution is granted for specific and identified goals or it is for the local government to decide what do with it in the future (that would usually be the case with monetary contributions);
- How important is the contribution to the city? How much does it save the city?

My contention is that it is required of local governments, assisted by the public (including members of interest groups, developers, residents, etc.), to shape the local set of criteria that reflects a concrete match to the level of discretion and types of contributions.

3 Burdens: Expropriation of Land for Public Uses

The next example to illustrate the type of analysis the burdens-benefits ratio principle requires is focused on the expropriation of land for public uses. The government's power to take private property for public uses can be found in all legal systems (Versteeg, 2015). It enables governments to overcome strategic bargaining problems such as holdout and land assembly and acquire land needed to facilitate public goods (Kelly, 2011). It is considered an essential tool to enhance social welfare, promote progress, and provide non-rival public goods. However, the existence of such powers gives rise to concerns about their potential abuse by government officials. For this reason, many constitutions impose the following constraints on governments when they seek to take private property (Lindsay, Deininger, &

[11] See, AdminC (TA) 2111-09 Rosenblum (Goren) v. Tel-Aviv Yafo Municipality (19.2.2012) (Isr.); AdminC (TA) 31405-09-13 Mindleen v. Tel-Aviv Yafo Municipality (10.4.2014) (Isr.).

Hilhorst, 2016). First, that private property shall not be taken without just compensation (fair market value) to the aggrieved property owner; second, that taking is justified only when it is for public use or public purposes.

In legal jurisprudence, takings for traditional, purely public, purposes such as roads, parks, and public buildings, are usually regarded the core example of proper and fair use of the expropriation power, and, mostly, subject to minimal judicial review (Bell & Parchomovsky, 2006; Epstein, 1985). This is so despite evidence that poor and minority neighborhoods were the frequent targets during the construction of interstate highways in the U.S. (Frieden & Sagalyn, 1991, p. 28). So is with takings for economic development. Poor people, politically weak, African-Americans and other minorities were usually required to bear the burden but not the benefit of economic development. In fact, in some cases, this is the outcome of an intentional effort to clear away "slums" or "underdeveloped" properties held by members of these communities (Becher, 2014; Carpenter & Ross, 2009; Frieden & Sagalyn, 1991; Gans, 1982; Gotham, 2001; Pritchett, 2003; Somin, 2015).

The vast evidence in support for the distributive concern with takings for economic development brought a U.S. Supreme Court Dissent to question the justification for such takings, despite long-lasting doctrine that permits it.[12] Thus, in *Kelo* Justice O'Connor, stated in her Dissent to the Court's approval of the plan to take the petitioner's house for establishing a Pfizer company facility, that the fallout from the Court's decision "will not be random." Thus, "the beneficiaries are likely to be those citizens with disproportionate influence and power in the political process… As for the victims, the government now has license to transfer property from those with fewer resources to those with more".[13] The strong public backlash to the 5-4 *Kelo* decision was fueled by the dissent's focus on *who wins and who loses* from such takings (Hoehn & Adanu, 2014; Nadler & Diamond, 2008).

In an important contribution, Daniel Chen and Susan Yeh (2012) examined whether takings increase inequality, which will be found "if those targeted by eminent domain are systematically different from those benefiting from public use projects and the benefits of public projects do not sufficiently compensate." They report that court decisions that expanded the government's power of expropriation spur economic growth and property prices by 0.2% points, but reduce *minority* home ownership and employment by 0.5% and 0.3% points, respectively. Their study does not distinguish, however, between pro-takings decisions regarding takings for pure public purposes and decisions regarding economic development, but seem to mostly document the effects of cases of the latter kind. Furthermore, Chen and Yeh's methodology is limited in the sense that they did not study the direct distribution of the taking *burden* in their case studies nor the different levels of enjoyment from the public goods facilitated by the takings.

Prior literature identified a distributive problem with designating land (and expropriating it) for public but noxious uses. In NIMBY or LULU (locally unwanted/undesired land uses) cases, it has been argued that those with the power impose on

[12] Berman v. Parker, 348 U.S. 26.

[13] Kelo v. City of New London, 545 U.S. 469.

those who lack it noxious land uses, such as homeless shelters, drug/alcohol treatment centers, waste disposal facilities, etc. (Been, 1992).

However, takings may have distributive effects even when they are for public but *non-noxious* uses. Such might be the case where a private property is taken for a highway which does not serve the local neighborhood directly but nevertheless has an adverse effect on it as it limits future development, minimizes open spaces, etc. In such a case, beyond the individual harm, the effected community bears the burden to supply the needs of the general public without any compensation to its *community loss*. We can term such cases *Community Devaluing Land Uses* [CDLU]. In cases where the effected community can be identified by the political, ethno-religious, or socio-economic status of the vast majority of its residents, then a distributive aspect might come into play, if the burden of supplying CDLU is not distributed fairly among different communities. Another example for a distributive concern with takings is when land taken from one community is used for wealth increasing public goods such as parks, schools, and daycares, while at another community—which is clearly different in its residents' political, ethno-religious, or socio-economic status—the land taken is used for CDLUs such as citywide roads. In other words, for takings for pure public uses to be distributed fairly, individual compensation might not suffice. There is a need to establish that what may seem to be a benefit to the public is not in fact a benefit to some communities but burden to others, who are part of politically or otherwise weak segments of the society.

To study the burdens-benefits ratio in the context of pure public use takings, I take advantage of a unique institutional situation in Jerusalem, Israel (Levine-Schnur, in press-b). Palestinians residing in Jerusalem are a large ethno-religious group, which represents 37% of the city's population. Their political power at the local level is especially low. They are 31% of the eligible voters for the local government, but their voter turnout is less than 1%. The reason for that is political: their vote may seem to grant approval to the Israeli annexation of East Jerusalem in 1967 which they (and the international community) perceive as illegal. They are left therefore totally unrepresented at the local level, in particular in the land use planning commission were expropriation powers are held. Geographically, the city exhibits a very high degree of segregation: Jews and Palestinians live in separated neighborhoods. The segregation is the result of historical developments. Individual preferences and related reasons. Integration is not prohibited. Thirty-six per cent of the city's land is in Palestinian areas, and the rest is in Jewish ones. Most public goods such as local roads, schools, playgrounds, and open public spaces, are available at the neighborhood-level. Other public goods, especially citywide roads, serve both communities indistinguishably. Jewish and Palestinian neighborhoods exhibit many differences—in terms, for instance, of land values, security of title, and property tax values. Jerusalem therefore provides an exceptional example to test the distribution of takings' burdens and benefits across political and ethno-religious lines.

I collected and coded data from the city's archives and from other public records on all exercises of eminent domain for local public uses by the City of Jerusalem between 1990 and 2014 (data was completed for 97% of the general sample). In

these years, the city executed its takings powers over 369 development projects, which include 3448 discrete takings observations. I used land records to verify owners' identity, analyzed comprehensive plans and zoning maps to identify projects' beneficiaries, conducted GIS analysis of the land cover, land titling, and demographic patterns, and relied on supplementary statistical and geographical resources.

Takings in Jerusalem are split between two modes: takings from private owners—Palestinians, Jews, and Churches, i.e., private property of different Christian institutions—and takings from the state or other governmental authorities that is then redistributed back to different public purposes. In general, the ownership composition in the taking sample follows the ownership distribution in the city at large. However, expropriated land is designated for Palestinian neighborhoods purposes (and not to citywide or Jewish neighborhood purposes) in a rate which falls both under this population's size (relative to the Jewish one) and—to a much greater extent—under its relative share of contribution to the overall pool of expropriated land.

Palestinians contributed 38% of the land taken over the years, while their neighborhoods benefited at the local-neighborhood level from only 10% of it. For Jewish owners the opposite ratio exists: 4% and 33%, respectively. The majority of the land expropriated from Palestinians was used for citywide purposes, and the rest for Palestinian neighborhood ones. Land taken from Jews and Churches, however, is used almost only for Jewish neighborhoods' purposes. State land is used almost only for Jewish and citywide purposes. Thus despite the fact that over the course of 25 years, Palestinians contributed 36% of the land used for citywide goods, they benefited at the neighborhood level from only 2% of the land taken from the state to be redistributed in the planning process. For Jews, again, the opposite ratio exists: 3% and 48%, respectively. Furthermore, most of the land designated for public buildings (schools, kindergartens, daycares, etc.) and public spaces (parks) went to Jewish neighborhoods, whilst the land taken for Palestinian neighborhoods was used mostly for roads. In fact, the city took land from Palestinian owners for citywide services but failed to supply Palestinian neighborhoods enough and as good open public spaces and public buildings.

Compared to Jewish land, where the property rights are not formalized (titled)[14] but mostly claimed by Palestinians, the land is subject to higher propensity of being taken for citywide use and not local neighborhood purposes, an effect which is substantially higher when the sole public use is roads. For titled Palestinian land compared to Jewish land, the differences are lower, and the effect of the specific public-use—road not road—is not large. In other words, *non-formalized land claimed by the politically-weak minority is more susceptible to be taken for citywide roads than any other alternative*.

These findings appear to call into question the reliance on the public use and just compensation requirements to assure fairness, even in cases of pure public-use takings. They emphasize the effect that political and ethno-religious differences may

[14] "Formalized" or "titled" land refers to land that is listed in an official land record, and hence its owners are publicly known (cf, Merrill & Smith, 2016, pp. 857–881).

have on taking decisions; and point at the need to find solutions to overcome the potential for an unequal distribution of burdens and benefits across different communities, where major differences between different segments of society exist.

4 Conclusion

Revitalizing land use law is an impractical task. I aimed to present in this chapter what I think should have been a leading principle in this process of founding an ethical basis for land use law: the burdens-benefits ratio principle. Despite the many difficulties in the way of reforming the field, I hope that practitioners, urban planners, scholars, public officials, judges and others, would attain to the call for better distributive outcomes in the planning process this chapter is asking for. In practical terms that would mean, to regenerate the use of development agreements, to push and trigger existing doctrines, in order to allow this to become a tool for a fairer distribution of urban surpluses. In addition, the use of eminent domain powers should be sensitive to identifying those who pay and those who enjoy from this practice, across susceptible lines such as political power, ethnicity or religious, regardless of the limited option to litigate takings once they have already been dropped out of the box.

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