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Overcoming Neoliberal Hegemony in Community Development: Law, Planning, and Selected Lamarckism

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Abstract

Law constrains our behavior, both individually and collectively. Legitimate law is that law that emerges from an inclusive process that identifies a governed community's collectively imagined future for a place, while respecting the concerns of necessarily oppressed minority interests. In the land use context, we use comprehensive land-use plans to identify and communicate a vision that motivates binding behavioral changes—i.e., plans create visions that are sufficiently attractive to motivate communities to act in meaningful ways. To the extent law emerges from an inclusive and effective community plan, it is legitimated by that plan. But a planning process that relies exclusively on letting visions emerge from a community necessarily prefers those visions that provide individual economic benefits to specific participants – e.g., the growth machine. Public goods – even public goods that might represent the “best” vision for a particular community – are not championed, supported, or developed in the planning process. Combined with a general trend toward neoliberal governance, and the weak legal position of comprehensive plans, this inherent preference for the growth machine over the public good yields land-use ordinances that are unrelated to what might be the best vision for a community. The remedy is twofold. If planning's purpose is to achieve public goods, planners must be willing to represent the unrepresented, potentially forcing particular visions on communities during the planning process rather than waiting for private-good-driven visions to emerge, at least initially. And the forced visions must be sufficiently specific so as to limit the universe of legal choices, and land-use consequences, that result. If the forced vision is useful – if it is a public good – the community will adopt it. Without the forced vision, it does not have that opportunity.

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I. Introduction

This article is an attempt to remedy problems in the *legal* aspects of the American planning-law system by addressing problems with the *planning* aspects. In that sense, it is something of a supply-side approach to legal evolution, recognizing that while planning cannot force legal change to occur, it can provide the resources that will allow it to occur. My core assumption is that land-use planning exists primarily to justify and legitimate the law that follows. Legitimate law emerges from the visions and desires of the affected community. But what if the law that creates our communities and regulates our land is not connected to the community visions and activities that imagine them? If land-use law does not emerge from those visions, where does it come from?

Two historical “accidents” – one in law and one in planning – have created a broken pathway between community visions and formal legal regimes. The planning accident is perhaps less obvious, or even certain, and certainly less simple. Over the past few decades, professional planning has transitioned from a rational, expert, modernist planner paradigm to a collaborative planning paradigm.² While this transition is warranted, it is not without its complexities. The transition occurred at the same time as two broader cultural shifts that significantly reduce the

² The contemporary planning paradigm is referred to interchangeably as “collaborative” or “communicative.” This distinction is meaningful, but will not be addressed in detail in this article.

usefulness of the idealized collaborative approach. First, the transition to a collaborative paradigm occurred at the same time as a general overall reduction in social involvement in the United States.³ Thus, a planning paradigm that relies on social involvement emerged at a time of limited social engagement. But more important, the collaborative paradigm must interact with an increasingly entrenched neo-liberal orthodoxy that permeates contemporary American culture, economy and government.⁴

The accident in law is much older and more apparent. The nation's original model land use law contemplated land use decisions "in accordance with a comprehensive plan."⁵ The failure to define "comprehensive plan" in the model act, and the decision to describe other types of plans in the later model planning act, created enough confusion among courts that land-use plans have largely been stripped of their legal significance.⁶ For most contemporary courts, comprehensive land-use plans are mere guides with little legal significance.

Those accidents are problematic. To earn and retain legitimacy, law must reflect the settled deliberations – even if only temporarily settled – of a community regarding a specific problem or context. And that community must be defined inclusively, allowing all sub-communities to participate in deliberations for a place, even those that are not favored in the market economy or otherwise do not occupy the positions of economic or social power that are preferred in market-based neoliberal government. Community visions must create community law. And community visions must emerge from the best ideas of the entire community, even – and especially – when the portions of the community are structurally or functionally unable to participate in the vision-creating exercise. Partial, exclusive visions that only weakly influence law do not and cannot justify legal regimes.

This work approaches the disconnect between community visions and on-the-ground law from the perspective of a person interested in creating, improving, and effectively implementing law. More to the point, my goal is to identify a system of connecting community visions to legal

³ See generally ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2000).

⁴ See generally DAVID HARVEY, *A BRIEF HISTORY OF NEOLIBERALISM* (2005).

⁵ STANDARD STATE ZONING ENABLING ACT § 3 (1926).

⁶ Charles M. Haar, *In Accordance with a Comprehensive Plan*, 68 HARV. L. REV. 1154 (1955); see also Jerrold A. Long, *Realizing the abstraction: Using today's law to reach tomorrow's sustainability*, 46 IDAHO L. REV. 341, 360-364 (2010).

regimes that might realize those visions. While I try to engage directly with planners, and communicate in their language, I write as a lawyer who wants to be able to use community plans in a meaningful way. But there are two impediments. First, the fact that a vision might emerge from a collaborative-planning exercise does not necessarily mean that the vision emerges from the community, and thus might not be the best future available to the community at that particular time. The community cannot select the best alternative if it is not aware of the full range of alternatives available to it. And second, even assuming the community could identify the best available alternative at a particular place and time, no effective mechanism exists to ensure that the alternative is realized, both legally and ultimately on the ground.⁷

A good community plan is a public good, intended and designed to benefit as much of the community as it can, and not merely a powerful subset of the community. But public goods do not enjoy the same benefactors as the private goods that are promoted in public forums. Public goods need public benefactors. When those public goods include a particular vision for a community, they need someone or something to create, promote, or even require the implementation of land-use approaches that might effect that vision, but which might not emerge from a neoliberal visioning and comprehensive planning process that emphasizes and implements private benefits. Planning must be *purposeful*. If the giraffe wants a long neck, it needs to lengthen its neck. If planning wants to be anything more than an exercise in justifying the status quo and confirming the power of entrenched property interests, it must transition from an emphasis on letting visions emerge from the community to *doing*. Local governments, and planners, must identify good places to go and then tell us how to get there. Even force us to get there, at least initially. It could be that good plans, good legal regimes, and ultimately good landscapes, must be forced on communities, which can then accept or reject them as they see fit. But they must have that opportunity.

The basic purpose of the planning-law system is to enact community visions on the ground through the parcel-by-parcel creation of a community's built environment. The system

⁷ See Jerrold A. Long, *Realizing the abstraction: Using today's law to reach tomorrow's sustainability*, 46 IDAHO L. REV. 341 (2010); Edward J. Sullivan & Michael J. Michel, *Ramapo Plus Thirty: The Changing Role of the Plan in Land Use Regulation*, 35 URB. LAW. 75, 86 (2003); Edward J. Sullivan & Laurence Kressel, *Twenty Years After—Renewed Significance of the Comprehensive Plan Requirement*, 9 URB. L. ANN. 33 (1975); Edward J. Sullivan, *Recent Development in Land Use, Planning and Zoning Law: Comprehensive Planning*, 36 URB. LAW. 541 (2004); Edward J. Sullivan, *Recent Developments in Comprehensive Planning Law*, 41 URB. LAW. 547 (2009).

contains two distinct components – in fact, two distinct purposes – that are explicit in the characterization of the system as one of “planning-law.” The planning purpose is concerned with place-making, “promoting and producing particular qualities of places, with the aim of promoting broader social, economic and environmental objectives.”⁸ The law’s somewhat more specific purpose is to make context-specific allocations of rights and responsibilities, “regulating private land use rights in the ‘public interest’ and managing conflicts over the use and development of land[.]”⁹ The system only functions well when the two components are explicitly linked and can work together: plans must recognize legal constraints and opportunities, and law must recognize that it is the plan’s statement of community purpose that legitimates law and its ultimate on-the-ground allocations of rights and responsibilities. Planning that ignores its implementation regime is useless; law that ignores its purpose is meaningless.

If community plans (of any type) are to provide both legitimacy and useable guidance for on-the-ground law, they must be able to balance two competing interests: inclusion and specificity. Legitimate law must approximate community consensus, and reduce oppressive outcomes, as much as local contexts and conflicts allow. But because true consensus on real problems is impossible, consensus-based planning approaches often leave the difficult problems to the law makers, avoiding specificity in the plan and reducing its capacity to guide legal choices effectively. This consensus-based vagueness limits the community’s direct influence on the plan’s final outcome—the community’s built environment. Assuming this is a problem, the solution is to identify a planning approach that both takes advantage of the experience and expertise of rational, technocratic, *expert* planners, while at the same time ensuring the participation of all aspects of the community. The outcome should be a specific, inclusive plan that identifies the best future available to a particular community and provides strict and clear guidance to subsequent legal choices.

This article identifies an approach to land-use planning that will better facilitate the on-the-ground realization of community purpose as expressed in community plans. The primary focus is on planning, although both law and planning need to evolve. The story proceeds in four parts. After an initial discussion of planning’s cultural context, the article describes the structure

⁸ Patsy Healey, *Collaborative Planning in a Stakeholder Society*, 69 TOWN PLANNING REV. 1, 6(1998).

⁹ *Id.*

and limitations of contemporary law and planning processes, respectively. Law fails to implement whatever plans communities provide. And planning fails to provide something useful for law to implement. The final proposal identifies a planning approach that might provide planning products better capable of implementing real community visions through and with the law. My argument combines modernist and post-modernist planning techniques in a collaborative-expert paradigm I have characterized as “selected Lamarckism.” It is Lamarckian because it relies on a “forcing” of specific plans on a community by expert planners, however that community chooses to define both “expert” and “planners”; it is “selected” because the community retains the capacity to both accept or reject the forced plans and participate in the creation of its own plan.

But before continuing the story, I must establish the context of the discussion. Both law and planning exist in a broader political and cultural context. While we do not have to accept that context as a given, it does affect both the causes of, and solutions to, any of the problems I might identify.

II. Planning, Law and the Neoliberal State

Two basic concepts are integral to understanding the need for and functioning of a selected Lamarckism approach to community planning. First is the concept of a public good, which I assume is the good a community plan intends to provide. Second is a neoliberal hegemony that largely prevents a community from identifying and achieving that public good.

This article assumes a specific type of public good: the idea or vision of the “best” community future at a given point and in a given place. The specific future at issue is the community’s built environment, which necessarily influences all other aspects of that community.¹⁰ There are entities that profit from the development of land, and profit more from

¹⁰ A variety of works from multiple academic disciplines have discussed the effect of the built environment on social, cultural and even family conditions. See JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* (1961); Tama Leventhal and Jeanne Brooks-Gun, *The Neighborhoods They Live In: The Effects of Neighborhood Residence on Child and Adolescent Outcomes*, 126 *PSYCH. BULL.* 309 (2000); Searching for the Just City: Debates in Urban Theory and Practice (Peter Marcuse, et al., eds, 2009); Dolores Hayden, *Domesticating Urban Space*, in *REDESIGNING THE AMERICAN DREAM: THE FUTURE OF HOUSING, WORK, AND FAMILY LIFE* 225 (2002 [1984]); Dan Koeppel, *Invisible Riders: For L.A.’s Immigrant Day Laborers, Biking Isn’t Exercise or a Hobby. It’s a Way to Get to Work—If There’s Work To Be Found*, *UTNE*, July/Aug. 2006, at 50.

particular patterns of development than from others. Together, these entities form the “growth machine” of a given community.¹¹ Depending on the political and cultural structure of a particular community, the vision offered by the growth machine might be the same vision that would be accepted by that community, even if all plausible alternatives were offered and all community members provided an equal voice in the process. The problem is not that the growth machine is incapable of offering what might be the best vision; the problem is rather that both basic microeconomic principles and a neoliberal hegemony ensure that the growth machine’s vision is the *only* vision considered and accepted by local government. Alternative visions, which as public goods provide no profit maximizing potential for the private firms that play the largest role in the neoliberal community, are not offered for consideration and will never be adopted, even if they provide the best alternative for that particular community.

II.a. Community Plans as Public Goods

The idealized market economy assumes that market actors behave in specific ways. The market itself is a setting where firms or individuals interact to exchange goods and services at known prices or rates of exchange.¹² Those firms and individuals act “rationally:” they will make those market choices that maximize their utility as determined by their own preferences.¹³ Of course, all market actors have limited resources to contribute to maximizing utility, so those resources are allocated based on the marginal utility achieved by allocating a given unit of resources to each potential good or service, compared to the marginal utility of allocating it to another good or service.¹⁴

In the present context – community planning – the resources that must be allocated depend on the specific market actor. Consider the following simplified example of two potential participants in a collaborative planning process: the generic interested citizen who is acting out of a general concern for the community (rather than in response to a specific proposal),¹⁵ and a developer interested in developing a specific parcel of land. The types of resources each

¹¹ See Harvey Molotch, *The City as a Growth Machine: Toward a Political Economy of Place*, 82 AMER. J. SOC. 309 (1976).

¹² ANDREU MAS-COLELL, MICHAEL D. WHINSTON, AND JERRY R. GREEN, MICROECONOMIC THEORY, 17 (1995).

¹³ EDWIN MANSFIELD AND GARY YOHE, MICRO ECONOMICS (10th ed.), 64 (2000).

¹⁴ *Id.* at 81-86.

¹⁵ If it is hard to imagine a citizen participating in the time-consuming and thankless comprehensive planning process solely out of an altruistic concern for the greater good, that is understandable, as I will explain below.

participant allocates differs in minor but important respects. The interested citizen largely allocates personal time. Prospective land developers also allocate time, as well as money, land, and, potentially, good will. More important, the opportunity costs for each participant vary substantially. The interested citizen likely forgoes time with family, work or recreation in order to attend the public meetings or other activities associated with the planning process. The land developer, as an individual rather than a firm, similarly allocates time to attend the meetings, but that time likely comes from personal time already allocated to “work” rather than “leisure.” If we consider the developer as a firm, rather than an individual, there is no leisure time to allocate. In other words, for the developer, the time allocated is part of the cost of “doing business”—it is taken from time allocated to other work duties, if from anywhere.

On the utility side, the land developer and the interested citizen differ even more sharply. For the land developer, a beneficial outcome is directly related to increased profits. Particularly where the land developer owns a specific parcel of land, the prospective benefits of various alternatives might vary widely, and the developer can measure the benefit to be received with some concreteness and specificity. But for the interested citizen, the utility obtained for engaging in the process is both less certain and less specific, particularly in the early stages of the planning process. The difference between medium-density residential and low-density residential as a general and vague planning description on a hypothetical parcel of land might not mean much to a typical citizen, but it could mean a significant difference in final profits for the person seeking to develop those parcels. For the average citizen, therefore, the opportunity cost for participating might be high, with the potential benefit relatively low. For the land developer, the opportunity costs are relatively lower (they are simply part of the job), but the potential benefits are much higher.

This simplistic hypothetical benefit-cost comparison suggests that certain types of community plans are unlikely to emerge from a collaborative planning process. So long as market actors behave “rationally,” the market will remain incapable of allocating resources to effectively provide public goods.¹⁶ Communities ideally do not engage in the planning process to benefit specific individuals, but rather to benefit the entire community as a single entity. The

¹⁶ See generally MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* (1971); see also EDWIN MANSFIELD AND GARY YOHE, *MICROECONOMICS* (10th ed.), 20 (2000)

citizen, and community generally, is seeking a public benefit: a “good community,” or a “nice place to live.” In the language of one recently-adopted comprehensive plan, a comprehensive plan must “promote . . . the spirit of the people, wildlife, and land entrusted to its care.”¹⁷ The hypothetical developer, in contrast, is seeking a *private* benefit: increased profits for her firm. Promoting or protecting the “spirit of the people, wildlife and land” is a benefit that the citizens together can imagine, but these things do not provide the specific, identifiable, and obvious utility that the developer’s private benefits provide.

In the abstract then, a community plan is a “public good”—a good that is unlikely to be provided by private firms acting in a market economy. A public good has two characteristics that reduce its marginal utility when considered by a potential market provider.¹⁸ Pure public goods are *nonrival*: the marginal cost of providing the good to another consumer is zero.¹⁹ Put another way, the consumption of a public good by one consumer does not diminish the capacity of any number of additional consumers to enjoy the public good in equal measure. This could be an extremely useful characteristic, given that a firm could reach additional consumers without increasing costs, but public goods are also *nonexclusive*.²⁰ The producer of the public good cannot easily or costlessly exclude additional people from consuming the good. Once the good is created and provided to one person, it is functionally impossible to prevent all other consumers from similarly enjoying the benefits the goods provide. A classic, if not perfect, example of a public good is the lighthouse built to guide maritime travelers.²¹ The use of the lighthouse by one traveler does not diminish the ability of another to use it, nor can any traveler be excluded from taking advantage of its guidance.²²

¹⁷ Kootenai County, Idaho Comprehensive Plan at 1-4 (2010), available at <http://www.kcgov.us/departments/planning/newcompplan.asp>.

¹⁸ EDWIN MANSFIELD AND GARY YOHE, *MICROECONOMICS* (10th ed.), 609-610 (2000).

¹⁹ *Id.* at 610.

²⁰ *Id.*

²¹ See JOHN STUART MILL, *PRINCIPLES OF POLITICAL ECONOMY*, in 3 *THE COLLECTED WORKS OF JOHN STUART MILL* 968 (J.M. Robson ed., 2006).

²² See *id.*; but see Ronald H. Coase, *The Lighthouse in Economics*, 17 *J. L. & ECON.* 357 (1974) (disagreeing that the lighthouse is in fact a pure public good, based in part on a British tradition of imposing a toll on ships that passed a lighthouse).

If providing a public good to any single consumer necessarily provides it to every other consumer, there is little to no incentive for the private provision of the public good.²³ As noted above, neoclassical economics generally assumes that a firm's primary objective is to maximize profits.²⁴ Because the free-rider problem associated with public goods eliminates most of the profit maximization potential in the private provision of public goods, those public goods will not be provided by private firms.²⁵ Instead, at least theoretically, it generally falls on the government to provide those public goods.²⁶

This is not to say that private actors do not voluntarily provide public goods in any circumstance. A significant body of literature exists providing examples of the private provision of public goods and attempting to document the conditions under which that provision will occur.²⁷ And many local governments rely on voluntary citizen contributions to local boards, including not insignificantly for our purposes here, local planning boards.²⁸ But even if they are "voluntary," the composition of those planning boards still reflects the basic public goods problem, and differential private benefits: local planning boards consist largely of members of the locality's growth machine, those individuals who stand to benefit personally from growth and development.²⁹

²³ ANDREU MAS-COLELL, MICHAEL D. WHINSTON, AND JERRY R. GREEN, *MICROECONOMIC THEORY*, 361-363 (1995).

²⁴ *Id.* at 135; MANSFIED AND YOHE at 191.

²⁵ *Id.*

²⁶ This is inherent in the basic concept of public goods and was Mill's primary point: "[I]t is a proper office of government to build and maintain lighthouses. . . : for since it is impossible that the ships at sea which are benefitted by a lighthouse, should be made to pay a toll on the occasion of its use, no one would build lighthouse from motives of personal interest[.]" MILL at 968.

²⁷ See, e.g., Theodore Bergstrom, Lawrence Blume and Hal Varian, *On the Private Provision of Public Goods*, 29 J. Pub. Econ. 25 (1986); James Andreoni, *Impure Altruism and Donations to Public Goods: A theory of warm-glow giving*, 100 THE ECON. J. 464 (1990); R. Mark Issac, James M. Walker, and Arlington W. Williams, *Group Size and the Voluntary Provision of Public Goods: Experimental evidence utilizing large groups*, 54 J. PUB. ECON. 1 (1994).

²⁸ See, e.g., Jeffrey L. Brudney, *Volunteer Involvement in the Delivery of Public Services: Advantages and disadvantages*, 16 Pub. Prod. & Management Rev. 283 (1993).

²⁹ See, e.g., Jerry L. Anderson and Erin Sass, *Is the Wheel Unbalanced? A study of bias on zoning boards*, 36 URB. LAW. 447 (2004); Jerry L. Anderson, Aaron Brees, and Emily Renninger, *A Study of American Zoning Board Composition and Public Attitudes Toward Zoning Issues*, 40 URB. LAW. 689 (2008). My own experience demonstrates this in a slightly different way. I am a volunteer on my community's Board of Adjustment, which hears a variety of land-use applications. While I would like to claim that my behavior is altruistic, the reality is that I perceived serving on this particular board as something that would benefit me in my profession. I was seeking to maximize personal utility.

In the community planning context, where the participants are primarily landowners or others who benefit from the use and development of land, there is little incentive by the most active participants to promote outcomes that might benefit the larger community.³⁰ As Mancur Olson argued over four decades ago: “If the members of a large group rationally seek to maximize their personal welfare, they will *not* act to advance their common or group objectives unless there is coercion to force them to do so[.]”³¹ Unfortunately, the long-range nature of comprehensive plans effectively creates a “game” with a finite number of rounds; the game ends once the plan is adopted, at least for that generation. Theoretically, participants contribute zero in the final round, as well as all preceding rounds, of any game participants know to be finite.³² Experimentally, while contributions are *not* zero in games with finite rounds, contributions decrease in each succeeding round, until over 70% of participants contribute zero in the announced final round.³³ While Elinor Ostrom, among many others, have demonstrated that groups are capable of cooperating to achieve public goods, a key component of that increased cooperation is face-to-face communication.³⁴ This suggests that as the size of a group or its geographic or cultural diversity increases, cooperation is likely to decline, yielding outcomes that more closely match Olson’s original argument about individual rationality and public goods. Even a small town contains potentially thousands of different land owners with different goals and interests.

II.b. Community Plans and Neoliberal Governance

The public goods problem is not insurmountable, but it is inherent in any individual’s resource allocation decisions. But perhaps more significant is how this public goods problem works itself out in the context of contemporary governance, which is increasingly overwhelmed by a neoliberal hegemony that takes the fundamental position that government is not in the

³⁰ See generally Harvey L. Molotch, *The City as a Growth Machine: Toward a Political Economy of Place*, 82 AM. J. SOC. 309 (1976); see also Harvey L. Molotch, *The Political Economy of Growth Machines*, 15 J. URB. AFFAIRS 29 (1993).

³¹ MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS*, 2 (1971)

³² See Elinor Ostrom, *Collective Action and the Evolution of Social Norms*, 14 J. ECON. PERSP. 137, 139 (2000)

³³ *Id.* at 140.

³⁴ See Elinor Ostrom & James Walker, *Neither Markets nor States: Linking Processes in Collective Action Arenas*, in *POLYCENTRIC GAMES AND INSTITUTIONS: READINGS FROM THE WORKSHOP IN POLITICAL THEORY AND POLICY ANALYSIS* (Michael D. McGinnis, ed., 2000); Elinor Ostrom, *Collective Action and the Evolution of Social Norms*, 14 J. ECON. PERSP. 137, 140 (2000); see also ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991).

business of providing public goods.³⁵ Neoliberalism refers to the use of orthodox neoclassical economics as the guiding principle in government, and even social and cultural relationships; the role of the state is to ensure the unfettered function of private markets:

Neoliberalism is in the first instance a theory of political economic practices that proposes that human well-being can best be advanced by liberating individual entrepreneurial freedoms and skills within an institutional framework characterized by strong private property rights, free markets and free trade. The role of the state is to create and preserve an institutional framework appropriate to such practices.³⁶

As University of Chicago Professor John Comaroff explains, paraphrasing and agreeing with Michel Foucault, the guiding principle of modern government is now the market economy; government has itself become business, treating the governed as shareholders with profit maximization as the overriding goal of governance.³⁷ Economic growth, rather than any particular philosophical imperative (e.g., life, liberty, and the pursuit of happiness), becomes both the mission and legitimator of the State.³⁸ Perhaps more significant, Chicago School neoliberalism extends beyond what might have been characterized as the traditional “economy” to include “all forms of human action and behavior.”³⁹

The shift to neoliberal government has significant effects on the approach local governments take to land-use regulation. Among core neoliberal principles are the sanctity of private property and deregulation.⁴⁰ Land-use planning, and the ultimate reallocations of potential rights and privileges it entails, necessarily regulates the use of private lands. The neoliberal government, therefore, fundamentally distrusts land-use planning. Unfortunately, because of the public goods problem discussed above, contemporary planning practice –

³⁵ See, e.g., DAVID HARVEY, A BRIEF HISTORY OF NEOLIBERALISM (2005); LOÏC WACQUANT, PUNISHING THE POOR: THE NEOLIBERAL GOVERNMENT OF SOCIAL INSECURITY (2009); Suzan Ilcan, *Privatizing Responsibility: Public Sector Reform under Neoliberal Government*, 46 CAN. REV. SOC. 207 (2009); Terris Milton, *The Neoliberal Triad of Anti-Health Reforms: Government Budget Cutting, Deregulation, and Privatization*, 20 J. PUB. HEALTH POL’Y 149 (1999).

³⁶ DAVID HARVEY, A BRIEF HISTORY OF NEOLIBERALISM, 2 (2005).

³⁷ See John Comaroff, *The End of Neoliberalism? What is Left of the Left*, 637 ANNALS AM. ACAD. POL. & SOC. SCI. 141, 144-145 (2011).

³⁸ See Thomas Lemke, *‘The Birth of Bio-politics’: Michel Foucault’s Lecture at the Collège de France on Neoliberal Governmentality*, 30 ECON. & SOC. 190, 196 (2001).

³⁹ *Id.* at 198; see also Jamie Peck and Adam Tickell, *Conceptualizing Neoliberalism, Thinking Thatcherism*, in CONTESTING NEOLIBERALISM: URBAN FRONTIERS 26 (Helga Leitner, et al., eds., 2007).

⁴⁰ Harvey at 64; see also HERNANDO DE SOTO, THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE (2000) (arguing that the protection of private property is one of the most important roles of the state).

originally intended to facilitate real involvement by all aspects of a community – serves instead to reinforce and legitimate the neoliberal hegemony over community planning.

Together, our understanding of the community plan as a public good, the identities and motivations of the actors in any planning-law ecosystem, and the neoliberal influence on government and its understood “purpose,” create the landscape in which land-use visions are created and communicated, and ultimately if ineffectively, realized on the ground through the creation and implementation of formal law. With this landscape in mind, we can now consider the inadequacies of both components of the planning-law system.

III. The Formalization of Community Vision Through Law

I have characterized the institutional structure at issue here as a “planning-law” system. Further, I have generally described the system as operating linearly in a single direction: from blank canvas to imaginings of place to plans to law and finally some realization on the ground. This is an oversimplification of an inaccurate model. The planning-law system is not linear, it is chaotic.⁴¹ There is no blank canvas on which we impose visions of place. Rather, there is a place – including existing law and other institutions, as well as the consequences of those institutions – that informs our developing visions for the future of that place. As we imagine our future, we react to what we did before, where we came from, and our understandings of the causes of the physical, social and cultural landscapes we have experienced and are experiencing.

This, of course, is obvious. But if our purpose is to consider carefully how visions legitimate law, we must also consider carefully the context in which those visions emerge. Before considering how we plan, and its potential effects on law, the following sections explain the legal context in which planning happens.

⁴¹ See Jerrold A. Long, *Private Lands, Conflict, and Institutional Evolution in the Post-Public-Lands West*, 28 PACE ENVTL. L. REV. 670, 726-729 (2011); see also EDWARD N. LORENZ, *THE ESSENCE OF CHAOS* (1993); JAMES GLEICK, *CHAOS: MAKING A NEW SCIENCE* (1987).

The key assumption of this article is that some best vision for a community exists, and that the planning process – including both creation and implementation – should facilitate achievement of that best vision. Rather than treating land-use plans as enforceable law, which would necessarily require that plans contain much more detailed requirements for the nature and structure of community plans, most American jurisdictions have determined that land-use plans are not legally enforceable, but rather “guides” of some measure. Local governments (or other implementing jurisdictions) and courts therefore are not bound by the exact language of the plan, but are able to freely interpret the plan in the context of some implementation exercise: either the establishment of a general zoning code, or the approval of a specific proposal.

Consequently, in addition to the creation of the plan itself, there are two decision moments or processes in which neoliberal hegemony influences the decision and potentially drives the outcome further from the hypothetical best vision the community might have desired. One of the critiques of collaborative planning I will present in subsequent sections is its tendency toward vagueness, which I claim is a necessary outcome of its collaborative nature. Understanding that many land-use plans are vague, without specific recommendations or requirements, helps explain much of the planning-law jurisprudence discussed below.

The law interacts with planning and intended planning outcomes in two ways. First, the law reacts to community plans by creating legal rules to give effect to those plans, and then in implementing those laws in the day-to-day banality of local government—the original zoning designations or revisions, conditional or special use permits, variances, subdivision approvals, design standards, exactions, planned unit developments, etc.⁴² The actual language of the plan should be crucial at this stage, given the inherent flexibility or discretion allowed local governments or their planning offices and the constant pressure from the growth machine to

⁴² While it might seem appropriate to separate this first interaction into two separate interactions – the creation and then implementation of local law – local land-use law is much more fluid than that. Zoning designations are subject to constant revision in response to site-specific applications. Many legal disputes – including claims of “spot zoning,” or the quasi-judicial v. legislative action distinction – reflect this fluid nature of local land-use law. See, e.g., DANIEL R. MANDELKER, *LAND USE LAW* (5TH ED.) §§ 6.27-6.33 (2003) (discussing spot zoning); see also *Fasano v. Board of County Comm’rs of Washington County*, 507 P.2d 23 (Or. 1973) (articulating quasi-judicial v. legislative distinction).

modify pre-established standards.⁴³ A vague plan increases discretion, a specific plan decreases it.

The second interaction happens during legal appeals, when the nature and propriety of the first interaction is challenged. While specificity continues to play a role in determining the outcome of this second interaction, at this point the plan's "creation story" grows in significance. The vast majority of U.S. states follow a legal approach that provides little guidance to courts as they consider how land-use plans and on-the-ground decisions should relate to each other. As Louis Menand describes, without (and often even with) strict legal standards for guidance, a court must balance an array of competing imperatives.⁴⁴ Without overtly preferring any single approach over the others, judges must consider the value of precedent, the potential for precedent to be inconsistent with evolving social norms, the need for justice in the individual case, the potential for a specific decision to influence future behavior, the need for the decision to conform with the judge's own moral and ethical standards, the desire to punish bad behavior and promote good behavior, and the need to promote economic efficiency while ensuring that costs are born by those who can afford to bear them, among other competing imperatives.⁴⁵ A plan that originated in a growth-machine dominated neoliberal process, and which more or less transparently reflects the desires and influence of the growth machine, provides little opportunity for a court to balance potentially competing imperatives. If the community is silent in the planning process, it is equally silent during judicial review.

There is, then, a significant disconnect in both of these intersections between what a community *might* imagine – given the opportunity to do so – and what happens on the ground. This disconnect between community imaginings and the legal-regimes that should result is both

⁴³ In most states, courts grant substantial discretion to local governing bodies in their review of the consistency of law or case-by-case decisions with comprehensive land-use plans. See DANIEL R. MANDELKER, *LAND USE LAW*, 5TH ED., §3.14 (2003); JULIAN CONRAD JUERGENSMEYER & THOMAS E. ROBERTS, *LAND USE PLANNING AND DEVELOPMENT REGULATION LAW*, 2ND ED., §2.13 (2007). Courts generally characterize both the original zoning and most re-zoning decisions as "legislative" decisions, subject only to arbitrary and capricious review. See, e.g., *Fasano v. Bd. of County Com'rs of Washington County*, 507 P.2d 23, 26 (Or. 1973), *disapproved of by Neuberger v. City of Portland*, 607 P.2d 722 (Or. 1980) (distinguishing between legislative and quasi-judicial land-use decisions, but recognizing that "the majority of jurisdictions state that a zoning ordinance is a legislative act and is thereby entitled to presumptive validity.")

⁴⁴ LOUIS MENAND, *THE METAPHYSICAL CLUB: A STORY OF IDEAS IN AMERICA* 339 (2001).

⁴⁵ *Id.* See also RICHARD A. POSNER, *LAW PRAGMATISM, AND DEMOCRACY* 59-85 (2003) (articulating principles of pragmatic adjudication).

unfortunate and problematic. It is unfortunate because a community-based, inclusive, and Pragmatic⁴⁶ planning exercise might yield a community vision of place, based in shared experiences and expectations, that could serve as a foundation for legal choices and evolving norms and rules. It is problematic because without that foundation, an existing legal regime has little to recommend it over other potentially legitimate or illegitimate alternatives. It becomes arbitrary, at least from a community perspective.

In most circumstances, arbitrary law cannot last. As we experience the consequences of previous choices, we compare those consequences to our previous imaginings to determine if the world we have created is the world we wanted to create.⁴⁷ If not, over time, we adapt, adjust, and proceed accordingly. This process is somewhat complicated in all circumstances, but it is particularly so with land. Our land use choices have two consequences that substantially constrain future choices. Land-use decisions create a durable physical and cultural place. The consequences of land-use choices are more real than many other legal decisions. They create the structure of the places we live, determine the size of our homes, nature of our commutes and communities, and the views we enjoy, or not, out our front windows. Only with extreme difficulty are those physical and cultural manifestations of choice revised or revisited. And rarely are they wholly eliminated.

Land-use decisions also create a metaphysical place that further constrains future choices. The most durable of American institutions is our system of property relations, almost exclusively (if inaccurately) referred to as a system of “property rights.” The existence, and even the assertion, of property rights in private lands constrains both the legal and political options available to a community. And land-use decisions, including site-specific land-use approvals as well as general zoning decisions, create the perception, and at times the reality, of vested rights to use a particular parcel of land in a particular way. Those political and legal rights can emerge

⁴⁶ I capitalize “Pragmatic” here to distinguish the philosophical pragmatism to which I refer from the more common, colloquial understanding of the term. See DOULAS MCDERMID, *THE VARIETIES OF PRAGMATISM: TRUTH, REALISM, AND KNOWLEDGE FROM JAMES TO RORTY* (2006).

⁴⁷ See generally JOHN R. COMMONS, *THE LEGAL FOUNDATIONS OF CAPITALISM* 147 (1923); see also DANIEL BROMLEY, *SUFFICIENT REASON: VOLITIONAL PRAGMATISM AND THE MEANING OF ECONOMIC INSTITUTIONS* 67-84 (2006). For a detailed discussion of how this process works in legal decision making, see RICHARD A. POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* (2003).

regardless of the wisdom or legitimacy of the specific land-use institution that birthed them. Unwise choices, even arbitrary choices, can create permanent legal rights.

But if we assume that law represents – or should represent – the final blessing we bestow upon our settled deliberations for a place (or at least for a specific conflict at a precise moment in time), the suggestion that law might not reflect our community visions for a place should be unsettling. It might also be inaccurate. I suggest that arbitrary law – defined as law without some foundation in reason or reasonable ends – cannot last. But “plan-less” land-use regimes do last. In fact, if experience provides any guide, plan-less land-use regimes are more durable than any alternative. That fact requires we inquire into how we justify those regimes, if it is not our reliance on the visions that might emerge from the community.

In the United States, we understand plans and law as two distinct structures, with separate and distinct legal meanings. Most states are “plan as guide” states, in which counties and municipalities must *consider* comprehensive plans during ordinance drafting and consideration of site-specific proposals, but land-use decisions need not strictly conform to comprehensive plans.⁴⁸ As the Idaho Supreme Court noted in its most recent decision directly on point, “A comprehensive plan is not a legally controlling zoning law, it serves as a guide to local government agencies charged with making zoning decisions. The ‘in accordance with’ language ... does not require zoning decisions to strictly conform to the land use designations of the comprehensive plan.”⁴⁹

Most states take approaches similar to Idaho’s, in which the plan is a factor in crafting ordinances or making site-specific decisions, but is not determinative. Even Washington, which is often characterized as a state with a stringent planning law requirement, follows the “plan as guide” approach. While journal articles might characterize Washington as requiring strict conformity with comprehensive plans,⁵⁰ the Washington Supreme Court has a different opinion:

⁴⁸ See, e.g., Edward J. Sullivan & Michael J. Michel, *Ramapo plus thirty: The changing role of the plan in land use regulation*, 35 URB. LAW. 75 (2003); Charles M. Haar, *In accordance with a comprehensive plan*, 68 HARV. L. REV. 1154 (1955).

⁴⁹ *Evans v. Teton County*, 73 P.3d 84, 89 (2003).

⁵⁰ Edward J. Sullivan & Michael J. Michel, *Ramapo plus thirty: The changing role of the plan in land use regulation*, 35 URB. LAW. 75, 86 (2003) (characterizing Washington as a “planning mandate” state: “In Delaware, Florida, Oregon, and Washington, the comprehensive plan is a legal standard for review of land use decisions[.]”).

In *Barrie v. Kitsap County*, we held comprehensive plans generally are not used to make specific land use decisions. Instead, we stated a comprehensive plan is a “guide” or “blueprint” to be used when making land use decisions. Although the court confirmed there need not be “strict adherence” to a comprehensive plan, any proposed land use decision must generally conform with the comprehensive plan.⁵¹

In the abstract, this language might allow for a requirement of some level of strict adherence with a comprehensive plan, but the Washington court clarified its intentions in the following sentences: “If a comprehensive plan prohibits a particular use but the zoning code permits it, the use would be permitted. These rules require that conflicts between a general comprehensive plan and a specific zoning code be resolved in the zoning code's favor.”⁵²

Only four states follow the “plan as law” approach, requiring strict conformance with the comprehensive land-use plan.⁵³ Wisconsin might be a fifth, as its new “smart growth” law uses language similar to Washington’s, requiring a range of land-use decisions – including zoning and subdivision approvals – to be “consistent with” the comprehensive plan. But that requirement has only been in effect since Jan. 1, 2010, and the Wisconsin courts have yet to determine the nature of the consistency required.⁵⁴ However, given its similarity to the Washington language, and the general “in accordance with” language of the standard act, it is not obvious that the “consistent with” language will require a significant change in Wisconsin law. Prior to 2010, the Wisconsin position was that “once a comprehensive land use plan is enacted, the plan is merely advisory. In essence, a comprehensive plan is merely a guide to community development.”⁵⁵

But at most, five states require strict compliance with land-use plans. The remaining forty-five states consider the plan to be a mere guide, with varying levels of influence. A recent Kansas case illustrates how the plan-as-guide approach limits the capacity of community plans to constrain site-specific development proposals. In *Manly v. City of Shawnee*, the local school

⁵¹ *Citizens for Mount Vernon v. City of Mount Vernon*, 947 P.2d 1208, 1214-15 (1997) (internal citations omitted).

⁵² *Id.* at 1215 (internal citations omitted).

⁵³ Those states are California, Delaware, Florida and Oregon. See Edward J. Sullivan & Michael J. Michel, *Ramapo plus thirty: The changing role of the plan in land use regulation*, 35 URB. LAW. 75 (2003); but also see Jerrold A. Long, *Realizing the abstraction: Using today’s law to reach tomorrow’s sustainability*, 46 IDAHO L. REV. 341, 363-364 (2010) (disagreeing with Sullivan and Michel’s claim that six states follow the plan as law approach).

⁵⁴ Wis. Stat. Ann. §66.1001(3).

⁵⁵ *Step Now Citizens Group v. Town of Utica Planning & Zoning Comm’n*, 663 N.W.2d 833, 845 (Wis. 2003).

district sought permission to construct a lighted softball stadium complex.⁵⁶ Although the zoning ordinance specifically allowed softball fields, the ordinance required a special use permit for both the lighting and the stadium seating. A neighboring landowner challenged the city's approval of the proposal, claiming that the decision violated a Kansas requirement that local zoning decisions be "reasonable."⁵⁷ In Kansas, courts must presume that land-use decisions by local governments are reasonable, and the burden is on the challenging landowner to prove unreasonableness by a preponderance of the evidence.⁵⁸ Kansas courts may only find land-use decisions unreasonable when "compelled to do so by the evidence," and when the action is "so arbitrary that it can be said it was taken without regard to the benefit or harm involved to the community at large, including all interested parties, and was so wide of the mark that its unreasonableness lies outside the realm of fair debate."⁵⁹ There are eight factors courts must consider in assessing the reasonableness of a land-use decision, including the decision's conformity with the locality's master or comprehensive plan.⁶⁰

In reviewing the city's decision regarding the softball complex's conformity with the Shawnee master plan, the Kansas Supreme Court did not consider the Shawnee master plan, nor cite to any relevant language of the plan. Perhaps more important, the Kansas Supreme Court acknowledged that the district court also did not expressly consider or explain its analysis of the Shawnee master plan, noting that "formal findings and conclusions are not necessary[.]"⁶¹ But because the district court "had the minutes from the City planning commission and City Council meetings, the City planning staff reports, the comprehensive plan, and an audiotape of the meetings, at which there was a great deal of debate on the project's impact on the surrounding property[.]" the *Manly* court found itself "convinced that the district court applied the appropriate analysis."⁶² In upholding the district court's reasonableness decision, the *Manly* court suggests that what matters is not whether the evidence demonstrates a particular decision's actual conformity with a locality's master plan, only that the evidence demonstrates that the locality

⁵⁶ *Manly v. City of Shawnee*, 194 P.3d 1 (Kan. 2010).

⁵⁷ *Id.* at 10-11.

⁵⁸ *Id.* at 10 (quoting *McPherson Landfill, Inc. v. Board of Shawnee County Comm'rs*, 49 P.3d 522 (Kan. 2002)).

⁵⁹ *Id.*

⁶⁰ See *id.* at 11 (citing to *Golden v. City of Overland Park*, 584 P.2d 130 (Kan. 1978)).

⁶¹ *Id.*

⁶² *Id.*

considered its master plan in reaching its decision. Actual conformity with the plan is largely irrelevant:

[i]t makes scant sense to complain that the City did not take the comprehensive plan into account, when the comprehensive plan was specifically mentioned in the motion to approve the special use permit. Again, the City took the factor into consideration but did not agree with the Manlys' point of view.⁶³

The point here is not that the Kansas Supreme Court upheld a local decision that was inconsistent with a comprehensive plan. The point is that the Kansas Supreme Court upheld a local decision without even knowing or considering whether it was consistent with the city's comprehensive plan. The plan itself played no role in the court's decision.

Kansas is not alone in its lack of respect for comprehensive plans. As noted above, only four states require strict compliance with land-use plans. And in fact, many states do not require a land-use plan at all in a real sense, even in the face of statutory requirements. In a classic New York case – *Udell v. Haas* – the New York Court of Appeals considered whether a specific rezoning decision satisfied the requirement that land-use decisions be made “in accordance with the comprehensive plan.”⁶⁴ The city had not adopted a formal comprehensive plan, but that did not trouble the court. Instead it noted that “the search for the village's ‘comprehensive plan’ is relatively easy. It may be found in both the village's zoning ordinance and in its zoning map.”⁶⁵ In other words, in New York, determining whether a zoning ordinance is in accordance with a comprehensive plan requires determining whether the zoning ordinance is in accordance with itself.⁶⁶ Connecticut follows a similar approach: “In the absence of a formally adopted

⁶³ *Id.* The Shawnee City Council had in fact considered whether the proposed softball complex was consistent with the city's comprehensive plan, and apparently determined that because the land was designated “quasi-public,” a softball complex would be appropriate. But because the city's planning and zoning commission had not considered that specific issue, the city attorney recommended the city include the following language in its approval: “Further, the Governing Body overrides ... any portion of the Comprehensive Plan to the contrary to the approval of the special use permit and [to] the extent necessary, the Comprehensive Plan is deemed to be amended.” Minutes of the City of Shawnee Kansas City Council, Jan. 9, 2006, available at <http://www.cityofshawnee.org/WEB/MINUTES.NSF/03133cfae4e31fc0862570dd005fe696/413195b25e8e0ccb86257100004f18ec?OpenDocument>.

⁶⁴ *Udell v. Haas*, 235 N.E.2d 897 (N.Y. 1968)

⁶⁵ *Id.* at 902.

⁶⁶ New York courts continue to accept the basic principle articulated in *Udell v. Haas*: “The amendments at issue in this case are, by their very nature, in accord with the comprehensive plan *manifested in the Zoning Ordinance* of the

comprehensive plan, a town's comprehensive plan is to be found in the scheme of the zoning regulations themselves.”⁶⁷ As many as eighteen states don't require any independent comprehensive plan at all, even in the face of statutory requirements that land use decisions be made “in accordance with a comprehensive plan.”⁶⁸

But even if the plan-as-guide (or less) approach remains the predominant understanding of the plan-law relationship, that does not mean that land-use plans have no capacity to affect local land-use decisions. Every year, Edward J. Sullivan prepares a document for *The Urban Lawyer* assessing “Recent Developments in Comprehensive Planning Law.” In 2010, Sullivan suggested that courts are gradually moving away from the plan-as-guide approach toward a more rigorous, demanding connection between plans and site-specific decisions: “The trend continues to shift ... to a greater judicial respect for the plan in evaluating zone changes and permits in the land use area[.]”⁶⁹ This “trend” does not always reflect a specific new respect for comprehensive plans. For example, to demonstrate his trend, Sullivan relies on one case from Washington that *reaffirms* the supremacy of zoning ordinances over conflicting comprehensive plans.⁷⁰ In *Cingular Wireless LLC v. Thurston County*, a Washington appellate court affirmed a county's decision to deny a permit based, in part, on requirements contained in the county's comprehensive plan.⁷¹ The court explicitly recognized that where a comprehensive plan and zoning code are in conflict, the zoning code will control.⁷² But that was not the case here. The court affirmed the decision based on the comprehensive plan because the zoning code *required* consistency with the comprehensive plan: “where, as here, the zoning code itself expressly requires that a proposed use comply with a comprehensive plan, the proposed use must satisfy

Town of Sardinia originally enacted.” *Gernatt Asphalt Products, Inc. v. Town of Sardinia*, 664 N.E.2d 1226, 1236 (N.Y. 1996) (emphasis added).

⁶⁷ *Timber Trails Associates v. Planning & Zoning Comm'n of Town of Sherman*, 916 A.2d 99, 111 (Conn. App. Ct. 2007).

⁶⁸ Edward J. Sullivan & Michael J. Michel, *Ramapo plus thirty: The changing role of the plan in land use regulation*, 35 URB. LAW. 75 (2003).

⁶⁹ See Edward J. Sullivan, *Recent Developments in Comprehensive Planning Law*, 42 THE URBAN LAWYER 665 (2010).

⁷⁰ See Edward J. Sullivan, *Recent Developments in Comprehensive Planning Law*, 39 Urb. Law. 681, 690 (2007).

⁷¹ *Cingular Wireless, LLC v. Thurston County*, 129 P.3d 300 (2006).

⁷² *Id.* at 306.

both the zoning code and the comprehensive plan.”⁷³ In other words, it was the zoning code, rather than the comprehensive plan, that provided the legal justification for denying the permit.

But although it is not yet clear if there is indeed a trend toward greater respect for local land-use plans, there is evidence from unexpected sources. In 2010, Sullivan reviewed a Montana Supreme Court case, *Lake County First v. Polson City Council*,⁷⁴ and characterized the Montana approach as requiring “only ‘substantial compliance’ of the zoning regulations with the plan, a *deferential standard*.”⁷⁵ But in contrast with the Kansas approach addressed in *Manly*, the Montana Supreme Court’s “deferential” approach directly and specifically considered the requirements of the comprehensive plan and the manner in which the City of Polson considered those requirements.

At issue in *Lake County First* was a request by Wal-Mart for the city to annex a parcel of land, rezone it to “highway commercial,” subdivide it, and approve a special use permit authorizing construction of a Wal-Mart supercenter.⁷⁶ Plaintiffs alleged that approval of Wal-Mart’s proposal failed to comply with two provisions of the City of Polson Master Plan. The plan indicated that the city should not permit “monolithic structures than continuously block views from the highway to the lake[.]”⁷⁷ Unlike the Kansas approach, the Montana court specifically considered how the city had dealt with this aspect of the comprehensive plan:

Views were a significant issue during the application process and were discussed in detail by the application and during public meetings. Wal-Mart worked cooperatively with the Department and the Board to address the architecture and elevation of the building to ensure that views would not be hindered. Wal-Mart presented a computer simulation of the proposed store to illustrate that the store would not rise above the grade of the hill next to the highway and thus would not obstruct the views from the highway to the lake.⁷⁸

⁷³ *Id.* at 301. For an alternative interpretation of a similar requirement, see *Urrutia v. Blaine County*, 2 P.3d 738 (Id. 1999) (deciding that zoning codes *could not* require compliance with a comprehensive plan, as that would – in the Idaho Supreme Court’s opinion – elevate the comprehensive plan to the status of law, which it cannot be).

⁷⁴ *Lake County First v. Polson City Council*, 218 P.3d 816 (Mont. 2009).

⁷⁵ Edward J. Sullivan, *Recent Developments in Comprehensive Planning Law*, 42 THE URBAN LAWYER 665, 668 (2010) (emphasis added).

⁷⁶ *Lake County First v. Polson City Council*, 218 P.3d 816 (Mont. 2009).

⁷⁷ *Id.* at 824 (quoting City of Polson Master Plan).

⁷⁸ *Id.* According to the “Street View” function available on Google Maps, the Wal-Mart building does not obstruct views of the lake, and is in fact only partly visible to travelers on the highway entering Polson from the South.

The second relevant plan provision concerned the city's central business district, containing the policy to "avoid excessive commercial zoning outside the CBD."⁷⁹ The Montana Court engaged in an even more thorough consideration of this issue. Again, rather than simply accept the city's determination as to whether it has satisfied this element of the comprehensive plan, the Montana court considered the evidence provided, the city's analysis of the evidence, and the appropriateness of its conclusions regarding that evidence.⁸⁰ The court noted that the "issue was a very visible issue throughout the review process and within the evidentiary record before the Council, including the Department Report, the Department Director's public statements, the Plaintiffs' Report, and many public comments."⁸¹

On its own, the *Lake County First* decision demonstrates a serious and careful consideration of a local government's treatment of its comprehensive plan. While the ultimate decision is appropriately deferential to the city, it is not blindly so, and requires that the city explain in some detail how "substantial compliance" is achieved. A more recent Montana case reinforces this interpretation of the Montana substantial compliance approach, suggesting again that it is not as deferential as Sullivan implies. In *Heffernan v. Missoula City Council*,⁸² the Montana Supreme Court considered the City of Missoula's approval of a thirty-seven-lot subdivision. While it still applied the "substantial compliance" standard that Sullivan characterized as "deferential," the *Heffernan* court used it to *overturn* the city's decision, rather than confirm it. The court overturned Missoula's decision notwithstanding the court's recognition of a recently adopted (but as yet, judicially unexamined) statutory provision that the court had suggested before could be assumed to have "intended to reduce in some fashion the reliance which local governing bodies are required to place upon growth policies when making land use decisions."⁸³

At issue in *Heffernan* was the consistency of the thirty-seven-lot subdivision with the Rattlesnake Valley Comprehensive Plan, a statutorily authorized sub-plan associated with the

⁷⁹ *Id.* at 825.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Heffernan v. Missoula City Council*, 255 P.3d 80 (2011).

⁸³ *Id.* at 101 (quoting *Citizen Advocates for a Livable Missoula, Inc. v. City Council*, 130 P.3d 1259 (Mont. 2006)).

overall City of Missoula Growth Policy and Missoula County Growth Policy.⁸⁴ The city and county worked jointly on the original Rattlesnake Valley plan in 1988, adopting an updated version in 1995. The city and county incorporated the 1995 plan into the Missoula County Growth Policy in 2002, and subsequently reaffirmed it in 2006.⁸⁵ The plan addresses the appropriate development of the Rattlesnake Valley as it transitions from urban Missoula in its lower reaches to the forests and protected wildlands higher in the valley. Consistent with the nature of the valley, the plan recommends a range of appropriate development densities, ranging from six to eight dwelling units per acre low in the valley, to one unit per ten acres on the valley's upper slopes.⁸⁶ The "Sonata Park" proposal approved by the city straddled two density zones that should have only allowed seven or eight units on 34.08 acres. As noted, the city's ultimate decision approved thirty-seven units.

In many ways, the *Heffernan* case is not terribly useful for identifying where we might draw the line between what is or is not "substantial compliance" with a land-use plan. Because rather than carefully consider the Rattlesnake Valley plan, Missoula city officials openly disregarded it. One member of the Missoula planning board indicated that he did not "put a lot of weight" on the legal argument regarding the plan.⁸⁷ According to this member of the Board, plans don't create legal obligations, but instead planning "wastes people's time."⁸⁸ Other members of the planning board disregarded the plan's density recommendations because they felt the area needed to "do its part in providing new homes for Missoula."⁸⁹ Another felt that the plan's original drafters desired higher levels of density in the area, notwithstanding the plan's actual language.⁹⁰ The city council, determining in part that Rattlesnake Valley should contribute to the city's need for new housing and that a landowner should have "considerable say" in how his property is developed, approved the subdivision by a ten-to-two vote.⁹¹ As the district court

⁸⁴ See Mont. Code Ann. §76-1-601(4). In Montana, land-use plans are now called "growth policies." Substantively, they are the same as what was previously referred to in Montana, and still in most states, as a "master plan" or "comprehensive plan."

⁸⁵ *Heffernan* at 87.

⁸⁶ See *id.* See also Rattlesnake Valley Comprehensive Plan Amendment, 1995 Update, available at <ftp://www.co.missoula.mt.us/opgftp/Documents/CompPlans/Rattlesnake/RattlesnakeLP.htm>.

⁸⁷ *Heffernan* at 89.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

noted, the city “essentially ignored” the plan’s central element, and “ignored or failed to substantiate its findings” regarding other elements of the plan.⁹²

Given this recitation of the basic facts, it is perhaps unsurprising that the Montana Supreme Court affirmed the lower court’s determination that the city had not substantially complied with the Rattlesnake Valley plan. But again, unlike the Kansas approach, the Montana Court dedicates significant time to conducting its own review of the record and is unwilling to rely on the city’s characterization of its decision. While Montana courts might apply a “deferential standard,” those courts will insist that local governments earn that deference:

a governing body is not entitled to rely on an “it’s okay because we said it’s okay” approach when developing the record underlying its decision. As we have previously indicated, the governing body must develop a record that fleshes out all pertinent facts upon which its decision was based in order to facilitate judicial review. For purposes of evaluating “substantial compliance,” that includes all pertinent elements of the growth policy.⁹³

The *Heffernan* court’s approach to land-use plans suggests that the content of the plan is relevant and must be directly and specifically addressed in a site-specific decision. More than the ultimate decision – overturning a city’s development approval – it is the court’s characterization of the importance of the plan (or “growth policy” in Montana) that should be our focus:

Growth policies are still “the preeminent planning tool.” They are the product of extensive study, deliberation, and public involvement. The final product is a well thought out, long range, detailed and comprehensive planning document which takes into consideration past, present, and anticipated land uses in the jurisdiction and which is debated and adopted in an atmosphere that is free, to the extent possible, from the influence of special interests and political expedience. Thus, given the vital role played by planning boards and the significance attributed to growth policies ... it belies common sense to suggest that a governing body no longer needs to comply with its growth policy.⁹⁴

The *Heffernan* decision provides an indication of what the law *might* look like were it faced with clear, detailed, and legitimate land-use plans. Of course, reviewing courts would have to actually consider (i.e., read) the relevant plan provisions – unlike the Kansas court in *Manly*. But if courts are willing to take their review obligations seriously, even “deferential” approaches

⁹² *Id.*

⁹³ *Heffernan* at 105 (internal citations omitted).

⁹⁴ *Id.* at 102.

to local land-use decisions might allow for a real implementation of community visions as expressed in community plans.

This brief review of the law suggests two things. Assuming that the deferential “plan as guide” approach remains the approach in the majority of the states, our task is to improve the connection between vision and law. If we desire to create visions that have a meaningful effect on law, one significant aspect of the “plan as guide” approach is that specificity matters. General or vague plans might justify a wide range of outcomes, including outcomes that might not reasonably be considered to fit within a single “vision” for a place.⁹⁵ Specific plans narrow the range of future choices, which is presumably the very purpose of planning—to identify the place a community wants to be, and then create the necessary tools to get there.

But the review also suggests that the transition required for courts to treat land-use plans seriously is not significant and can occur under existing law. As that transition occurs, it will both allow for and require a more careful approach to crafting community plans. Because the plans could in fact determine the outcome of site-specific proposals, it is even more important that they be both specific and as close to the community’s hypothetical best alternative as possible. More to the point, courts cannot enforce land-use plans unless and until the plans provide something to enforce.

IV. Collaborative Exclusion: the failure of the Neoliberal planning paradigm

This article imagines planning from the perspective of a legal community tasked with giving legal effect to community plans. The essence of the argument is that the on-the-ground implementation – i.e., the law – of community plans can be improved by addressing the origin and composition of the plans themselves. Planners, who are not as strictly bound by formal

⁹⁵ See generally Jerrold A. Long, *Private lands, conflict, and institutional evolution in the post-public-lands West*, 28 PACE ENVTL. L. REV. 670 (2011).

regimes as lawyers, judges, and local government officials, can facilitate an improvement in planning law by improving planning. Unfortunately, contemporary community planning fails in two significant respects. First, its emphasis on participation and process over substantive outcomes necessarily prefers those interests most motivated to participate. And second, those same motivated interests benefit from vague, easily-manipulated planning language that facilitates the approval of a wide-array of land-use applications, even those not contemplated during the plan's creation.

The following discussion of planning theory and contemporary planning practice adopts an overly simplistic modernist/post-modernist dichotomy to explain both the substance and transition of planning approaches. While it necessarily avoids much of the nuance inherent in any consideration of the interactions between modernist and post-modernist thought, it does represent with substantial accuracy both some of the motivations for transitions in planning theory and practice over the past few decades, as well as the language planning theorists themselves use to talk about that transition.⁹⁶ For our purposes – which understand plans as community visions reified – the important distinction is between how the two paradigms understand what constitutes the narrative (or, obviously, narratives) that might legitimately inform a community's development. In our story, collaborative planning – which claims to recognize the validity of multiple narratives and should distrust claims that any particular narrative is better than any other – represents post-modern planning, at least in part. This “post-modern planning” – collaborative planning – is defined here primarily by its alleged purpose and ideology – at least as the public might understand it – rather than as planning theorists might define it. In this *initial* nomenclature, collaborative planning represents a respect for diversity, reasonable pluralism, and the value of multiple narratives about a particular place. The *problem* with collaborative planning is that its *pro*-modernist origins and tendencies create outcomes that disrespect those same things. The modernist planning project is much less confused about its

⁹⁶ See, e.g., PATSY HEALEY, *COLLABORATIVE PLANNING: SHAPING PLACES IN FRAGMENTED*, 2ND ED. 31-71 (2006); Susan F. Fainstein, *New Directions in Planning Theory*, 35 *URB. AFFAIRS. REV.* 451 (2000); Robert Fishman, *The American Planning Tradition: An Introduction and Interpretation*, in *The American Planning Tradition: Culture and Policy 1* (Robert Fishman, ed., 2000); Robert A. Beauregard, *Without a Net: Modernist Planning and the Postmodern Abyss*, 10 *J. PLANNING EDUC. & RES.* 189 (1991); Raphaël Fischler, *Communicative Planning Theory: A Foucauldian Assessment*, 19 *J. PLANNING EDUC. & RES.* 358 (2000).

role, as it clearly prefers a single narrative, informed by reason and technical rationality, and implemented as a unitary plan by a singular authority.⁹⁷

From a legal perspective, with its concerns for legitimacy and implementation, planning fails to guide law effectively in two ways: it reifies neoliberal hegemony and prefers a single privileged perspective in a way that delegitimizes planning outcomes, and its consensus-seeking approach requires outcomes that, if not completely co-opted by neoliberal interests, are so vague as to provide no rigorous guidance that might compete effectively with ongoing neoliberal influences on both local governments and reviewing courts. Because of these planning failures, contemporary planning and legal practice yield built environments that are without any *community* meaning. They are not without *any* meaning, but that meaning does not emerge from the social and cultural structure of any given place. Contemporary planning theory focuses on process rather than substance, and consequently reinforces existing power structures.

IV.a. Consensus as Exclusion

Although some alternatives or critiques exist – “mostly on the fringes”⁹⁸ – the dominant contemporary planning paradigm is one emphasizing communication or collaboration over physical place or place making.⁹⁹ That is to say, process is more important than on-the-ground effect.¹⁰⁰ This collaborative paradigm¹⁰¹ occupies a “hegemonic position” in contemporary planning theory,¹⁰² as well as contemporary planning practice. Generally speaking, collaborative planning operatives from the ground up, allowing both initial ideas and final outcomes to emerge

⁹⁷ See, e.g., Robert A. Beauregard, *Without a Net: Modernist Planning and the Postmodern Abyss*, 10 J. PLANNING EDUC. & RES. 189 (1991).

⁹⁸ Mark Purcell, *Resisting Neoliberalization: Community planning or counter-hegemonic movements?* 8 PLANNING THEORY 140, 148 (2009).

⁹⁹ Other decision-making forums have also adopted collaboration as a useful, if not exclusive, tool for attempting to enhance legitimacy. See Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. Rev. 1 (1997).

¹⁰⁰ Michael Mascarenhas & Rik Scarce, *‘The Intention Was Good’: Legitimacy, Consensus-Based Decision Making, and the Case of Forest Planning in British Columbia, Canada*, 17 SOC. & NAT. RES. 17, 18 (2004) (summarizing the arguments of a number of consensus-based decision making theorists).

¹⁰¹ Although I recognize that “communicative planning” and “collaborative planning” differ in some important aspects, I will use them somewhat interchangeably here, given that whatever their differences, the two approaches are largely focused on process.

¹⁰² Mark Purcell, *Resisting Neoliberalization: Community planning or counter-hegemonic movements?* 8 PLANNING THEORY 140, 148 (2009); but see Margo Huxley and Oren Yiftachel, *New Paradigm or Old Myopia? Unsettling the Communicative Turn in Planning Theory*, 19 J. PLANNING EDUC. & RES. 333 (2000).

from the participating elements of the community.¹⁰³ Its focus and ultimate goal is consensus.¹⁰⁴ Consequently, its successes and failures are measured by whether it does or does not reach consensus-based decisions accepted and “owned” by the community.

Collaborative planning emerged both as part of the general post-modern transition as well as a response to dissatisfaction with the on-the-ground consequences of specific implementations of the modernist approach. The modernist planning paradigm posited that the planner as expert – exercising an instrumental rationalism – could identify the best approach for a given community. Judith Innes, characterizing the modernist planner as “systemic,” described planners as assuming their purpose is to “maximize welfare and solve problems.”¹⁰⁵ Modernist planning, like abstract modernism generally, sought positive outcomes: “By the application of scientific knowledge and reason to human affairs, it would be possible to build a better world, in which the sum of human happiness and welfare would be increased.”¹⁰⁶ Modernist planning assumed that a singular community narrative existed, and that the planner, through rational, scientific, technocratic analysis, could identify and implement that narrative.

The problem was how the modernist planner chose to achieve those ends on the ground. In commenting on the origins of the modernist planning approach, Robert Beauregard identified its “subtext [as] a wide-ranging subjugation of society to the functional and aesthetic inclinations of a singular perspective.”¹⁰⁷ That singular perspective, of course, is that of the “expert” planner.¹⁰⁸ Viewed through an urban-renewal lens, the critique of modernist urban planning and its singular perspective is well known. During the early to mid 20th Century, government agencies undertook a range of urban renewal projects, many of which destroyed existing

¹⁰³ See Patsy Healy, *Planning Through Debate: The Communicative Turn in Planning Theory*, 63 THE TOWN PLANNING REV. 143 (1992).

¹⁰⁴ Judith E. Innes, *Planning Through Consensus Building*, 62 J. AMER. PLAN. ASS'N 460 (1996).

¹⁰⁵ Judith E. Innes, *Planning theory's emerging paradigm: Communicative action and interactive practice*, 14 J. PLANNING EDUC. & RES. 183, 184 (1995).

¹⁰⁶ Patsy Healey, *Planning through debate: The communicative turn in planning theory*, 63 THE TOWN PLANNING REV. 143 (1992).

¹⁰⁷ Robert A. Beauregard, *Without a net: Modernist planning and the postmodern abyss*, 10 J. PLANNING EDUC. & RES. 189, 191 (1991).

¹⁰⁸ See Robert A. Beauregard, *Between Modernity and Postmodernity: The Ambiguous Position of US Planning*, 7 ENV. AND PLANNING D: SOCIETY AND SPACE 381 (1989).

neighborhoods and successful land uses.¹⁰⁹ Perhaps the most famous and effective story of the “expert” planner’s negative effects on the ground is Jane Jacobs’ *The Death and Life of Great American Cities*.¹¹⁰ Jacobs’ critique of expert planners’ failure to understand life and conditions on the ground in our cities is amplified by her own role as a *non-expert* in her battles with Robert Moses, the epitome of the expert urban planner.¹¹¹

But planning’s move away from modernism reflects as much a broader post-modern transition as it does a specific on-the-ground dissatisfaction with planning’s modernist tendencies. As was the case in other disciplines, planning developed its own general post-modernist critique of the broader cultural modernist project. At the end of the 20th Century, following Habermas and the notion of “communicative rationality,”¹¹² planning theory made a “communicative turn” away from modernism’s single rational narrative and toward an arguably more inclusive approach that recognizes the validity of multiple stories.¹¹³ Even though Habermas considered communicative rationality as a pro-modern approach, the collaborative approach, to the extent that it cares about “place,” must recognize that place occupies a complex physical and meta-physical space: “conceptions of ‘place’ are social constructs, interweaving the social experience of being in a place, the symbolic meaning of qualities of a place and the physicalness of the forms and flows which go on in it.”¹¹⁴ The challenge for planning in this post-modern environment is to develop a community vision for a place “in full recognition of the complexity and openness of the relationships which flow across any particular area, and the consequent diversity and multiplicity of stakeholders who actively do, or potentially could, assert a concern about a place.”¹¹⁵ In this sense, collaborative planning follows Pragmatism’s earlier inquiries into how communities might value particular ideas: the “best” idea is that which we (as

¹⁰⁹ See, e.g., Lawrence J. Davis, *Tearing Down Boise*, HARPER’S MAGAZINE, Nov. 1974, at 32; *Poletown Neighborhood Council v. City of Detroit*, 410 Mich. 616, 304 N.W.2d 455 (1981) overruled by *County of Wayne v. Hathcock*, 471 Mich. 445, 684 N.W.2d 765 (2004).

¹¹⁰ See JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* (1961); see also Robert Fishman, *The American Planning Tradition: An Introduction and Interpretation*, in *The American Planning Tradition: Culture and Policy* 1 (Robert Fishman, ed., 2000).

¹¹¹ ROBERT A. CARO, *THE POWER BROKER: ROBERT MOSES AND THE FALL OF NEW YORK* (1974).

¹¹² See JÜRGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION* (Thomas McCarthy, trans., Beacon Press 1984) (1981).

¹¹³ See Patsy Healy, *Planning through debate: The communicative turn in planning theory*, 63 *THE TOWN PLANNING REV.* 143 (1992); PATSY HEALY, *COLLABORATIVE PLANNING: SHAPING PLACES IN FRAGMENTED SOCIETIES*, 2nd Ed., 38-55 (2006); Susan S. Fainstein, *New Directions in Planning Theory*, 35 *URBAN AFFAIRS REV.* 451 (2000).

¹¹⁴ Patsy Healey, *Collaborative Planning in a Stakeholder Society*, 69 *TOWN PLANNING REV.* 1, 5 (1998).

¹¹⁵ *Id.* at 6.

a community) find most useful after *all* ideas have been offered and considered—with the key assumption here being that collaborative planning is the best process to identify *all* potential ideas.¹¹⁶

At this point, it is useful to make explicit an assumption – or better said, caveat – that has been implicit throughout this discussion. The preceding paragraph continues a theme developed throughout this paper: that our purpose in creating our planning-law system is to identify and implement the “best” version of the single “community” at issue. But there can be no single best future, nor is it possible to identify any single community that should be the single community whose “best” we should seek to achieve. While community might refer to a number of distinct social groups, planning generally considers community to refer to social organizations oriented around a specific place: “an integrated, place-based social world.”¹¹⁷ But notwithstanding that general understanding, the ideal “place-based community culture” does not exist, or if such communities do exist or have existed, they are “limiting and stifling,” failing to take into account the diversity of legitimate and reasonable perspectives.¹¹⁸

Because of the diversity of thought, purpose, or visions of the future that are inherent in any given place, any singular community plan will necessarily be oppressive of some portion of the community. This is an inherent and unavoidable element of any liberal democratic system: “Under the political and social conditions secured by the basic rights and liberties of free institutions, a diversity of conflicting and irreconcilable –and what’s more, reasonable – comprehensive doctrines will come about and persist[.]”¹¹⁹ Holding to any one plan, or single comprehensive perspective, requires the oppression of all other reasonable visions.¹²⁰

Just as this is not a reason to jettison democracy in its entirety, neither should it threaten the legitimacy of community planning or attempts to identify a “best” future for a given community. But given the planning-law system’s inherent tendency to prefer power-reinforcing

¹¹⁶ See, e.g., Robert B. Talisse, *A Farewell to Deweyan Democracy*, 59 *Political Studies* 509 (2011) (characterizing Peircean Pragmatism as requiring truth claims to be subjected to all reasonable scrutiny, counter arguments or challenges).

¹¹⁷ PATSY HEALY, *COLLABORATIVE PLANNING: SHAPING PLACES IN FRAGMENTED SOCIETIES*, 2nd Ed., 123 (2006).

¹¹⁸ *Id.* at 124.

¹¹⁹ JOHN RAWLS, *POLITICAL LIBERALISM* 36 (expanded ed. 2005).

¹²⁰ See *id.* at 37.

outcomes,¹²¹ we must carefully consider whether the collaborative planning paradigm furthers that same tendency by enabling the same oppression of a community's reasonable pluralism.¹²²

Although the collaborative or communicative model now represents the predominant planning paradigm,¹²³ it is not without its critics; and much of that criticism focuses on the allegedly *non-inclusive* – and thus *unnecessarily* oppressive – aspects of communicative planning. Although collaborative planning theorists characterize collaborative planning as “a democratic exercise aimed at promoting social justice and environmental sustainability,”¹²⁴ its critics allege it has precisely the opposite result in many cases. The non-inclusive aspect of collaborative planning emerges from a tendency – likely unintentional and certainly unstated – to prefer neoliberalism as the foundational ideology of community planning. This tendency is embedded in collaborative planning's theoretical origins, suggesting that despite its claimed respect for multiple narratives and conceptions of place, collaborative planning is not post-modernist as I have characterized, but decidedly and distinctly pro-modern.

Habermas's communicative rationality was originally a liberal defense of modernism,¹²⁵ and it assumed that communication would allow the identification of a single consensus narrative accepted by an entire community: “A (if not *the*) basic assumption of communicative rationality is that consensus can be reached.”¹²⁶ For Habermas, this consensus narrative represented a better modernism, since it emerged from the community rather than being imposed on it, but it did still rely on finding a single unitary narrative. From the planning theorist's perspective, in this Habermasian approach, open communication, with all potential participants enjoying equal status and access to available information, can lead to identifiable ‘truths:’ “If based on principles of

¹²¹ See *supra* Section __; see also Harvey L. Molotch, *The City as a Growth Machine: Toward a Political Economy of Place*, 82 AM. J. SOC. 309 (1976); see also Harvey L. Molotch, *The Political Economy of Growth Machines*, 15 J. URB. AFFAIRS 29 (1993).

¹²² See generally Rawls; Robert B. Talisse, *Can Democracy be a Way of Life? Deweyan Democracy and the Problem of Pluralism*, 39 TRANS. OF THE CHARLES SANDERS PEIRCE SOC'Y 1, 4 (2003) (“pluralism implies that there is no substantive and basic value that could win the consensus of an entire population of rational persons”).

¹²³ PATSY HEALEY, *COLLABORATIVE PLANNING: SHAPING PLACES IN FRAGMENTED SOCIETIES* (1997); Susan Fairstein, *New directions for planning theory*, 35 URBAN AFFAIRS REV. 451 (2000); Judith E. Innes, *Planning theory's emerging paradigm: Communicative action and interactive practice*, 14 J. PLANNING EDUC. & RES. 183 (1995)

¹²⁴ Quoted in M. Tewdwr-Jones & P. Allmendinger, *Deconstructing Communicative Rationality: A Critique of Habermasian Collaborative Planning*, 30 ENVIRONMENT AND PLANNING A 1975, 1978 (1998).

¹²⁵ See FREDERIC JAMESON, *POSTMODERNISM, OR, THE CULTURAL LOGIC OF LATE CAPITALISM* 55-61 (1991)

¹²⁶ M. Tewdwr-Jones & P. Allmendinger, *Deconstructing Communicative Rationality: A Critique of Habermasian Collaborative Planning*, 30 ENVIRONMENT AND PLANNING A 1975, 1979 (1998).

honesty, sincerity, and openness, to people's views and to available knowledge, then these truths and values can transcend the relativism of different perspectives.”¹²⁷ *Communicative* planning, with its focus on rational communication and its goal of identifying a unified planning narrative, is therefore theoretically pro-modernist.¹²⁸

This pro-modernist position of collaborative planning is inconsistent with my characterization of collaborative planning as a post-modernist response to the failures of mid-20th Century modern planning. But the transition from *communicative* to *collaborative* planning represents a dissatisfaction, at least in part, with several components of a strictly Habermasian planning project. One significant concern is the modernist notion of unitary truths, which Habermas retained and defended in his communicative rationality.¹²⁹ But perhaps more significant, Habermasian communicative rationality ignores potential power differentials among participants.¹³⁰

Collaborative planning's focus on process, and failure to address power differentials among the participants (or potential participants), reinforces the status quo and allows for entrenched, land-based power interests to dominate the planning process.¹³¹ “The turn to argument has thrust planning theory squarely into the domain of power relations. Yet this emerging paradigm remains blinkered to the dynamics of power.”¹³² Collaborative planning theorists obviously do not intend this outcome, but “the evidence suggests that collaborative, or communicative planning, has been largely captured, or has been intentionally deployed, to obscure and facilitate the dominant ideology of contemporary market forces.”¹³³ In many ways, this is almost inevitable. As discussed above, a neoliberal reliance on markets as the ideology of governance and the logic of neoclassical economic theory yields planning outcomes that prefer

¹²⁷ PATSY HEALEY, *COLLABORATIVE PLANNING: SHAPING PLACES IN FRAGMENTED SOCIETIES*, 2D ED. 53 (2006); see also Jürgen Habermas, *Justification and Application: Remarks on Discourse Ethics* (1993).

¹²⁸ Tim Richardson, *Foucauldian Discourse: Power and Truth in Urban and Regional Policy Making*, 4 EUR. PLANNING STUD. 279 (1996).

¹²⁹ See PATSY HEALY, *COLLABORATIVE PLANNING: SHAPING PLACES IN FRAGMENTED SOCIETIES* (2nd ed.), 264 (2006);

¹³⁰ Michael Gunder, *Planning as the Ideology of Neoliberal Space*, 9 PLANNING THEORY 298 (2010).

¹³¹ See generally Harvey L. Molotch, *The city as a growth machine: Toward a political economy of place*, 82 AM. J. SOC. 309 (1976); see also Harvey L. Molotch, *The political economy of growth machines*, 15 J. URB. AFFAIRS 29 (1993).

¹³² Tim Richardson, *Foucauldian Discourse: Power and Truth in Urban and Regional Policy Making*, 4 EUR. PLANNING STUD. 279, (online, no page) (1996).

¹³³ Michael Gunder, *Planning as the Ideology of (Neoliberal) Space*, 9 PLANNING THEORY 298, 302 (2010).

specific arguments. As significant, neoliberal rhetoric – in almost all ways synonymous with modernism and the arguments and principles of the Enlightenment – claims a privileged space among competing narratives. It is, after all, the language of science and rationality. And finally, reinforcing this privileged space, those interests that most benefit from neoliberal planning hegemony are most likely to participate in the planning process, given the specific and identifiable economic benefits and “harms” at issue.

These outcomes are particularly ironic given that collaborative planning finds some of its inspiration in Dewey’s Pragmatism. A collaborative planning that reinforces neoliberal hegemony necessarily constrains the potential options available for a community. This is a failure of democracy and the original goals of collaborative planning: “The democratic deficit here is that a polity can hardly be considered democratic if it cannot offer its citizens meaningful options. Citizens might have formal decision-making power, but their range of decisions can become so narrow as to not really be decisions at all.”¹³⁴ From this perspective, collaborative planning is ultimately no more inclusive than Robert Moses and the redevelopment of New York.¹³⁵

IV.b. But what would “consensus” look like?

Public choice problems, embedded neoliberal ideologies, and growth-motivated preferences of local officials, yield planning outcomes that are exclusive rather than inclusive, notwithstanding the claims of collaborative planning theorists. Rather than identifying new, better, and community-legitimated futures, collaborative planning reinforces the status quo and entrenched power interests. But even if collaborative planning’s neoliberal preferences are overstated, the focus on consensus building necessarily yields planning outcomes that are insufficient to guide on-the-ground legal decisions.

Planning theory does not appear to have identified or adopted its own uniform definition of “consensus.” A popular dictionary defines consensus as “a general agreement: unanimity.”¹³⁶

¹³⁴ Mark Purcell, *Resisting Neoliberalization: Communicative Planning or Counter Hegemonic Movements?*, 9 *PLANNING THEORY* 140, 145-146 (2009).

¹³⁵ ROBERT A. CARO, *THE POWER BROKER: ROBERT MOSES AND THE FALL OF NEW YORK* (1975).

¹³⁶ Merriam-Webster

Some planning theorists recognize that unanimity is likely impossible, and so suggest that “in practice . . . a recommended and achievable goal is 80-90 percent [agreement], making sure that stakeholders from all the major interests are included.”¹³⁷ But as discussed above, the planner’s consensus emerged, in part, from Habermasian communicative rationality with its goal of identifying unitary truths or values for particular communities.¹³⁸ In this Habermasian approach, a primary goal is to avoid the oppression that occurs when one worldview is imposed on another. In other words, in the Habermasian context of contemporary collaborative planning, consensus means – or should at least approach – unanimous assent. Without unanimous assent, some oppression is inevitable.

It is largely for this reason that in a consensus-based approach, the “success” of the outcome is not measured by scientific or other rational, modernist measures – that is to say, success is not determined by comparing on-the-ground consequences to the problems or conflicts that motivated the activity in the first place. Rather, participants measure success by considering the *process*: “breadth of representation in the planning process, the political or social acceptability of the agreement, improved relationships with others and with agencies, the amount of learning that may occur, and the prevalence of a sense of ‘ownership’ of the plan by nonagency personnel.”¹³⁹ The emphasis on process in a consensus approach is understandable. Without the perception – among the affected community – that the decision-making process was open, inclusive, and democratic, the ultimate outcome would lack legitimacy.¹⁴⁰

But if we accept a pluralist society, it is clear that consensus is impossible on all but the simplest of questions. What a particular community should look like, how we should use (or not use) particular natural resources, the ‘highest and best’ use of a particular parcel of land, are not the types of questions that lend themselves to consensus, as anyone who pays even passing attention to land-use disputes recognizes. In the land-use planning context, consensus necessarily means simple, vague, and largely unenforceable.

¹³⁷ Judith E. Innes, *Consensus Building: Clarifications for the Critics*, 3 PLANNING THEORY 5, n. 4 (2004).

¹³⁸ See Judith E. Innes, *Planning Through Consensus Building*, 62 J. AMER. PLAN. ASS’N 460 (1996).

¹³⁹ Michael Mascarenhas & Rik Scarce, ‘*The Intention Was Good*’: *Legitimacy, Consensus-Based Decision Making, and the Case of Forest Planning in British Columbia, Canada*, 17 SOC. & NAT. RES. 17, 18 (2004) (summarizing the arguments of a number of consensus-based decision making theorists).

¹⁴⁰ See *id.* at 25-32

This characteristic of consensus-built planning outcomes is more obvious when we consider actual plans on the ground. One example of a consensus-built land-use plan is the document adopted by Kootenai County, Idaho in late 2010.¹⁴¹ While Kootenai County is in a relatively conservative state, and consequently might be assumed to have greater neoliberal tendencies than other places, it is one of many western communities that has undergone fairly substantial social and cultural change over the past few decades.¹⁴² While this would not eliminate its neoliberal tendencies, and in fact might reinforce them,¹⁴³ it does suggest that Kootenai County's experience is representative of communities undergoing local land-use conflicts—precisely the circumstances in which collaborative planning should be most useful.

Beginning in 2006, Kootenai County began revising a comprehensive land use plan that had been in place since 1994. As the final version of the plan reported, its “fundamental premise ... is attention to *the clear public sentiment* that the County's beauty and culture not be compromised and that growth occurs in a responsible way that preserves these virtues.”¹⁴⁴ A recurring theme throughout the process was the desire to avoid mistakes that plagued the previous plan, which apparently included under-regulated development in the county's rural areas.¹⁴⁵

¹⁴¹ Kootenai County is in northern Idaho. It is home to Lake Coeur d'Alene, the resort town of Coeur d'Alene, and significant portions of the Idaho Panhandle National Forest. It is part of a continuous urban corridor with Spokane, Washington, along Interstate 90. It is also downstream from the nation's largest CERCLA Superfund site, the Bunker Hill Mining District.

¹⁴² See e.g., Hannah Gosnell & Jesse Abrams, *Amenity Migration: Diverse Conceptualizations of Drivers, Socioeconomic Dimensions, and Emerging Challenges*, GEOJOURNAL (2009); Richelle Winkler et al., *Social Landscapes in the Intermountain West: A Comparison of 'Old West' and 'New West' Communities*, 72 RURAL SOC. 478 (2007); Soren C. Larsen et al., *Place Perception and Social Interaction on a Exurban Landscape in Central Colorado*, 59 PROF. GEOGRAPHER 421 (2007); Rita Ghose, *Big Sky or Big Sprawl? Rural Gentrification and the Changing Cultural Landscape of Missoula, Montana*, 25 URB. GEOGRAPHER 528 (2004); Gayla Smutny & Lois Takahashi, *Economic Change and Environmental Conflict in the Western Mountain States of the USA*, 31 ENV'T & PLAN. A 979 (1999); Andrew J. Hansen et al., *Ecological Causes and Consequences of Demographic Change in the New West*, 52 BIOSCIENCE 151 (2002); Peter B. Nelson, *Perceptions of Restructuring in the Rural West: Insights from the "Cultural Turn"*, 15 SOC'Y & NAT. RESOURCES 903 (2002); Peter B. Nelson, *Rural Restructuring in the American West: Land Use, Family, and Class Discourses*, 17 J. RUR. STUDIES 395 (2001); J. Matthew Shumway & Samuel M. Otterstrom, *Spatial Patterns of Migration and Income Change in the Mountain West: The Dominance of Service-Based, Amenity-Rich Counties*, 53 PROF. GEOGRAPHER 492 (2001); Debra Ohman, *Restructuring and Well-Being in the Non-Metropolitan Pacific Northwest*, 30 GROWTH & CHANGE 161 (1999).

¹⁴³ See Jerrold A. Long, *Private lands, conflict, and institutional evolution in the post-public-lands West*, 28 PACE ENVTL. L. REV. 670 (2011).

¹⁴⁴ Kootenai County Comprehensive Plan (2010) at 1-3, emphasis added.

¹⁴⁵ The 1994 Plan contained only two goals directly relevant to rural residential development densities. The goals' objectives provided little additional specificity. Those goals were: Goal 9: “Develop land use regulations that protect

Several factors present in Kootenai County – recent rapid population growth, concern about development on rural lands, and the “fundamental premise” that the County should protect “beauty and culture” – suggest an outcome that would address and limit rural development. But focusing specifically on the issue of rural residential density – where population growth, development on rural lands, and “beauty and culture” intersect – the plan takes an unexpected approach.¹⁴⁶ Although the plan recognizes the effects of several decades of rapid population growth, and identifies protecting the county’s natural resources and rural characteristics as its most fundamental goal, it provides very little substance that might lead toward those goals.

The comprehensive plan proposes several new categories of rural land use, with five specifically residential classifications, but only two of which are primarily *rural* residential classifications.¹⁴⁷ For rural lands, the primary residential classification is “country.” The plan identifies the “country” designation as those lands which should have the “third lowest density,” relative to “scenic” and “resource/recreation,” which are not intended as residential classifications.¹⁴⁸ “Country” is intended to “maintain the rural atmosphere and rural quality of life in the unincorporated part of the County.”¹⁴⁹ These “country” lands are “characterized by activities including, but not limited to, small-scale farms, dispersed single-family homes, and open space.” The next *more* densely-developed lands are “suburban,” which are low to moderate density. The next *less* densely-developed lands – “resource/recreation” – are “characterized by activities including, but not limited to, resource-oriented activities (farming, timber, and mineral

property rights, maintain quality of life, provide adequate land for development, buffer non-compatible land uses, and protect the environment.” Goal 10: “Guide population growth to allow for inevitable expansion without sacrificing the environment or the quality of life which currently characterizes Kootenai County.” The zoning ordinances that emerged from these goals are discussed below.

¹⁴⁶ In Spring 2011, my seminar students engaged in a regulatory mapping exercise of the Spokane River watershed, focusing on land-use controls. Several of the students grew up in the area, and we all began the exercise with our perceptions of the political and cultural personalities of the various places. Of all the land-use regimes across the watershed, this specific component of Kootenai County’s regimes – rural residential densities – was the most surprising. The regime is otherwise somewhat restrictive, with a variety of resource-protective measures. We expected the same for rural residential development, but didn’t find it.

¹⁴⁷ That plan has three classifications – transitional, village, and shoreline – that are on the rural-urban interface, or otherwise are within areas of high expected density, i.e., not rural.

¹⁴⁸ The “scenic” designation applies almost exclusively to public lands managed by the National Forest Service, unavailable for development. The Plan specifically identifies “scenic” lands as lands “not typically available for development due to public land ownership[.]” Kootenai County Comprehensive Plan, 14-34 (2010). The remaining lands are largely classified “resource/recreation,” which are designed to “promote large acre agriculture, timber, mining, and recreational opportunities.” Kootenai County Comprehensive Plan, 14-34 (2010).

¹⁴⁹ *Id.* at 14-35.

extraction), open space, and residential.” Resource/recreation is primarily a rural industrial category.

In the abstract, these land-use designations and recommended residential densities are largely meaningless. They are anchored on one side by suburban development, which is sufficiently common to provide some guidance, but the plan provides no usable definition or description of “rural,” which might provide a boundary on the other side.¹⁵⁰ But they were established in a specific context, with a specific regulatory history, and that context provides some understanding of what “rural” might mean in this place. For the past four decades, Kootenai County’s least dense zoning designation has been “rural,” which still covers the majority of the county and allows for a minimum lot size of five acres. The zones closer to the urban areas and lakes allow lot sizes as small as 8,250 square feet (just under 1/5 of an acre).¹⁵¹ As a result of these zoning ordinances, the majority of the “rural” residential parcels in the county are fairly small. An inventory conducted in 2007 determined that of the almost 30,000 residential parcels that existed in the county at that time, 56% were less than two acres in size, and 70% were less than five acres.¹⁵²

At one point, the draft comprehensive plan contained a recommendation that “rural” residential areas allow one unit per ten to twenty acres,¹⁵³ and that “rural infill” residential areas allow one unit per three to ten acres. Some participants criticized these provisions as allowing for too much density, while others – including realtors and developers – didn’t want any density

¹⁵⁰ This is not entirely true. The Plan’s glossary does define “rural” as “A sparsely developed area where the land is largely undeveloped or primarily used for resource purposes.” But this definition is inconsistent with the description of the “country” land-use designation. In fact, the “scenic” designation – which is primarily undevelopable public lands – was originally titled “rural,” and this definition of rural appears to be a remnant of that earlier classification. See Alecia Warren, *The 3 ‘Rs’ of revision: County officials still tweaking comp plan*, COEUR D’ALENE PRESS, Dec. 15, 2010. A more relevant definition, if still less than useful, is “rural lifestyle,” defined as: “Subjective term based on individual values. A distinctive character identified by individuals or neighborhoods that involve lower population density, natural or agricultural land use, and a degree of privacy and quiet in contrast to an urban lifestyle.”

¹⁵¹ Kootenai County Code §9-8-3 (2007).

¹⁵² KC Comp Plan at 14-4.

¹⁵³ As noted above, the “rural” designation is now “scenic.” So although the suggested densities appear to be some improvement (assuming less dense rural development is better, which is not always the case), those reduced densities only applied in portions of the county that are already largely undevelopable, because they are primarily public lands managed by the National Forest Service.

designations in the plan.¹⁵⁴ In other words, the community had not reached consensus on what development should be allowed in the county's undeveloped areas. In May 2010, after over three years of work and nearing the end of the process, the county commissioners removed the specific residential densities from the plan, leaving the vague descriptions referenced above.¹⁵⁵

Although Kootenai County has yet to adopt ordinances implementing these aspects of its new comprehensive plan, the draft working ordinances are available for review and comment.¹⁵⁶ The draft ordinances implement the plan's eight proposed future land uses as ten distinct zoning districts that generally reflect the spirit of the plan's designations.¹⁵⁷ In most cases, the differences between the Plan's future land uses and ultimate zoning ordinances are understandable. For example, the Plan's "resource and recreation" designation and its associated uses appear to have been allocated among the "Farming and Forestry," "Mining" and "Scenic" zoning districts.¹⁵⁸ Similarly, the Plan's "Village" has been implemented as an allowed land use in the Farming and Forestry, Countryside, Estate, Suburban, and Planned Regional Destination zoning districts, rather than as its own distinct zoning district.¹⁵⁹

These differences between the plan and its implementation are relatively uncontroversial. More interesting is how the draft ordinance implements the residential densities that were not included in the plan. Although the county has not released its draft zoning map, the Plan suggests most of the developable rural land will be placed in the "Countryside" zoning district. The Countryside's proposed standard density is fifteen acres per dwelling unit, with various cluster-development strategies allowing up to five acres per dwelling unit gross density, and two acres per dwelling unit net density (within the actual development cluster).¹⁶⁰ These densities are

¹⁵⁴ See, e.g., comments by Concerned Businesses of North Idaho, June 6, 2008 (disagreeing with the suggested densities); comments by Joe Dobson, Land and Rural Properties Manager, Coldwell Banker, Schneidmiller Realty, (undated, received by county June 8, 2008) ("this is designated a no growth document") (all cited comments on file with author and available from Kootenai County).

¹⁵⁵ See Alecia Warren, *Acreage pulled from plan proposal*, COEUR D'ALENE PRESS, May 20, 2010. Members of the planning commission expressed some dissatisfaction with the commissioners' participation in the planning process, on this and other issues. See Kathlene Kolts, *Special to the Press, Time to get comp plan done*, COEUR D'ALENE PRESS, Feb. 26, 2010.

¹⁵⁶ See Kootenai County Unified Land Use Code, at <http://www.zoningplus.com/regs/kootenai/> (last visited Jan. 19, 2012).

¹⁵⁷ See Kootenai County Unified Land Use Code, §2-1-1.

¹⁵⁸ See *id.* at Table 2-3-2.

¹⁵⁹ See *id.* at Table 2-3-3.

¹⁶⁰ See *id.* Table 3-2-1.

roughly consistent with the densities originally included in, but ultimately removed from, the County Plan.¹⁶¹

Whether these densities are included in the final ordinances remains to be seen. But it remains possible that the ultimate densities implemented over time will be more similar to the past zoning ordinance than the currently proposed densities. First, the comprehensive plan itself recommends a high level of rural development, notwithstanding suggestions to the contrary. The county's development pattern is currently 70% urban-30% rural. The comprehensive plan indicates a preference for maintaining this pattern in the future.¹⁶² The current average lot size in unincorporated Kootenai County is less than four acres, and as noted above, over half of existing parcels are less than two acres. As the county continues to grow, maintaining 30% of development in the rural areas will necessarily require fitting more people in increasingly less space, requiring *more dense* rural development across rural areas, rather than less.¹⁶³

But more significant, all private land in the county has been zoned for five-acre minimum lots for four decades. Any change in zoning designations would necessarily reduce the developable value of undeveloped rural lands by reducing the number of units that could be built on those lands. While landowners are not constitutionally entitled to the continuation of a zoning ordinance,¹⁶⁴ down zoning is extremely difficult and controversial politically, to the point that it often exceeds the political authority (if not the Constitutional authority) available in a given place. Absent a significantly changed socio-ecological context – which the final comprehensive plan language suggests is not present – meaningful down zoning is highly unlikely.¹⁶⁵

¹⁶¹ See Alecia Warren, *Acreage pulled from plan proposal*, COEUR D'ALENE PRESS, May 20, 2010.

¹⁶² See Kootenai County Comprehensive Plan (2010) at 2-1. Ada County, Idaho, home to Boise and Idaho's largest metropolitan area, targets 3% rural development in its comprehensive plan.

¹⁶³ Targeted density (i.e., cluster developments or development near urban areas) would, of course, allow for the preservation of more "rural" land. But the plan places most of that targeted density in the 70% desired urban development.

¹⁶⁴ See, e.g., *Hale v. Bd. of Zoning Appeals for Town of Blacksburg*, 673 S.E.2d 170, 180 (Va. 2009) ("when a landowner has only a future expectation that he will be allowed to develop his property in accord with its current classification under the local zoning ordinance, there is no vested property right in the continuation of the land's existing zoning status").

¹⁶⁵ Although it may only represent a loud minority, some opposition to the perceived takings of property rights (i.e., downzoning) has already emerged. See Alecia Warren, *Building, zoning law rewrite in question*, COEUR D'ALENE PRESS, Aug. 30, 2011.

The point of this example is not to suggest that this county did anything *wrong* in either its planning process or the proposed zoning districts or uses implementing the plan. Nor do I intend to suggest that the draft ordinances are inconsistent with the Kootenai County plan. To the contrary, they are absolutely consistent, *because almost anything would have been*. The plan's guidance for residential density in the country land use designation consisted of the suggestion that it be more dense than the immediately less dense category, that it consist of "dispersed" single family homes, and that it be less dense and quieter than urban uses. These descriptions do little more than indicate the proposed uses should not be urban or suburban. It is then up to the much less inclusive and participatory ordinance-drafting process to determine what the place will actually ultimately look like.

To put a somewhat finer point on this argument, consider the designation "rural," which appears with some regularity in non-metropolitan planning documents.¹⁶⁶ Rurality is socially constructed (and contested), and our expectations for a place determine whether it is rural or not. For a rancher traveling to town for groceries and supplies, Wheatland, Wyoming – with its developed 'downtown' of stores and bars, and the massive coal-fired power plant just outside town – might feel crowded and urban. For the CEO of a Dallas-based energy company, passing through on the way to visit a billion-dollar coal mine or natural gas development, Wheatland is just a wide spot in the road, offering little but wind and sagebrush.

The differing ideas of rural possessed by this rancher and CEO are reflected in the diverse rural studies literature. Researchers have attempted many different approaches to defining the rural but are unable to arrive at any consensus.¹⁶⁷ Keith Halfacree identified four approaches to defining rural – descriptive, socio-cultural, rural as locality, and rural as social

¹⁶⁶ In addition to the language from Kootenai County discussed above, *see, e.g., Routt County, Colorado Master Plan* at 7 (2003), available at <http://www.co.routt.co.us/planning/plans/Master%20Plan.pdf> ("The general goal of the Plan is to ensure the rural character while accommodating appropriate development."); *Grand County, Utah Draft Master Plan* (2011), available at http://www.grandcountyutah.net/pdf/planning/general_plan/GrandCountyGeneralPlanDRAFT10-7-2011web.pdf (characterizing Grand County as a "recreation-based, western, rural community[,] and using "rural" throughout to describe development densities.); *Teton County, Wyoming, Comprehensive Plan* at ES 8 (2011), available at http://www.jacksontetonplan.com/files/2011/07/110706_JacksonTeton_Part1_ExecutiveSummary.pdf ("Managing growth means proactively planning for what we want – rural open spaces and high quality, desirable complete neighborhoods.")

¹⁶⁷ *See* Brian Ilbery, *Dimensions of Rural Change*, in *THE GEOGRAPHY OF RURAL CHANGE* 1-10 (Brian Ilbery ed., 1998) (discussing the various approaches to defining "rural").

representation – but (although he personally prefers the ‘rural as locality approach’) ultimately suggested that the “quest for any single, all-embracing definition of the rural is neither desirable nor feasible.”¹⁶⁸ Michael Woods notes that “‘rural’ is one of those curious words which everyone thinks they know what it means, but which is actually very difficult to define precisely.”¹⁶⁹ Woods does not attempt to provide his own, more precise definition of ‘rural.’ Rather, he approaches the issue from place toward definition (rather than applying definition to place), choosing to address the rural by seeking to understand “how particular places, objects, traditions, practices and people come to be identified as ‘rural’ and the difference this makes to how people live their everyday lives.”¹⁷⁰

But notwithstanding the lack of a cohesive definition of rural, ‘rural’ areas tend to share at least one quality in common: the people who live in or visit the place *think* of it as rural. Rural peoples believe that their place is different from more developed, busier, ‘urban’ areas. The perceived pace of life might be slower, interpersonal relationships different, or social, cultural or moral values distinct from the values of non-rural areas. The rancher visiting Wheatland, Wyoming likely feels that Wheatland is somehow different from Denver, or even Cheyenne, even if she considers Wheatland less rural than her 5,000-acre ranch. There might be more open space, more farms, more cows or wildlife, more pickup trucks, more people saying hello on the streets; but whatever the specific quality or combination of qualities, something makes residents and visitors think ‘rural.’ In this way, ‘rural’ is less about the physical characteristics or economy of a place than it is about how residents perceive – or wish they could perceive – their place.

It is precisely this socially-constructed understanding of “rural” (or any other potential description of a place) that communities should explore in the planning process. The planning process should develop and identify the meaning a particular community assigns the term, if it is relevant in determining the development future of a particular place. But when a community chooses *not* to engage in the difficult work of precisely determining meaning, as Kootenai County arguably did in the example provided here, or when a consensus-based approach cannot approach the fundamental, if difficult, questions required to define and describe, that task is left

¹⁶⁸ Keith Halfacree, *Locality and Social Representation: Space, Discourse and Alternative Definitions of the Rural*, 9 J. Rural Stud. 23, 34 (1993).

¹⁶⁹ MICHAEL WOODS, RURAL GEOGRAPHY 15 (2005).

¹⁷⁰ *Id.*

to ordinance drafters, who must make the choices avoided in the planning process. That is precisely the non-inclusive, technocratic approach that collaborative planning seeks to avoid.

Contemporary collaborative planning suffers from two weaknesses that inhibit the creation of inclusive and effective community visions. The solution is for everyone associated with the planning process – planners, local government officials, and land-use lawyers – to act with specificity and purpose. Public goods will not necessarily emerge from a collaborative planning process that advantages neoliberal orthodoxy over building good communities. And creating vague plans – a necessary byproduct of any attempt at making everyone happy in a consensus-based collaborative process – provides little guidance for future decisions and provides additional opportunities for the on-the-ground realization of community visions to move away from what the community might have originally desired. But a Pragmatic and specific plan not only increases the likelihood that the community might be able to identify and implement its “best” future, but also constrains the influence of the growth machine and reduces the anti-community aspects of neo-liberal, “collaborative” approaches. That should be the goal of community planning.

V. Selected Lamarckism: Creating and achieving the public good

*The failure of the market to provide diversity in most places means that if planners do not attempt to foster it, the outcome will be increasingly segregated neighborhoods and municipalities.*¹⁷¹

Underlying the entire concept of zoning is the assumption that zoning can be a vital tool for maintaining a civilized form of existence only if we employ the

¹⁷¹ Susan F. Fainstein, *New Directions in Planning Theory*, 35 URBAN AFFAIRS REV. 451, 465 (2000).

*insights and the learning of the philosopher, the city planner, the economist, the sociologist, the public health expert and all the other professions concerned with urban problems.*¹⁷²

This critique of contemporary collaborative planning does not recommend its elimination. Nor do I intend my discussion of both collaboration and consensus-based decision making to reflect a dissatisfaction with, or rejection of, the value of consensus-based or participatory democracy. To the contrary, as I have emphasized throughout this article, effective land-use plans are those plans that are *maximally inclusive*, allowing for the participation and input of all potentially interested parties. Only those inclusive plans are legitimate and can form the foundation for legitimate law. But consensus-based decisions both reinforce existing power structures and fail to provide adequate guidance to legal actors.

The task then is to identify a planning-law system that might be both inclusive as well as technocratic, that can rely on the input of the affected communities – earning their blessings – as well as take advantage of the expertise and experience of those epistemic communities we have assigned to provide guidance and develop truth claims, i.e., “experts.” Local governments, planners, or even local stakeholder groups, must recognize that good community visions must be provided to the community for its consideration and blessing. They will not necessarily emerge from that community. And those local governments and planners must create and enact those visions with enough specificity to effectively constrain future land-use choices.

The solution presented here relies on several theoretical assumptions, which are discussed and explained – at least implicitly – in the following section. First, the only way to know the value of a particular idea is to imagine (or empirically witness) the actual consequences of acting on the idea, and then to compare those actual consequences to the consequences that might result from plausible alternatives. This is the essence of planning: we develop plausible futures and then compare the imagined consequences of each to select the option that seems best at that moment.¹⁷³ But the key aspect is that we cannot identify what we might prefer until we have

¹⁷² *Udell v. Haas*, 21 N.Y.2d 463, 469, 235 N.E.2d 897 (1968).

¹⁷³ There are analogs in other areas of the law. For example, the alternatives analysis is considered the “heart” of the environmental impact statement required by the National Environmental Policy Act. 40 C.F.R. §1502.14.

actually identified what our options might be.¹⁷⁴ Second, the best future for a given place can only emerge if all possible futures are presented and available for consideration. The only way to ensure that all possible, plausible futures are presented is to ensure that everyone has the opportunity to participate in the vision-forming process. This is the essence of a Pragmatic democracy. As Susan Fainstein argued in her critique of communicative planning theory: “The aroused consciousness that puts ideas into practice involves leadership and the mobilization of power, not simply people reasoning together.”¹⁷⁵ Good ideas are not implemented or recognized through accidental processes or “natural” evolution. Rather, the implementation of good ideas requires intentional action. Combining these considerations suggests a *selected Lamarckism*: evolutionary change driven by intentional action that is ultimately selected based on its actual effects on the ground. In the planning context, a selected Lamarckism would involve a technocratic *and* inclusive Pragmatism: experts – potentially from a variety of disciplines or local stakeholder groups – create multiple alternative visions for a place with the specific goal of identifying public goods and representing the under-represented elements of the community. These experts would not wait for planning ideas to emerge from the community, and – perhaps unfortunately – would not be limited to consensus-based approaches.

As is obvious in its title, this approach borrows from the evolutionary theory developed by Jean-Baptiste Lamarck. To paraphrase it in a way that is relevant to the current discussion, Lamarckian evolution is the largely discredited theory that animals can “force” evolution, and the creation of specific traits, by physically trying to develop those traits.¹⁷⁶ More accurate, if still incomplete, Lamarck posited two things. First, that the continued use of an “organ” strengthens, develops and enlarges that organ, and that disuse has the opposite effect, ultimately causing the organ to disappear. And second, that any such changes that occur in an individual during its life are passed on to its offspring. Animals (or other organisms) can acquire traits during life, in response to environmental conditions, which are then passed on to their offspring. For example, a giraffe that reaches for leaves on the top of the tree will lengthen and strengthen

¹⁷⁴ See DANIEL W. BROMLEY, SUFFICIENT REASON: VOLITIONAL PRAGMATISM AND THE MEANING OF ECONOMIC INSTITUTIONS, 144 (2006).

¹⁷⁵ Susan S. Fainstein, *New directions in planning theory*, 35 Urban Affairs Rev. 451, 458 (2000).

¹⁷⁶ Lamarck’s ideas are enjoying some new found respect. See Michael Balter, *Genetics: Was Lamarck just a little bit right?* 288 SCIENCE 38 (2000); Eva Jablonka, Marion J. Lamb, and Eytan Avital, ‘Lamarckian’ mechanisms in Darwinian evolution, 13 TRENDS IN ECOLOGY & EVOLUTION 206 (1998).

its neck, and that longer, stronger neck will then be passed on. Darwinian evolution, in contrast, posits that a long neck is the result of genetic accidents that turn out to provide a competitive advantage over those members of the species without the same trait, i.e., the long-necked giraffes were better able to obtain adequate nutrition, in a specific context, and thus more likely to create offspring containing the same genetic trait.

A number of theorists have used Lamarckian evolution as an analogy useful for explaining change in a wide array of social processes. Boyd and Richerson developed a detailed theory of cultural evolution containing a component they called “guided variation.”¹⁷⁷ Guided variation recognizes the capacity for “adaptation through rational calculation,” which occurs when individuals collect information about the environment, estimate the results of various choices, and evaluate the desirability of those outcomes according to some criteria.¹⁷⁸ This process directly affects the culture that emerges: “humans are embedded in a complex social network through which they actively participate in the creation and perpetuation of their culture.”¹⁷⁹ It is through the guided variation process – i.e., the process of imagining futures and identifying the means or choices to get there – that we develop our goals or preferences.

Boyd and Richerson are not alone in recognizing the usefulness of a Lamarckian analogy in understanding cultural change. F.A. Hayek described cultural evolution as simulating Lamarckism: “all cultural development rests on [the inheritance of acquired characteristics] – characteristics in the form of rules guiding the mutual relations among individuals which are not innate but learnt.”¹⁸⁰ Paul McLaughlin described a “socially constructed adaptive landscape” in which various cultural actors can “alter their structural contexts by engaging in various discursive and claims-making activities and by directly employing economic and political power.”¹⁸¹ Although McLaughlin distinguishes his approach from Lamarck’s by suggesting that

¹⁷⁷ ROBERT BOYD AND PETER J. RICHERSON, *CULTURE AND THE EVOLUTIONARY PROCESS* (1985). Guided variation is only one component of Boyd and Richerson’s broader theory of cultural evolution.

¹⁷⁸ *Id.* at 9.

¹⁷⁹ ROBERT BOYD AND PETER J. RICHERSON, *THE ORIGIN AND EVOLUTION OF CULTURES*, 290 (2005).

¹⁸⁰ FRIEDRICH A. HAYEK, *THE FATAL CONCEIT: THE ERRORS OF SOCIALISM*, 25 (1988).

¹⁸¹ Paul McLaughlin, *Toward an ecology of social action: Merging the ecological and constructivist traditions*, 8 *RESEARCH IN HUMAN ECOLOGY* 12, 21 (2001)

Lamarck posited a “context independent natural path of change,”¹⁸² the socially constructed adaptive *cultural* landscape is consistent with the acquisition of acquired cultural characteristics.

Each of these theories of cultural evolution posits a cultural structure that is “inheritable” – that is, the structure is passed from individual to individual or from group to group. Culture consists of the relationships, signs, meanings and ideas humans have and create as they interact—including legal regimes. While culture, like all animal behavior, has some genetic components, it is primarily of our own creation. Clifford Geertz argues that culture is ultimately semiotic: “Believing . . . that man is an animal suspended in webs of significance he himself has spun, I take culture to be those webs, and the analysis of it to be therefore not an experimental science in search of law but an interpretive one in search of meaning.”¹⁸³ Culture passes from generation to generation through imitation and learning, and so even acquired variations – our intentional responses to environmental factors – are continued across cultural generations.¹⁸⁴

Of course, the purpose here is not to defend Lamarckism as a biological theory. Rather, my claim is that Lamarckian evolution – particularly to the extent that it contemplates an intentional reaction to environmental conditions – is a useful metaphor for explaining cultural (and thus legal) evolution.

The usefulness of the Lamarckian analogy in cultural evolution is precisely this capacity for a community – and external factors – to affect the content of the institutional structure. It is not just the institutional structure itself that can cause its own change (i.e., through “mutation”). Were there some institutional genotype free from influence of external environmental factors, we might be able to completely reject the Lamarckian metaphor. But unless we assume that *all* human behavior – including the specific content and effect of our laws – is genetically coded, we shouldn’t take that step.

But a complete theory of cultural evolution should combine both Darwinian notions of random change and natural selection with the Lamarckian idea of intentional response to external forces causing durable change. The Lamarckian ideas contain an implicit reference to natural

¹⁸² Id. at 13.

¹⁸³ CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES*, 5 (2000 [1973]).

¹⁸⁴ ROBERT BOYD & PETER J. RICHERSON, *CULTURE AND THE EVOLUTIONARY PROCESS*, 8 (1985)

selection as well (otherwise there would be no purpose for the response). But one additional nuance is required. In cultural evolution, the process of natural selection can and will include the Lamarckian component. A community will experience the outcome of either random or intentional change, consider whether it likes the outcome, and then act specifically and purposefully in response to that outcome. In other words, a community can respond to a particular cultural change by intentionally changing the culture.

These Darwinian and Lamarckian understandings of cultural evolution combine in what Daniel Bromley has described as “volitional pragmatism.” Bromley’s theory includes two interrelated components, as his title suggests – volition and pragmatism. But it will be useful to begin by separating the two. First, Bromley argues that collective action – including the creation of legal regimes – involves “*prospective volition*: the human will in action, looking to the future, deciding how that future ought to unfold.”¹⁸⁵ The second component, of course, is “Pragmatism.” As explained by Charles Sanders Peirce, the essence of Pragmatism is that we can only know the meaning of something by experiencing its effects.¹⁸⁶ Volitional pragmatism therefore entails the imagining of plausible desired futures and the intentional selection of specific alternatives – including specific legal regimes – with the goal of attaining that desired future. Human actors drive cultural evolution by imagining the effects of various “ends,” making normative choices as to which constellation of effects is preferred, and then identifying and implementing the institutional choices necessary to achieve those ends. Those normative choices and institutional steps are assessed or reassessed as their effects become apparent, and a new plausible future is imagined.

How is this relevant to land use planning? If Pragmatism can claim any access to better outcomes, it is in its insistence that proposals be assessed based on the effects they might have. Identifying the “best” future for a specific place, at a specific time, requires consideration of *all* plausible futures, not only those offered or imagined by a politically or economically powerful subset of the community. We identify what we want as we go about the process of determining what we can have. If that process is curtailed, and the full range of ‘what we can have’ is not

¹⁸⁵ DANIEL W. BROMLEY, SUFFICIENT REASON: VOLITIONAL PRAGMATISM AND THE MEANING OF ECONOMIC INSTITUTIONS, 217 (2006).

¹⁸⁶ Charles S. Peirce, *How to Make Our Ideas Clear*, in PRAGMATISM: A READER 26, 36 (Louis Menand ed., 1997).

made available for our consideration, we have no way of knowing whether our ultimate choice is the best available to us.

The ultimate problem with any idealized consensus-based approach is that oppression is a basic fact of any democracy.¹⁸⁷ At its most fundamental, the purpose of the planning-law system is to determine how a specific, identifiable parcel of land will be used. That decision makes very specific and real assignments of rights and privileges, and in so doing, necessarily takes away potential rights and privileges from other actors. It also creates specific correlative duties in both the state and other neighboring landowners.¹⁸⁸ Ultimately, a right is the capacity to call upon the coercive power of the state to protect the right holder against competing interests. Those decisions will be – in fact, must be – made for any social structure to avoid a return to a Hobbesian state. An open and free democracy allows us to justify this oppression, but it does not avoid the oppression. The best system is the system that most closely approximates consensus, understanding that in a society of reasonable pluralism, consensus on the important questions is impossible. Avoiding oppression caused by market failures, or even illiberal majorities, often requires state action to give a voice or power to the oppressed.

But the argument is not that the government should be responsible for promoting – or at least describing – specific outcomes because the government ‘knows best.’ Rather, there are outcomes that the market would not otherwise recommend or provide because no means exist to ensure that the entity or individual providing the good can benefit from providing the good. A particular alternative community design is of no specific economic value to a single potential provider, even if it is a public good of potentially great social value. When the public good is a specific community vision, the likelihood that it will emerge from the market is even less. Consequently, the creation of community visions is dominated by those ideas or components that *do* provide a specific economic benefit to a specific individual or group of individuals.

A Lamarckian approach does not require that communities accept the “forced” vision, only that they *have the opportunity* to accept it. This the essence of *selected* Lamarckism. A Lamarckian approach to community planning would provide the public goods that the current

¹⁸⁷ JOHN RAWLS, *POLITICAL LIBERALISM* 36 (expanded ed. 2005).

¹⁸⁸ Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 *YALE L. J.* 16 (1913).

system, because of economic and collective action constraints, is unable to provide. A Lamarckian approach would place the burden on the plan drafters, rather than on the “community,” to identify the best future for the community, or at least one or more initial “drafts” of that best future. The public good – in the form of a vision otherwise disadvantaged by the neoliberal hegemony – would then be available to the community, to accept or reject as it chooses.

This policy proposal, which sounds a lot like imposing a particular vision (or land-use regime) upon a community, might seem unwise,¹⁸⁹ or at least distasteful, particularly for people who might not believe the planning process is the appropriate place for planners to make normative judgments.¹⁹⁰ But before rejecting it, we must consider the alternative. Refusing to make an explicit normative statement through the planning process only means that the normative statement is implicit. It is no less real. As discussed above, a planning process that relies on a marketplace of ideas will necessarily elevate those ideas that yield specific and identifiable economic benefits to the individual participants. And because public goods provide no specific and identifiable economic benefits to individual participants, those goods will not emerge. Or if they do, they will not be championed, supported, nor ultimately adopted.

The choice to remain “neutral” – to allow the vision to emerge from the community – is not in fact a neutral choice. It is also not a choice that will necessarily yield the best outcomes. It is a specific choice to prefer the status quo, to prefer outcomes that provide economic benefits to the players that are motivated – by the prospect of those economic benefits – to effectively participate in the process. It is a choice to prefer the growth machine.¹⁹¹ This choice is made by both planners as well as elected officials. The elected officials have their own benefits to consider. Enriching the growth machine provides a simpler path to reelection than does insisting on public goods to the potential detriment of that growth machine.

¹⁸⁹ See Jonathan Thompson, *Fearful of Agenda 21, an Alleged U.N. Plot, Activists Derail Land-Use Planning*, HIGH COUNTRY NEWS, Feb. 6, 2012.

¹⁹⁰ Not all planners seek to avoid normative judgments. In a classic essay, Paul Davidoff argued for planners to actively participate in the normative discussion: “the planner should do more than explicate the values underlying his prescriptions for courses of action; he should affirm them; he should advocate for what he deems proper.” Paul Davidoff, *Advocacy and Pluralism in Planning*, 31 J. AMER. INST. PLANNERS 544 (1965).

¹⁹¹ See generally Harvey L. Molotch, *The city as a growth machine: Toward a political economy of place*, 82 AM. J. SOC. 309 (1976); see also Harvey L. Molotch, *The political economy of growth machines*, 15 J. URB. AFFAIRS 29 (1993).

This fact, of course, remains problematic, particularly given that the public policy proposal offered here is primarily that local decision makers must insist on providing public goods, even in the face of a constellation of private opposition. But the justification for the proposal in the face of what unfortunately, and I believe inaccurately, seems to be the obvious political realities *is that it will work*. The reason sprawl remains the predominant development pattern in the western United States is not because we have investigated all of the options and chosen the one that we prefer. It is the predominant development pattern because it is the *only* development pattern we have allowed to exist. It is all that we know. But when provided better options, we will choose those options. Consider the following simplified example.

Originally motivated by farmers fearing the loss of agricultural land, Oregon enacted its state-wide land-use regime in 1973. Often described as a state-wide *planning* law, or simply state-wide planning, the 1973 Act was significant primarily for its *substantive* requirements. Two in particular are relevant to this discussion. First, the Act enabled the Department of Land Conservation and Development to create statewide land-use goals with substantive provisions. They were, and are, articulated as planning goals, but that description does not convey adequately the significance of the state-wide goals. Contrary to the common understanding of the word “goal” as an aspirational potential end state, the Oregon legislature defined a goal, for the purposes of the 1973 Act, as a “mandatory statewide land use planning standard[.]”¹⁹² Goal 14, for example, *requires* cities, counties and regional governments to create urban growth boundaries: “Urban growth boundaries *shall* be established and maintained by cities, counties and regional governments to provide land for urban development needs and to identify and separate urban and urbanizable land from rural land.”¹⁹³

Of course, absent any mechanism to enforce that requirement, it would be meaningless. But the second aspect of the 1973 Act relevant to this discussion is the Act’s requirement that all local land-use decisions strictly comply with the statewide goals: “all comprehensive plans and land use regulations adopted by a local government to carry out those comprehensive plans and all plans, programs, rules or regulations affecting land use adopted by a state agency or special

¹⁹² OR. REV. STAT. ANN. § 197.015 (West)

¹⁹³ <http://www.lcd.state.or.us/LCD/docs/goals/goal14.pdf>

district *shall be in compliance with the goals[.]*”¹⁹⁴ Oregon’s state-wide planning law represented a very clear decision to adopt a fundamental change in the state’s approach to the regulation of private lands.

But the Oregon Act was not a statement of a collective state-wide vision. To the contrary, most of the state – defined geographically – overwhelmingly opposed the Act. It was predominantly a Willamette Valley Act,¹⁹⁵ and enough legislators from the Willamette Valley supported the Act that it would have passed even with zero votes (rather than nine out of forty possible) from the rest of the state.¹⁹⁶ Dissatisfaction with the Act threatened its existence on numerous occasions. Its opponents finally succeed in 2004 when Oregon voters approved Measure 37.¹⁹⁷

Measure 37, which largely repealed Oregon’s 1973 law, at least with respect to long-time landowners, might suggest that the forced approach did not work. But it does just the opposite. The government, against the wishes of the community, forced a particular vision that was ultimately rejected.¹⁹⁸ And were Measure 37 that final act, that might be a powerful story, challenged only by claims that Measure 37 was “sold” dishonestly to an unknowing public. But it wasn’t the final act. Just three years later, Oregonians enacted Measure 49, which repealed and replaced most of Measure 37’s anti-planning provisions. This is Pragmatism at work—identifying the value of a choice by considering its consequences. Compared to the available alternatives, as represented by Measure 37, Oregon preferred the original “forced” approach.¹⁹⁹

¹⁹⁴ OR. REV. STAT. ANN. § 197.250 (West)

¹⁹⁵ Oregon’s large urban areas, university towns, and capital city – e.g., Portland, Eugene, Corvallis, Salem – are all in the Willamette Valley.

¹⁹⁶ See the following website for a history of the 1973 Act:

http://www.oregonencyclopedia.org/entry/view/land_use_planning/ (last visited Sept. 9, 2011).

¹⁹⁷ For a discussion of Measure 37, its origins and consequences, see Michael C. Blumm & Erik Grafe, *Enacting libertarian property: Oregon’s Measure 37 and its implications*, 85 Denv. U. L. Rev. 279 (2007).

¹⁹⁸ For one version of this story from a property rights advocate’s perspective, see David J. Hunnicutt, *Oregon land-use regulation and Ballot Measure 37: Newton’s Third Law at work*, 36 ENVTL. L. 25 (2006).

¹⁹⁹ Of course, the story is much more complicated than this statement suggests, and Measure 49 was not a wholesale return to the 1973 regime. See Edward J. Sullivan & Jennifer M. Bragar, *The Augean Stables: Measure 49 and the herculean task of correcting an improvident initiative measure in Oregon*, 46 WILLAMETTE L. REV. 577, 579 (2010); Bethany R. Berger, *What owners want and governments do: Evidence from the Oregon experiment*, 78 FORDHAM L. REV. 1281, 1330 (2009).

VI. Conclusion

In the abstract, the socio-ecological structure of a place, including its urban, suburban and exurban form, is determined in large part by a tapestry of historical local, regional and national land-use norms and rules. Those land-use norms and rules – together forming the land-use institution of a place – are themselves a product of an ongoing conversation about the future of a place that is informed by the on-the-ground consequences of previous land-use choices. This conversation is increasingly influenced by a neoliberal hegemony that reinforces existing power structures and prefers specific narratives. Excluded from the conversation are narratives that represent public goods—e.g., community plans that might most closely approach a consensus the community could reach, if provided the opportunity to do so.

But the fact that the effects of previous choices lead to new choices that create new effects suggests that an underused tool exists to promote community development that more closely reflects a pure public good. If we can only understand the benefit of an approach by experiencing its benefits, the primary tool – if not the only effective tool – for creating community-protective land-use institutions is the creation of institutions that protect a community’s social, cultural and natural resources in a manner that makes readily apparent to the affected community the benefits of those previous choices. Put another way, to successfully implement community-protective land-use regimes, a community must protect its valued resources and communicate the benefits of that protection to the regulated community. It is the consequences of doing that provide the reasons for doing, and the consequences of doing are only known when they are available for us to experience.²⁰⁰ It is the effects of doing that provide the reasons for doing.

By providing complete, specific alternatives at the beginning of the planning process, a selected Lamarckism approach would enable communities to more accurately imagine the potential consequences of particular planning choices. As important, by reincorporating experts – from a variety of disciplines – as both creators of and advocates for particular planning alternatives, selected Lamarckism can identify and champion public goods that would not otherwise emerge in a neoliberal-dominated collaborative process. Notwithstanding the use of

²⁰⁰ For an alternative perspective, see, e.g., David M. Messick, *Alternative logics for decision making in social settings*, 39 J. ECON. BEHAV. & ORG 11 (1999).

rational technocrats to develop the initial alternatives, this approach is potentially more inclusive than collaborative processes that yield vague outcomes co-opted by growth-oriented interests.

Human landscapes are law realized. And law should be vision formalized. If planners want communities to enact good visions, planners must create good visions for communities to enact.