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## Internally Buffered Districts: A New Technique to Make Zoning Less Exclusionary

William Leaf, *The University Of Michigan*

Michael Lewyn, *Touro Law Center*

## Internally Buffered Districts: A New Technique to Make Zoning Less Exclusionary

*William Leaf\* and Michael Lewyn\*\**

I cannot help feeling too some doubt of my right of controlling what my neighbor shall do with his lot by the use I make of mine. Why should the first fellow decide what the next fellow may build?

-Alfred Bettman, 1929 *National Conference on City Planning*

### I. INTRODUCTION

American zoning divides cities into districts and applies a unique set of regulations to each district. Each set of regulations has density controls and use restrictions. Density controls regulate the size of homes, the number of homes that can be built on each parcel of land, and the number of people allowed to live in each home. Use restrictions ban certain activities; for example, zoning regulations for residential districts often forbid apartment buildings and stores.

Many scholars have criticized both types of restrictions.<sup>1</sup> Density controls make housing more expensive,<sup>2</sup> and segregate the poor from other social classes.<sup>3</sup> They also spread apart homes, offices, and other destinations, which

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\*\*Associate Professor, Touro Law Center. Wesleyan University, B.A.; University of Pennsylvania, J.D.; University of Toronto, L.L.M.

<sup>1</sup>See *infra* notes 2–4 and accompanying text; see generally JOHN R. OTTENSMA, MARKET-BASED EXCHANGES OF RIGHTS WITHIN A SYSTEM OF PERFORMANCE ZONING 2–3 available at [http://www-pam.usc.edu/volume1/v1i1a4s1.html#ottensmann\\_contents](http://www-pam.usc.edu/volume1/v1i1a4s1.html#ottensmann_contents).

<sup>2</sup>See EDWARD L. GLAESER AND JOSEPH GYOURKO, THE IMPACT OF ZONING ON HOUSING AFFORDABILITY 21 (2002), available at <http://www.law.yale.edu/documents/pdf/hier1948.pdf>.

<sup>3</sup>See JONATHAN ROTHWELL, HOUSING COSTS, ZONING, AND ACCESS TO HIGH SCORING SCHOOLS 21 (2012), <http://www.brooking>

makes travel more difficult.<sup>4</sup> Use restrictions may also be undesirable, as surveys show that most Americans want to live in areas with a mixture of houses and stores.<sup>5</sup>

The growing recognition of these harms has not caused density and use restrictions to fade away. In fact, zoning rules are stricter than they were before the 1970's.<sup>6</sup> In this article, we try to explain this trend, and suggest a new zoning technique called an "internally buffered" district as a possible compromise between the status quo and complete deregulation.

In Part II of this article, we explain why zoning has failed to achieve its purpose. Early proponents of zoning argued that districting would protect homeowners and renters from the harmful effects of more intense land uses. But in fact, zoning protects some residents far more than others. For example, if a residential district is next to a noisy commercial district, the residents at the center of the residential district are further from the commercial district (and thus more fully protected from the commercial district's noise) than those near the border of the two zones. Thus, zoning "protections" are inconsistent and inequitable. Zoning regulations do not promote health and safety generally, but instead create special rights for certain property owners.

In Part III, we explain why zoning has become more exclusionary and restrictive over time. Local politicians, not urban planners, usually control zoning codes, which gives voters substantial influence.<sup>7</sup> Homeowners and other residents of a residential neighborhood often have political ad-

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[s.edu/~media/research/files/papers/2012/4/19%20school%20inequality%20rothwell/0419\\_school\\_inequality\\_rothwell.pdf](http://s.edu/~media/research/files/papers/2012/4/19%20school%20inequality%20rothwell/0419_school_inequality_rothwell.pdf).

<sup>4</sup>See JONATHAN LEVINE ET AL., DOES ACCESSIBILITY REQUIRE DENSITY OR SPEED 170 (2012), available at <http://www.tandfonline.com/doi/full/10.1080/01944363.2012.677119>.

<sup>5</sup>See NATIONAL REALTOR ASSOCIATION, 2013 COMMUNITY PREFERENCE SURVEY 5 (2013), available at <http://www.realtor.org/sites/default/files/reports/2013/2013-community-preference-topline-results.pdf>.

<sup>6</sup>See WILLIAM A. FISCHER, AN ECONOMIC HISTORY OF ZONING AND A CURE FOR ITS EXCLUSIONARY EFFECTS 17-24 (2001), available at <http://www.dartmouth.edu/~wfischer/papers/02-03.pdf>.

<sup>7</sup>See WILLIAM A. FISCHER, THE ECONOMICS OF ZONING LAWS: A PROPERTY RIGHTS APPROACH TO AMERICAN LAND USE CONTROLS 32-33 (1985).

vantages that allow them to influence zoning conflicts more than business owners or developers, and they use zoning to further their own interests. Frequently, they exclude apartments, stores, and other land uses that could lower the value of their homes or otherwise make their neighborhoods less pleasant.<sup>8</sup> The structure of zoning prevents direct negotiation, so homeowners are pushed to either approve nearby developments without compensation or reject them entirely. Unsurprisingly, they often reject them entirely. As a result, homeowners have chipped away at landowners' rights to create compact or intense development, limiting housing supply and making cities less compact or walkable.

In Part IV, we propose to create a type of zoning district that solves both the problem addressed in Part II (inadequate protection of some neighborhood residents) and the problem addressed in Part III (overly restrictive zoning). In particular, we propose a new kind of zone called an "internally buffered district." Within these zones, intensive land uses like stores and apartments are allowed, so long as the latter uses are physically separated from nearby residential districts. These separation rules ensure that the intense uses within an internally buffered district does not strongly affect residents outside of that district. Thus, internal buffering gives us the best of both worlds: quiet residential neighborhoods are shielded from the harmful impacts of development, but landowners far away from those neighborhoods have unfettered freedom to build.

Internally buffered districts allow for a new development procedure, in which developers pay compensation to surrounding property owners in exchange for rezoning their property to the internally buffered classification. Alternatively, developers can buy a cluster of properties, and request that the entire cluster be rezoned to the internally buffered classification. Both methods allow developers to compensate homeowners in exchange for allowing more permissive zoning. Compensation could persuade homeowners to support changes that weaken density controls and use-restrictions. Thus, the internally buffered district may allow for both more compact development *and* more protection of homeowners' interests.

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<sup>8</sup>See generally RICHARD F. BABCOCK, THE ZONING GAME 140-144 (1966).

## II. The Failure of Zoning

Usually, the same rules apply to every property in the same zoning district, regardless of each property's location within the district. For example, stores are generally allowed anywhere within a commercial district, even if there is a residential district nearby. This consistency in what activities are allowed comes at a cost: it makes the protections within districts inconsistent. Properties in the center of restrictive districts have better protections than those near permissive districts.

This can be seen in the current zoning code of New York City. The code states that the purpose of residential districts is to protect residences from a variety of harms, including noise, traffic congestion, and a wide variety of pollutants.<sup>9</sup> To prevent these harms, the code forbids certain structures and activities in residential districts. However, these restrictions do not apply just outside the district, which means that protections are not effective near the district's border.

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<sup>9</sup>See NEW YORK, NEW YORK, ZONING RESOLUTION ART. II, § 21-00, available at <http://www.nyc.gov/html/dcp/html/zone/zonetext.shtml>.



*R6B residence districts in Park Slope, Brooklyn.*<sup>10</sup>

For example, some of the homes in residential R6 zones are next to C8 General Service Districts. The description of C8 districts states: “Since these service establishments often involve objectionable influences, such as noise from heavy service operations and large volumes of truck traffic, they are incompatible with both residential and retail uses.”<sup>11</sup> This suggests that the homes next to the C8 district have fewer protections against trucking and noise compared to homes in the center of residential districts. The zoning map does not show this inconsistency. All of the houses in the R6B districts are given the same label, even though homes next to the C8 district have weaker protections.

Because zoning protections are inconsistent, zoning is essentially inequitable: it gives more significant rights to persons living in the center of a zone than to persons living

<sup>10</sup>NEW YORK CITY ZONING MAP, <http://maps.nyc.gov/doitt/nycitymap/template?applicationName=ZOLA>.

<sup>11</sup>ZONING RESOLUTION ART. III, § 31-18.

on the fringe of the zone. The argument that zoning is a public safety tool that benefits all residents equally is therefore false, because zoning does not isolate nuisances or dangers from the general public as a whole.

Examples from the early history of zoning shows how zoning is a tool for distributing rights, not protecting the public. Early zoning advocates claimed that districting would protect residents from apartment buildings, garages, and other allegedly dangerous or offensive land uses.<sup>12</sup> Supposedly, if there were districts where offensive land uses were forbidden, then people within those districts would be safe. Supreme Court Justice George Sutherland used this reasoning in his influential opinion in *Euclid vs. Ambler*:

The question whether the power exists to forbid the erection of a building of a particular kind or for a particular use, like the question whether a particular thing is a nuisance, is to be determined not by an abstract consideration of the building or of the thing considered apart, but by considering it in connection with the circumstances and the locality. A nuisance may be merely a right thing in the wrong place—like a pig in the parlor instead of the barnyard.<sup>13</sup>

Sutherland argued that useful but bothersome land uses should be separated from certain protected areas. A store or apartment—the pig—would only be harmful only near a single-family residential neighborhood—the parlor. This principle, that some legitimate activities must be isolated, was already well established at the time of Sutherland's decision. Horace Wood stated in his classic treatise on nuisances: "A use for a particular purpose and in a particular way, in one locality, that would be lawful and reasonable, might be unlawful and a nuisance in another."<sup>14</sup> As an example, Wood noted that governments can ban the storage

<sup>12</sup>See THE ADVISORY COMMITTEE ON ZONING, A ZONING PRIMER 2 (1926), available at <https://archive.org/details/zoningprimerbyad00unit>. For the purposes of this article, we assume that such uses are in fact dangerous or offensive. But see Jay Wickersham, *Jane Jacob's Critique of Zoning: From Euclid to Portland and Beyond*, 28 B.C. Env'tl. Aff. L. Rev. 547, 550–51 (2001) (criticizing separation of uses).

<sup>13</sup>*Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 388, 47 S. Ct. 114, 71 L. Ed. 303, 4 Ohio L. Abs. 816, 54 A.L.R. 1016 (1926).

<sup>14</sup>HORACE G. WOOD, A PRACTICAL TREATISE ON THE LAW OF NUISANCES IN THEIR VARIOUS FORMS, INCLUDING REMEDIES THEREFOR AT LAW AND IN EQUITY 3 (1875).



of explosive materials near public highways, even if the materials are stored carefully.<sup>15</sup> Justice Sutherland's argument was new, not because it supported the separation of land uses, but because it equated this separation with zoning. In fact, zoning was poorly suited to separating land uses.

If reformers merely wanted to separate harmful land uses from other areas, they could have argued for consistent location-based rules. Reformers in New York, who pushed for the first ever comprehensive zoning code in the United States, acknowledged that location-based rules already existed in other cities. For example, a Milwaukee law stated that in commercial areas: "No garage may be maintained in a block where two-thirds of the buildings in a block are devoted exclusively to residential purposes without the written consent of the property owners on both sides of the street or alley in such block."<sup>16</sup> Throughout Milwaukee, residents had the right to exclude certain offensive land uses from residential areas. The report also noted that in Baltimore and Seattle, a special permit was required for certain disruptive land uses, and surrounding property owners could protest against the issuance of such permits.<sup>17</sup> If reformers had merely wanted more comprehensive and consistent forms of separation, they could have made broader use-based rules. For example, city planners could have forbidden new stores from locating near houses. With consistent separation rules, people who wanted to open stores or factories would have had to adjust to the circumstances of the locality.

In contrast, zoning created districts where intensive land uses were allowed regardless of the surroundings. For example, Justice Sutherland noted that Euclid's zoning code included a district that allowed both homes and industrial

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<sup>15</sup>*Id.* at 89.

<sup>16</sup>EDWARD BASSETT ET AL., REPORT OF THE HEIGHTS OF BUILDINGS COMMISSION TO THE COMMITTEE ON THE HEIGHT, SIZE AND ARRANGEMENT OF BUILDINGS OF THE BOARD OF ESTIMATE AND APPORTIONMENT OF THE CITY OF NEW YORK 41 (1913), available at <https://archive.org/details/reportofheightso00newy>.

<sup>17</sup>*Id.* at 42.



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uses like incinerators and sewage disposal plants.<sup>18</sup> Even in cities where zoning districts allowed only a single kind of use, different uses were allowed next to each other at the borders between zones.

This kind of inconsistency is part of every zoning code. If a code has the same separation standards throughout a city, then a map of different districts serves no purpose. If a city government wanted to consistently isolate offensive land uses, it would simply forbid people from creating new offensive land uses near houses or other protected land uses.

It follows that zoning is poorly suited to regulate serious harms such as dangerous or highly polluting industries. For real threats, consistent rules must be applied, or else dangerous land uses could locate next to harmless ones. The plaintiffs in *Euclid v. Ambler Realty* pointed this out. They argued that if the City of Euclid really believed that industry threatened houses, then it would not have created districts that allowed both houses and industry.<sup>19</sup> They stated, “The public safety, health, and welfare are just as much offended by a family next to a laundry in one place as another. The private interests of some residence property owners, however, may be strengthened by separation.”<sup>20</sup>

While zoning is poorly suited to preventing industrial dangers, it is well suited to furthering the private interests of the politically influential. It allows city governments to give special protections to certain residents without the difficulty of applying the protections to an entire city. An example of this can be seen in the history of the first comprehensive zoning code in the United States, which was created for New York City in 1916.<sup>21</sup>

New York City’s zoning plan gave certain merchants in Manhattan special rights that were not shared by other citizens. The Fifth Avenue Merchant Association wanted to exclude garment factories from Fifth Avenue. The association feared that crowds of foreign garment workers would ir-

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<sup>18</sup>Village of Euclid, 272 U.S. at 381.

<sup>19</sup>Brief for Appellee at 22, *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 47 S. Ct. 114, 71 L. Ed. 303, 4 Ohio L. Abs. 816, 54 A.L.R. 1016 (1926).

<sup>20</sup>*Id.*

<sup>21</sup>See SEYMOUR I. TOLL, *ZONED AMERICAN* 140 (1969).

ritate retail customers who came by carriage.<sup>22</sup> In response, the association argued that garment factories should be banned from the area around Fifth Avenue. To achieve this, the association could have tried to ban new garment factories from locating near retail stores throughout New York City, but this plan would have been unnecessarily ambitious for the association's purposes. Instead, they supported the concept of districting, which had been discussed at the first National Conference on City Planning in 1909.<sup>23</sup> Districting, which is now called zoning, applied different height limits to different parts of the city. The merchant association requested a low height limit for the district covering Fifth Avenue, so as to indirectly ban garment factories, which were usually very tall.

The New York districting plan succeeded, and the Fifth Avenue area received a lower height limit than other parts of Manhattan.<sup>24</sup> Zoning broke up the city's uniform building regulations into new rights that were unevenly distributed among various residents. Retailers in the center of the low height district surrounding Fifth Avenue gained the right to exclude tall buildings. Garment factory owners kept their right to build tall buildings in permissive districts, regardless of local conditions.<sup>25</sup> Property owners just inside the border of the low height district lost their right to build tall buildings, without gaining the right to exclude them from their surroundings.

The residents who lost rights were victims of zoning's basic structure. When some residents gain the rights to create a new development, other residents lose the right to exclude it. The reverse is also true, since every exclusionary right destroys a reciprocal right to develop. However, zoning does not define rights explicitly.

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<sup>22</sup>*Id.* at 158.

<sup>23</sup>See FREDERICK L. OLMSTEAD, PROCEEDINGS OF THE FIRST NATIONAL CONFERENCE ON CITY PLANNING 63–70 (1909), available at <https://archive.org/stream/proceedingsoffir00nati#page/n7/mode/2up>.

<sup>24</sup>*Id.* at 159.

<sup>25</sup>See Toll, *supra* note 21, at 170.

### III. Why Has Zoning Become More Restrictive?

#### A. Homeowners Can Gain Exclusionary Rights

Homeowners<sup>26</sup> have several advantages during zoning conflicts, because of the distribution of harms and benefits that accompany zoning changes. When a rezoning allows a new development, the benefits go to the property owner who gains the privilege to develop more intensely, as well as to future customers, employees, or residents of the development.<sup>27</sup> The harms caused by the development—such as traffic, noise, and disrupted views—affect current residents who live near the proposed development. Homeowners are especially sensitive to local harms, because they fear that harms could lower their property values.<sup>28</sup> When pro-development and anti-development groups lobby local officials to approve or deny zoning changes, the pro-development group suffers from several disadvantages.

The future customers or residents of a development cannot be sure that they will live or shop at a place that does not exist yet. They are spread throughout a city, or possibly a larger region. They might not even find out about the development until years after it is approved. For these reasons, it is not practical for them to lobby for zoning changes.

Another group of beneficiaries is equally powerless. If the development will reduce the demand for a similar project somewhere else, it will benefit residents who live near the

<sup>26</sup>Renters as well as homeowners may on occasion resist development near their residences. However, this article focuses on homeowners because the latter group is more motivated to do so, since they might suffer reduced housing values from such development and thus cannot move away from unpleasant land uses as easily as renters. See Kenneth A. Stahl, *Neighborhood Empowerment and the Future of the City*, 161 U. PA. L. REV. 939, 948–50 (2013) (explaining homeowner interests); Vicki Been et. al., *Urban Land Use Regulation: Are Homevoters Overtaking the Growth Machine?* 49, at [http://www.law.nyu.edu/sites/default/files/ECM\\_PRO\\_075062.pdf](http://www.law.nyu.edu/sites/default/files/ECM_PRO_075062.pdf) (downzoning more common in New York City neighborhoods with high percentages of homeowners, as opposed to those dominated by renters).

<sup>27</sup>See generally BABCOCK, *supra* note 8, at 138–152.

<sup>28</sup>See William A. Fischel, *Political Structure and Exclusionary Zoning: Are Small Suburbs The Big Problem?* 8, at <http://urpl.wisc.edu/papers/Fischel-Exclusionary%20Zoning.pdf>.

alternative site. But even if a rejected development will likely be approved somewhere else, the uncertainty of where it will be approved prevents neighbors at the alternative site from petitioning to approve the first location.

Nearby homeowners who oppose development are usually in a stronger position.<sup>29</sup> They can speak as a unified group of voters at local government meetings. They can point out specific trees, views, and historic buildings that might be destroyed as a result of development. These harms are no more real than the harms of pushing development to an alternate site, but they are more visible and therefore persuasive to officials who are responsible only to their constituency. These advantages explain why zoning rules tend to become stricter over time. The distribution of development's harms and benefits allow homeowners to expand their exclusionary rights at the expense of other property owners' development rights (and at the expense of the rights of invisible future beneficiaries of such development).

Today's zoning goes far beyond what the early advocates of zoning supported. In the early 20<sup>th</sup> century, zoning advocates supported separation of land uses<sup>30</sup>— but only in moderation. Alfred Bettman, one of the most important early advocates for zoning, argued that residential neighborhoods should be close to commercial areas. In his friend of the court brief in *Euclid v. Ambler Realty*, he stated, “Each residential district, for instance, requires its neighborhood business center with its grocery store, drug store, branch bank, churches, schools . . . consequently these local business and civic areas, though segregated somewhat from the residential areas, are placed immediately adjoining to or in the center of the residential areas.”<sup>31</sup> Other important zoning advocates favored even more mixing of uses than Bettman. Edward Bassett, who chaired the committee that recom-

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<sup>29</sup>*Id.*

<sup>30</sup>See THE ADVISORY COMMITTEE ON ZONING, *supra* note 12, at 1–3.

<sup>31</sup>ALFRED BETTMAN, CITY AND REGIONAL PLANNING PAPERS 177 (1946), available at <http://www.tnlanduse.com/bettmanbrief.pdf>

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mended zoning for New York City,<sup>32</sup> argued that some housing should be allowed even in industrial districts.<sup>33</sup> But today, residential zones may be miles from commercial areas.<sup>34</sup>

If these commentators actually controlled zoning's development, zoning would not have become as intolerant as it has. In fact, local politicians controlled zoning, and they used it to benefit their constituents, who were often homeowners.<sup>35</sup> Edward Basset criticized this trend at the National Conference on City Planning in 1929. He argued that some suburbs were developing a "hypercritical exclusiveness," and were excluding hospitals from residential zones.<sup>36</sup> Early zoning advocates helped convince the Supreme Court that zoning served broad public purposes,<sup>37</sup> but after the court's decision, homeowners used zoning in ways that contradicted these purposes.

Thus, zoning is basically a tool for enforcing homeowner interests, rather than a apolitical tool of professional planners. Homeowner interests could be reconciled with the public interest in facilitating compact development<sup>38</sup>—for example, if property owners were allowed to sell their zoning rights. But this option is not possible under current law.

<sup>32</sup>See generally EDWARD BASSETT ET AL., *supra* note 16.

<sup>33</sup>See EDWARD M. BASSETT, ZONING 324–25 (1922), at <https://play.google.com/store/books/details?id=CbErAAAAAYAAJ&rdid=book-CbErAAAAAYAAJ&rdot=1>.

<sup>34</sup>See Michael Lewyn, *The (Somewhat) False Hope of Comprehensive Planning*, 37 U. OF HAWAII L. REV. 39, 53 (2015) (citing example).

<sup>35</sup>See generally FISCHER, *supra* note 7, at 17–22.

<sup>36</sup>PLANNING PROBLEMS OF TOWN, CITY, AND REGION: PAPERS AND DISCUSSIONS AT THE TWENTY-FIRST NATIONAL CONFERENCE ON CITY PLANNING, HELD AT BUFFALO AND NIAGARA FALLS, NEW YORK, MAY 20 TO 23, 1929 97 (1929), available at [https://archive.org/stream/planningproblems04natirich/planningproblems04natirich\\_djvu.txt](https://archive.org/stream/planningproblems04natirich/planningproblems04natirich_djvu.txt).

<sup>37</sup>See generally MICHAEL A. WOLF, THE ZONING OF AMERICA: EUCLID V. AMBLER 109 (2008).

<sup>38</sup>See *supra* notes 2–4 and accompanying text (noting harms caused by restrictive zoning).

### ***B. Homeowners Cannot Sell Their Exclusionary Rights***

Even though nearby homeowners often dominate rezoning proceedings, the structure of zoning does not serve their interests well, because they do not have the option of selling their rights. Homeowners must either keep their rights by denying developers' rezoning requests, or give them away for free by accepting rezonings. In some cases, negotiation could benefit both parties. If a potential rezoning benefits a developer more than it harms nearby homeowners, both sides could profit if property owners were able to voluntarily give up their zoning rights in exchange for compensation.

Homeowners and developers already negotiate indirectly through a process called contract zoning.<sup>39</sup> When developers request a zoning change, local officials sometimes agree to approve it, so long as the developers pay a fee, or provide some public service, in return.<sup>40</sup> This approach has limitations for both homeowners and developers. First, it may be illegal for developers to make specific offers to local governments in return for zoning changes.<sup>41</sup> Second, local officials may choose to give up homeowners' rights in exchange for compensation that does not benefit the affected homeowners. For example, local officials might let a developer build a factory in a residential neighborhood, so long as the developer provides parkland in a different part of the city. Third, it is difficult for local officials to know which rights are affected by a zoning change, because they are undefined- that is, it is not clear which property owners should be compensated for a zoning change that allows a new development. These limitations prevent direct negotiation between homeowners and developers.

## **IV. One Way To Improve Zoning: The Internally Buffered District**

### ***A. Rights Must be Defined Before They Can Be Sold***

In order for property owners to sell their rights, there

<sup>39</sup>See generally JULIAN C. JUERGENSMEYER AND THOMAS E. ROBERTS, LAND USE PLANNING AND DEVELOPMENT REGULATION LAW 150–154 (2007).

<sup>40</sup>See generally FISCHER, *supra* note 16, at 74–79.

<sup>41</sup>See JUERGENSMEYER AND ROBERTS, *supra* note 39, at 152.

must be a record of what rights exist and who owns them. Currently, zoning rights exist only as unlabeled relations between districts on zoning maps. Property owners cannot sell their rights, because their ownership is undefined. For example, homeowners at the center of a single family residence district enjoy the right to exclude retail stores, but they cannot give away or sell this right. They cannot simply ask local officials to rezone their properties to a commercial classification, because this change would affect an unknown number of people outside the border of the new district. Local officials would not know who would have to consent in order for the change to be voluntary. In order to assign rights to specific owners, the structure of zoning must be changed.

### ***B. Internal Buffering As An Alternative***

As early as 1929, urban reformer Ernst Freund recognized that zoning did not protect residents equitably. He claimed that a residentially zoned property near a non-residential zone was obviously less desirable than a property at the center of a residential zone.<sup>42</sup> Professor Arthur Comey discussed a special device to remedy this problem in his 1933 book *Transition Zoning*.<sup>43</sup> Comey discussed methods of managing borders between zones. He argued that cities could protect border areas by making restrictions within districts vary by location.<sup>44</sup> As an example, he used a commercially zoned business in Kansas City near the border of a residence district. The local zoning ordinance required the business to have a side yard, because it was next to a residence district.<sup>45</sup> Thus, the ordinance created a buffer between the business and the residences- but the buffer was “internal” to (that is, inside) the commercial district, rather than being a separate district.

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<sup>42</sup>PLANNING PROBLEMS OF TOWN, CITY, AND REGION, *supra* note 36, at 87–88.

<sup>43</sup>See ARTHUR C COMEY, TRANSITION ZONING 3–4 (1933), available at <https://archive.org/details/transitionzoning00comerich>.

<sup>44</sup>*Id.* at 10.

<sup>45</sup>*Id.* at frontispiece.





Courtesy of S. Herbert Hare  
24d. BUSINESS BUILDING REQUIRED TO HAVE A REAR YARD BECAUSE ABUTTING ON A RESIDENCE DISTRICT, KANSAS CITY, MISSOURI

This kind of internal buffering occasionally exists in modern codes. For example, the 2014 New York zoning ordinance states that primary business entrances in commercial districts must be at least 75 feet from the front of any building in a residence district.<sup>46</sup>

We propose that the advantages of internal buffering can be extended to create a completely buffered district. Under such a system, all of the rights belonging to people in the district would be precisely and fully defined. This allows property owners within the district, as well as those in nearby districts, to better understand which rights they possess.

### ***C. Internally Buffered Districts Define Protections Comprehensively***

An internally buffered district regulates activities based only on their effects outside the district. For example, the maximum height of a building is listed as a fraction of the

<sup>46</sup>ZONING RESOLUTION ART. III, § 32-512 (setting forth both rule and exceptions to rule).

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distance between the building and the nearest residential district. Other protections can be expressed in similar ways:

	<b>Traditional Commercial District</b>	<b>Internally Buffered District</b>
Use	Stores are allowed throughout the district.	Stores are not allowed within 500 feet of a single-family residential district, or 100 feet of a multi-family residential district.
Setbacks	Buildings must be set back six feet from the property line.	Buildings must be set back six feet from multi-family residential districts and ten feet from single-family districts.
Noise	Activities may produce up to 70 decibels of noise.	Activities may send 60 decibels of noise to a property in a residential district, and 80 decibels to all other areas.
Truck Traffic	Truck deliveries are allowed throughout the district.	Truck deliveries are not allowed within 100 feet of a residential district.

In the process of creating the internally buffered district, previously unspoken protections are made explicit. Zoning agencies must confront the question of what structures and activities should be separated. This process may encourage a transition to performance-based restrictions, such as limitations on noise or truck deliveries, rather than use restrictions. However, internal buffering can also preserve use restrictions. Because the protections of traditional zoning rules depend on the spatial relation between districts on a map, they can always be expressed as distance

requirements. For example, suppose that a zoning map happens to separate commercial districts and single-family residence districts by 100 feet everywhere on the map. The same separation can be enforced in an internally buffered district with a rule that forbids stores within 100 feet of single-family residence districts.

If all significant protections are included in the rules for an internally buffered district, then the position and size of the district does not harm the rights of people living outside of it. This allows local governments to enact master plans that presume that rezoning requests to the internally buffered classification are valid. Zoning agencies might even grant these kinds of requests administratively (that is, without a city council vote).<sup>47</sup>

Because an internally buffered district limits the rights of landowners at the edge of the zone more aggressively than it limits landowners at the core of the zone, it might at first glance seem that the district allows even less intense, compact development than current zoning districts. But this is not the case. By initiating a rezoning, property owners within the district voluntarily give up their right to exclude compact development- that is to say, as long as their properties within the district are sufficiently far away from other zoning districts, zoning does not constrain their rights. Only the city's uniform development restrictions remain, along with building codes and health and safety regulations. Thus, a buffered district could create the best of both worlds: protection for *all* homeowners in a nearby residential district (not just those at the district's core) *and* more compact, intense development within the buffered district.

#### ***D. Internally Buffered Districts Allow Property Owners to Sell their Rights***

If zoning agencies freely grant rezonings to the internally buffered district, a new procedure for development is possible. When developers want a zoning change, they can negotiate directly with neighboring property owners. They can offer money or design concessions, and in return, nearby owners can rezone their property to the internally buffered classification. Intensive development is then allowed in the

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<sup>47</sup>See generally JUERGENSMEYER AND ROBERTS, *supra* note 39, at 133-135.

center of the new district, but buffering rules preserve the rights of property owners outside of it.

***E. An Example of Property Owners Selling their Rights***

An example in Ann Arbor, Michigan shows how negotiation might work in practice. In this hypothetical case, we assume that Ann Arbor's zoning code contains an internally buffered district, and its master plan provides that when one or more property owners request that their properties be rezoned to the internally buffered classification, the planning commission and city council should grant the request. Suppose that developers wanted to build tall apartment buildings and stores in the residential neighborhoods near the University of Michigan's campus. The current residential zoning does not allow the developments. Developers have two new methods for getting the zoning changes necessary to build apartments and stores.

First, the developers could buy up a cluster of properties near the downtown, and then request a rezoning to the internally buffered classification. If officials grant the rezoning, developers could build apartments and stores on the properties that are close to downtown, but far from residential zones. Nearby residents would be separated from the new developments, and therefore would be less likely to protest the zoning change. Nearby homeowners might actually welcome the change, because values of properties near the internally buffered district might increase because of this development potential.

Second, the developers could pay nearby property owners to rezone their properties to the internally buffered classification. This would allow the developers to build the tall buildings on their own property. The developers and neighbors could request that all of the properties be rezoned as a single map amendment. This would prevent property owners from waiting until the developer has already spent time and money negotiating with other owners, and then demanding huge sums.

If the internally buffered district expands, properties near the center would gradually be subject to fewer restrictions. The central property owners who initially gave up their zoning protections would gain the ability to create new developments. This prospect may convince property owners

to give up their zoning rights for only a little compensation. A change that reduces their protections could eventually lessen their restrictions and raise the value of their property. For example, the owners of a small apartment building might agree to rezone their property to the internally buffered classification, even if the immediate financial benefits were small, because the change could encourage surrounding property owners to rezone their properties. If surrounding property owners followed the lead of the central property owners, the central properties would be subject to fewer restrictions, which could make them more valuable.



*A Residential Neighborhood near the University of Michigan*



*An Internally Buffered District in the Same Neighborhood*

The Ann Arbor example shows how internally buffered districts can make zoning changes more cooperative. Developers do not battle nearby homeowners. Instead a group of homeowners works with developers to lobby for a zoning change. Homeowners outside the new zone are buffered from the effects of the change, so they have little

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reason to oppose it. They may actually support the change, because their property values are likely to increase from the new development potential caused by the closeness of the internally buffered districts. This new alliance between developers and nearby homeowners could encourage local officials to grant zoning changes to allow new development.

### ***F. Allowing Property Owners to Sell Their Rights Has Many Benefits***

In a traditional zoning system, protections come from an undefined relationship between permitted activities on a map. Every rezoning threatens to remove invisible rights. If, instead, new development occurs only through an expansion of internally buffered districts, homeowners' rights are more certain. Their rights depend only on their own properties' classifications. They can choose whether to keep their rights, or to rezone their properties in exchange for compensation. This gives homeowners security as well as new opportunities for profit.

Developers also benefit. They know exactly what is necessary to achieve a zoning change, and they can begin their developments as soon as nearby property owners are satisfied. If developers own large amounts of property in a cluster, negotiation is not necessary, and they can develop intensely at the center of their cluster as soon as they receive a routine rezoning. Developers gain certainty and save time and expense.

Allowing property owners to sell their zoning rights also benefits the public as a whole. Each sale weakens the density controls and use restrictions that causes the problems mentioned at the beginning of this article. Less restrictive zoning rules could make housing more affordable, transportation more convenient, and neighborhoods more diverse and walkable.

## **V. Conclusion**

Zoning can be seen as a politically managed system of rights. Homeowners often control the rights that affect their surroundings. They frequently use this power to exclude apartments, stores, and other structures and activities that could lower their property values. This exclusion causes problems for homeowners, developers, and society as a whole. Changing the structure of zoning to allow residents to sell their exclusionary rights could mitigate these problems.



To accomplish this, local governments can create an internally buffered district with rules that depend only on the proximity of nearby districts, and then allow property owners to rezone their property to the internally buffered classification upon request. When property owners request a rezoning, they give up their exclusionary rights, without affecting the rights of other owners. This process allows developers to pay surrounding property owners compensation in exchange for rezoning their property to the internally buffered classification. These exchanges could gradually make zoning rules less exclusionary.