RESOLVING LAND USE CONFLICTS WITHOUT ZONING

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INTRODUCTION

In Houston, a real estate developer proposed a twenty-three-story high-rise in the vicinity of affluent neighborhoods.[1] Residents sued, alleging that the project would impact their privacy, aesthetics, traffic, and the market values of their homes.[2] Texas's appellate court ruled in favor of the developers in 2016,[3] but development has yet to go forward: the project, under a new developer, is targeted for completion in 2025.[4]

In the village of Hancock, on the New York–Pennsylvania border, newly arrived homeowners sued a manufacturing business which had been operating in an adjacent residential parcel, alleging that the manufacturing noise and odor substantially and unreasonably interfered with their use of their residential properties.[5] The court noted that the manufacturing, though out of character with the residential neighborhood, caused minimal disturbance to its neighbors. The business was permitted to continue its operations.[6]

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1 1717 Bissonnet, LLC, v. Loughhead, 500 S.W.3d 488 (Tex. App. 2016).

2 *Id.* at 492.

3 *Id.* at 509.

4 Steven Devadanam, *Posh New Boulevard Oaks Tower Replaces Controversial Ashby High-Rise*, CULTUREMAP HOUSTON (May 2, 2022, 5:25 PM), https://houston.culturemap.com/news/real-estate/05-02-22-the-langley-ashby-high-rise-1717-bissonnet-for-rent-luxury-streetlights-residential-hunt-companies/ [https://perma.cc/DG5D-H95R].

5 Nemeth v. K-Tooling, 955 N.Y.S.2d 419, 421 (N.Y. App. Div. 2012).

6 *Id.* at 421–22, 424. The homeowners in this case moved in on either side of the manufacturing operation in 2002 and 2004, with one couple using their property as a "vacation home," and sued soon after moving in. *Id.* at 421. The manufacturers had been operating on their own property since 1971, a decade before the village had any zoning

In Tempe, Arizona, residents of a senior living high-rise across the street from a restaurant and live music venue sued, alleging that concerts across the street interrupted their daily lives, shaking their furniture and forcing them to move out of the high-rise.[7] Officers who investigated these complaints considered them exaggerated.[8] Still, the venue was enjoined from live performances outside specified hours and decibel levels.[9]

Conflicts over disparate land uses are a hot political issue.[10] And exclusionary (also characterized as restrictive) zoning has long been the dominant form of land use regulation intended to control these conflicts.[11] Exclusionary zoning functions to separate out conflicting types of property uses by limiting the types of property uses which can be undertaken in areas of a municipality, and, within purely residential zones, by regulating permissible density and lot sizes.[12] Other types of controls (private controls like nuisance covenants and the common law of nuisance and other torts) play a part, but regulatory zoning schemes tend to have the final word in prohibiting construction of a new building or forbidding new use of existing real estate.[13] But the exclusionary zoning regime is under attack. Exclusionary zoning is

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laws, and was permitted to remain as a nonconforming use once the area was residentially zoned. *Id.* at 423.

7 Mirabella at ASU Inc. v. Peacocks Unlimited LLC, No. 1 CA-CV 22-0318, 2022 WL 17983430, at *1 (Ariz. Ct. App. Dec. 29, 2022).

8 *Id.*

9 *Id.* at *2–3. In this case, too, the appellate court noted that the district in which these properties were located was mixed-use and not intended to be subject to residential noise expectations.

10 *See* David Schleicher, *Exclusionary Zoning's Confused Defenders*, 2021 WIS. L. REV. 1315, 1316–17 ("In local and, increasingly, in state politics, no type of political conflict is fiercer than fights over land use." *Id.* at 1316).

11 *See* 1 PATRICIA E. SALKIN, AMERICAN LAW OF ZONING § 2.11, Westlaw (database updated November 2023) (noting that, as of 1930, 35 states had adopted the Standard State Zoning Enabling Act, and that every state eventually enacted similar legislation).

12 *See Exclusionary Zoning*, MERRIAM-WEBSTER, https://www.merriam-webster.com/legal/exclusionary%20zoning [https://perma.cc/G7MN-9CUT] ("[A] residential zoning plan whose requirements (as minimum lot size and house size) have the effect of excluding low-income residents."); *Zoning*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("[L]egislative division of a region, esp. a municipality, into separate districts with different regulations within the districts for land use, building size, and the like.").

13 *See* Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Controls*, 40 U. CHI. L. REV. 681, 691–93 (1973). This article informed much of the scholarship that followed it by framing private law (covenants), common law (tort/nuisance), and statutory law (zoning regulations) as alternative systems for dealing with property conflicts between neighbors. *Id.* at 683. This Note, by considering how the common law might increasingly respond to neighbors' conflicts in the absence of zoning controls, and proposing solutions to mitigate this response, positions itself within this framework as well.

viewed in a negative light by broad academic and (increasingly) popular consensus.[14] It is accused of causing prohibitively high development costs and separating out land uses to an inefficient degree, of furthering racial disparity and inequity, and of being environmentally destructive, among other criticisms.[15]

As a result, there is a demand for alternative systems of land use regulation, and some localities and municipalities are experimenting with less intensive regulatory regimes. Upzoning (rezoning to permit higher density development) is one possibility.[16] Another is mixed-use developments: these are developments with multiple revenue-generating land functions (e.g., retail, hotel, office, residential, recreational), especially where the development is cohesively planned, functionally and physically integrated, and the uses are mutually supportive.[17] Mixed-use development seeks to remedy what are seen as zoning's mistakes by bringing different land uses together.[18]

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14 *See* Christopher Serkin, *A Case for Zoning*, 96 NOTRE DAME L. REV. 749, 750–51 (2020); Richard Florida, *The Flip Side of NIMBY Zoning*, BLOOMBERG CITYLAB (Oct. 26, 2017, 9:54 AM), https://www.citylab.com/equity/2017/10/the-flip-side-of-nimby-zoning/543930/ [https://perma.cc/ZBE4-PD9Y].

15 *See* William A. Fischel, *The Rise of the Homevoters: How the Growth Machine Was Subverted by OPEC and Earth Day*, *in* EVIDENCE AND INNOVATION IN HOUSING LAW & POLICY 13, 13, 30 (Lee Anne Fennell & Benjamin J. Keys eds., 2017) ("[L]ocal land use regulation is associated with unusually high housing prices . . . . Accommodating growth in the Boston-to-Washington corridor and in the larger cities of the West Coast is important for national economic growth and for reducing the level of income inequality in the United States."); *infra* note 58 (criticizing land use regulation on environmental grounds).

16 *See* Jenna Davis, *The Double-Edged Sword of Upzoning*, BROOKINGS (July 15, 2021), https://www.brookings.edu/articles/the-double-edged-sword-of-upzoning/ [https://perma.cc/W4RQ-HPZQ].

17 GRANT IAN THRALL, BUSINESS GEOGRAPHY AND NEW REAL ESTATE MARKET ANALYSIS 216–17 (2002). Thrall takes this definition from DEAN SCHWANKE, MIXED-USE DEVELOPMENT HANDBOOK 3–5 (1987), and the term itself originates from a 1976 publication: ROBERT E. WITHERSPOON, JON P. ABBETT & ROBERT M. GLADSTONE, URBAN LAND INSTITUTE, MIXED USE DEVELOPMENTS: NEW WAYS OF LAND USE 6–8 (1976); *see* THRALL, *supra*, at 239 ("The terms *mixed use* and MXD [mixed use development] arise from the Urban Land Institute's 1976 publication . . . .").

18 Throughout this Note, the term "mixed-use" is used to situate places where archetypal property conflicts occur. "Upzoning" is mentioned less frequently, alongside the catch-all "deregulatory zoning." For purposes of this Note, these terms are interchangeable, as they each cover scenarios where different property uses are being brought into proximity and creating conflict between users of these properties (though these conflicts look different in different cases). So, although the term "mixed-use" and imagery associated with standard mixed-use developments will be used throughout this Note, the problems this Note identifies applies to any case (rural, urban, etc.) where modern deregulation allows different types of property uses to come into proximity to each other, and the solutions this Note proposes can also be applied in any of these cases, not just in mixed-use developments.

As exclusionary zoning loses contested battles nationwide,[19] proponents of land use reform have cause for excitement. But there is a hidden challenge in these mixed-use, upzoning, and other deregulatory reforms. As historians and legal scholars have pointed out, zoning itself developed as a response to conflicts between neighbors over conflicting land uses.[20] Zoning was seen as a tradeoff—a remedy to the conflicting land uses of neighbors by separating them spatially so that such conflicts wouldn't occur to begin with.[21] Industrial zones were sent beyond the railroad tracks, shopping districts were put into their area, or the suburbs permitted only single-family residences across large areas. The nuisances caused by each type of use were separated out to only harm those with similar uses, where neighbors wouldn't object to each other.

Nuisance law, for centuries the primary arbiter of these conflicts, has been held comparatively in the background over the past hundred years as private[22] and regulatory (zoning) controls separate out conflicting uses in the first instance.[23] But active conflicts are more likely to occur between neighbors fundamentally at odds over what

19 For a summary of these fights, see John Infranca, *The New State Zoning: Land Use Preemption Amid a Housing Crisis*, 60 B.C. L. REV. 823, 846–75 (2019); Christopher S. Elmendorf, *Beyond the Double Veto: Housing Plans as Preemptive Intergovernmental Compacts*, 71 HASTINGS L.J. 79, 94–116 (2019). For a few of many examples, see *Mass. Adds New Penalties for Towns Not Following MBTA Communities Zoning Law*, MASSLIVE (Aug. 17, 2023, 5:04 PM), https://www.masslive.com/politics/2023/08/mass-adds-new-penalties-for-towns-not-following-mbta-communities-zoning-law.html [https://perma.cc/9E4D-56SK] ("The law was adopted in 2021 and requires cities and towns served by the transit agency have at least one zoning district 'of reasonable size' where multi-family housing is allowed within a half-mile of a commuter rail, subway or bus station or ferry terminal . . . . Earlier this month, the town of Holden was sued by the Central Massachusetts Housing Alliance for saying it would not follow the law."); NAT'L LOW INCOME HOUS. COAL., *Berkeley Ends Exclusionary Zoning* (Apr. 12, 2021), https://nlihc.org/resource/berkeley-ends-exclusionary-zoning [https://perma.cc/N8YH-729E] (noting that "[o]ther cities—Minneapolis, Grand Rapids, Cambridge, Portland, and Sacramento—have also successfully utilized . . . advocacy strategies to pass up-zoning legislation."); U.S. DEP'T OF HOUS. & URB. DEV., ZONING REFORM IN MINNEAPOLIS, MINNESOTA, https://www.huduser.gov/portal/rbc/indepth/interior-031021.html [https://perma.cc/QLG7-2CFV]. Defenders of exclusionary zoning still win sometimes. *See* Nora O'Neill, *Spilt* [sic] *Gainesville Commission Reinstates Exclusionary Zoning Despite Segregation Origins*, THE GAINESVILLE SUN (April 20, 2023, 2:36 PM), https://www.gainesville.com/story/news/local/2023/04/20/gainesville-commisioners-vote-to-bring-back-exclusionary-zoning/70133823007/ [https://perma.cc/35NN-8D36].

20 *See* Edward M. Bassett, *Zoning*, 9 NAT'L MUN. REV. 311, 317–18 (rev. ed. 1922) (providing contemporary account of the problems zoning was intended to solve); Serkin, *supra* note 14, at 749.

21 *See* Bassett, *supra* note 20, at 324; Serkin, *supra* note 14, at 762 ("Conventional justifications for zoning focused on separating incompatible uses of land.").

22 *See* Maureen E. Brady, *Turning Neighbors into Nuisances*, 134 HARV. L. REV. 1609, 1612–13 (2021).

23 *See id.* at 1628–29; Bassett, *supra* note 20, at 324.

constitutes normal land use. Now, as various property uses come into proximity to each other in mixed-use and less restrictive regulatory regimes, the potential for conflicts between nearby land users is on the rise. Homeowners in the vicinity of heavy industry, the bustle of a marketplace, or even apartment buildings, in the absence of zoning controls which decisively separate these conflicts out, are incentivized to deploy common-law nuisance suits as a remedy for conflicts with their neighbors. Will these conflicts re-emerge as a prohibitive cost of mixed, proximate land uses? And if so, this Note seeks to work out the answer to the next question: how might the law respond to reduce litigative friction between neighbors?

This Note presumes the rise of mixed-use development, upzoning, and other deregulatory zoning schemes. It sets aside the question of whether the costs of exclusionary zoning outweigh its benefits to society.[24] And it characterizes the return-of-nuisance problem as something to be mitigated while pursuing land use deregulation, not as a cause for slowing that deregulation.

To this end, this Note offers three possible solutions towards mitigating conflicts between competing land uses in deregulated regimes. This Note contends that where today's deregulated developments do generate conflicts between conflicting use types, society would reap net benefit by weakening judicial protection of nuisance of action, recognizing that some conflicts are necessarily incidental to the perceived benefits of the modern mixed-use, upzoning, and deregulatory regimes. Legislators and private actors can also weaken nuisance protection in pursuit of these same goals. This Note proposes solutions that each type of actor can implement.

First, and most simply, judges can choose to weaken nuisance common law when different types of land uses in a mixed-use regime occur. This solution offers a case-by-case basis for resolving conflicts ex post, requires less complex implementation, and permits the common law to adapt naturally as changing societal circumstances demand.

Second, and best from a democratic standpoint, legislatures can implement laws which make nuisance causes of action more difficult to bring between competing uses in mixed-use regimes. Procedural protections can offer buffers against legal liability between competing users without affecting the substance of the nuisance doctrine.

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24 Defenders of exclusionary zoning offer various justifications for keeping the system or at least slowing transitions away from it. *See* Serkin, *supra* note 14, at 752–54; Schleicher, *supra* note 10, at 1320–23. Whether or not these justifications are convincing, the merits of this debate are nonessential to (though they are occasionally invoked by) this Note, which examines instead the consequences of a world where mixed-use and other deregulatory zoning regimes triumph in fact over exclusionary zoning.

Third, private developers can opt to provide contractual solutions for users of their mixed-use developments in the form of covenants not to sue for specified inter-use nuisances. This offers a market-based way for developers to avoid liability conflicts. This also has the benefit of being (like the legislative proposal) an ex ante solution.

The primary objection to each of these proposals is that changes in legal rules of liability might not, in fact, solve the underlying conflicts between different property users. According to this argument, reductions in liability for any instance excluded from the judicial, legislative, or private definitions of nuisance will be reflected in reduced property values on the market as these properties come with a built-in inability to take action against certain interferences. This Note considers this argument and other objections in Part IV.

Part I of this Note summarizes the status of zoning, nuisance, and private covenants as competing ways to deal with conflict between neighboring land uses. Part II sets up the problem: where deregulatory zoning regimes permit varying land uses, conflicts between neighbors will necessarily occur at a higher rate and in less resolvable ways. This problem makes mixed-use regimes less desirable. Part III turns to this Note's main argument: where mixed-use zoning necessarily entails conflicting land uses between neighbors, judges, law, and policymakers should soften nuisance and covenant enforcement by permitting each type of land use to engage in its own "normal" level of activity within the mixed-use zone. Part IV considers objections from law and economics and normative perspectives, and Part V offers a brief conclusion.

I. BACKGROUND

This Part very briefly covers the history and status of competing legal methods for dealing with land use conflict.[25] It presents a picture of common law remedies (especially nuisance law) for conflicts between neighbors' conflicting land uses, the rise of zoning as a mechanism for separating out land uses to reduce conflict, and the more recent pressure on policymakers to reduce zoning regulations as a response to some of zoning's negative effects, noting examples of the results of this pressure as manifested in deregulatory zoning regimes.

25 This is a well-traveled history, especially in relation to zoning. *See* Serkin, *supra* note 14, at 754–62 (providing "a very brief history of zoning," *id.* at 754); Brady, *supra* note 22, at 1617–73 (a history of private covenants against nuisance and their relation to zoning); Ellickson, *supra* note 13, at 719–22 (history of nuisance law); Carpenter v. Double R Cattle Co., 669 P.2d 643, 646 (Idaho Ct. App. 1983) (same). These sources serve to provide much more detailed and nuanced accounts of the historical background than the scope of this Note permits.

A. History of Land Use Conflicts and Responses

Since the beginning of time, neighbors have been in conflict.[26] More precisely, since the rise of private real property,[27] owners, residents, and users of adjacent or nearby properties have engaged in uses which hamper their neighbors' ability to use or enjoy their own property to varying degrees.[28] People use their property in different ways: to produce goods, conduct business, for recreation, or as shelter (and so as a place for residential life and its accompanying activities). Each of these uses creates externalities—traffic, noise, smell, sights, and so forth—that tend to interfere with their neighbors' uses of property.[29] But what an "interference" consists of can be difficult to decide in any given case. A septic field built on a property adjacent to a well might constitute such an interference,[30] as might planes flying at low altitude over one's property.[31] Apartment buildings next to single-family housing have been characterized as interferences,[32] as have smells and pollution emanating from factories,[33] fences intended to block a neighbor's view,[34] and innumerable other types of interferences.[35]

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26 *See* Jason Daley, *Recently Deciphered 4,500-Year-Old Pillar Shows First Known Record of a Border Dispute*, SMITHSONIAN MAGAZINE (Dec. 7, 2018), https://www.smithsonianmag.com/smart-news/pillar-first-evidence-neighbors-behaving-badly-180970969/ [https://perma.cc/87VU-3YHH] ("[E]ven at the dawn of civilization, people were bickering about their borders.").

27 For an account of the rise of real property in the English tradition, see JOHN LOCKE, *The Second Treatise of Government*, *in* TWO TREATISES OF GOVERNMENT 285–301 (Peter Laslett ed., Cambridge Univ. Press student ed. 1988) (1690).

28 *See* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1090 (1972) ("The entitlement to make noise versus the entitlement to have silence, the entitlement to pollute versus the entitlement to breathe clean air, the entitlement to have children versus the entitlement to forbid them—these are the first order of legal decisions.").

29 *Id.*

30 *See* Hendricks v. Stalnaker, 380 S.E.2d 198, 202 (W. Va. 1989).

31 *See, e.g.*, Hinman v. Pac. Air Transp., 84 F.2d 755, 758 (9th Cir. 1936) (denying actionable trespass for airplane overflights except for "actual interference with his possession"); United States v. Causby, 328 U.S. 256, 262, 269 (1946) (takings case alleging airplane noise and lights caused farmer's chickens to die, constituting interference with "enjoyment and use" of the land).

32 Vill. of Euclid v. Amber Realty Co., 272 U.S. 365, 394–95 (1926).

33 *See* Jost v. Dairyland Power Coop., 172 N.W.2d 647, 650 (Wis. 1969); Brown v. Well-Pet LLC, No. 21-cv-00576, 2023 WL 3483935, at *1 (N.D. Ind. 2023) (pet food manufacturer created odors interfering with surrounding neighborhood, just ten minutes down the road from this Note's inception on Notre Dame's sunny campus).

34 *See* Sundowner, Inc. v. King, 509 P.2d 785, 785 (Idaho 1973).

35 For an enjoyable pop account of some of these examples, see MARK WARDA, NEIGHBOR VS. NEIGHBOR: OVER 400 INFORMATIVE AND OUTRAGEOUS CASES OF NEIGHBOR DISPUTES (2d ed. 1999). *See also* CORA JORDAN & EMILY DOSKOW, NEIGHBOR LAW (6th. ed. 2008).

In places like the United States that elevated the right to private property to a fundamental status,[36] interferences with a person's ability to effectively use their property became crucial. As legal regimes developed in England, and later in the United States, multiple sources emerged to protect people from harms they suffered due to their neighbors' interferences.

At common law, the solution to these interferences was nuisance law. Commonly formulated, for someone's activity to be a nuisance (and so entitled to damages or injunctive remedy),[37] it must substantially and unreasonably interfere with another person's use or enjoyment of his or her land.[38] The costs that the interference creates are balanced against the defendant's interests in the land, and so a plaintiff will seek to prove, on balance, that the costs of the interference outweigh its benefits and so that the interference is unreasonable.[39] This common law regime (formulated in America in the nineteenth century) already represented a deviation from the old common law rule: strict injunctive liability for any substantial interferences.[40] But,

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36 *See* Lynch v. Household Fin. Corp., 405 U.S. 538, 552 (1972) ("That rights in property are basic civil rights has long been recognized."); Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427, 468 (1991) ("[T]he English government's abuse of personal property rights in the American colonies fueled this country's drive for independence. The reaction to these practices is reflected in the provisions of the federal and state constitutions that recognize the right to own and enjoy property and protect it against government abuse or appropriation without compensation. These provisions demonstrate how well-established Locke's propositions have become."); *see also* LOCKE, *supra* note 27; U.S. CONST. amend. V ("No person shall . . . be deprived of . . . property[] without due process of law.").

37 There is a rich literature on the differences between these remedies. See Calabresi & Melamed, *supra* note 28, for a seminal pursuit of the topic. *See also* Jeff L. Lewin, *Compensated Injunctions and the Evolution of Nuisance Law*, 71 IOWA L. REV. 775 (1986). This Note's proposals will tend to favor prodefendant property rules, so plaintiffs will bear more costs of interferences via possible reduced property values or less efficiency in their own activities.

38 *See* RESTATEMENT (SECOND) OF TORTS § 822 (AM. L. INST. 1979) and cases cited therein. The First Restatement's formulation explicitly asked whether the interference was "substantial," see RESTATEMENT (FIRST) OF TORTS § 822 (AM. L. INST. 1939), and while the Second Restatement drops this language, the substantiality requirement survives as part of the unreasonableness inquiry. *See* RESTATEMENT (SECOND) OF TORTS § 822 cmt. g (AM. L. INST. 1979) ("Not every intentional and significant invasion of a person's interest in the use and enjoyment of land is actionable . . . . [E]ach individual in a community must put up with a certain amount of annoyance, inconvenience and interference and must take a certain amount of risk in order that all may get on together . . . . [T]herefore the law of torts does not attempt to impose liability or shift the loss in every case in which one person's conduct has some detrimental effect on another.").

39 RESTATEMENT (SECOND) OF TORTS § 826 (AM. L. INST. 1979); *see also* Lewin, *supra* note 37, at 779–85.

40 *See* Lewin, *supra* note 37, at 779; Carpenter v. Double R Cattle Co., 669 P.2d 643, 646 (Idaho Ct. App. 1983) (tracing a history of nuisance law). Rylands v. Fletcher [1868] 3

though supported by hundreds of years of development, nuisance law as a remedy for interferences in a property user's enjoyment of their land "reached a height in the United States during the 1920's and 1930's as landowners invoked it to relieve actual or threatened noxious uses in their neighborhoods."[41] Other methods of controlling land-use interferences, which could be planned out beforehand and prevent nuisance-like land uses from causing disturbances in the first place, rose to prominence instead. These private and regulatory controls developed in the nineteenth century and rose to supplant nuisance by the twentieth. For nearly a century, nuisance law lost its status as preferred mechanism of handling land use disputes.[42]

The first of these replacement mechanisms were private controls on land use. These developed to deal with interferences between neighbors via the neighbors' own agreement, or the agreement of other interested parties like owners. Covenants between landowners were used for hundreds of years, and gained their popularity in America in the early nineteenth century.[43] Private covenants operate as a sort of contract between landowners to perform or avoid certain land uses: neighbors can covenant to build and maintain fences,[44] keep a central garden square surrounded by buildings free from development,[45] or establish any other agreed-upon limit. Some "covenant[s] against nuisance[]" were formulated to explicitly preempt the kinds of land-use interferences that would previously only have been litigated in the common-law courts after the interference was committed.[46]

LRE & I. App. (HL) 330 (appeal taken from Eng.) is most often cited for the classic, strict-liability formulation of the nuisance rule, that:

> the person who . . . brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril; and if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape.

Id. at 339–40. *Rylands* was a trespass case, but the rule was the same for nuisance, as the court noted that interferences caused by "beasts, or water, or filth, or stenches" would be held to the same standard. *Id.* at 340; *see also Carpenter*, 669 P.2d at 646. Some features reminiscent of the strict liability regime survive today, though. A plaintiff may still be entitled to damages even if the defendant isn't causing enough harm to be worthy of an injunction. *See* Lewin, *supra* note 37, at 785.

41 Ellickson, *supra* note 13, at 721.

42 *Id.* at 719–20 (noting even in the 1970s that nuisance law had long been neglected).

43 *See* Brady, *supra* note 22, at 1620; *see also* WILLIAM S. WORLEY, J.C. NICHOLS AND THE SHAPING OF KANSAS CITY: INNOVATION IN PLANNED RESIDENTIAL COMMUNITIES 125 (1990) (tracing restrictive covenants back to 1583).

44 Burbank v. Pillsbury, 48 N.H. 475 (1869).

45 *See, e.g.*, Tulk v. Moxhay (1848) 41 Eng. Rep. 1143; JOHN B. PINE, THE STORY OF GRAMERCY PARK, 1831–1921, at 4–6 (1921) (describing American adoption of this development pattern).

46 Brady, *supra* note 22, at 1623–29.

These mechanisms still constitute an "important, lurking limitation on land use reform,"[47] but, like the nuisance cause of action, they exist mostly in the background.

For the past century, a second alternative to nuisance law has borne the primary burden of conflicts between property users. This is zoning. Exclusionary zoning (also known as Euclidean zoning after the *Euclid* case[48] which established its constitutionality) originated in the early twentieth century as a regulatory-based alternative to manage competing land uses. Exclusionary zoning is established by land regulatory bodies, generally at the local or municipal level, to establish "zones" within which particular types of buildings or land uses are and are not permitted. These zones can be "flat" (permitting only specified types of uses within each zone) or "hierarchical" (permitting types of uses to nest within each other: less disruptive uses like residential buildings might be permitted in industrial zones, but not vice versa).[49] Like private covenants, zoning functions to separate out types of property uses which are seen as causing more disturbances.[50] But unlike private controls, zoning has all the force which local lawmakers can give it, and can be used in more comprehensive ways within a locality. Plus, zoning was conceived of as a mechanism which could regulate not only nuisances, but land uses which constituted "near-nuisance" behavior, and thus could be deployed in more expansive ways.[51] For these and other reasons, zoning mechanisms rose to swift popularity in the early and middle twentieth century, and have held sway over nuisance and covenants as the primary form of land use control since.[52]

B. The Consensus Against Zoning

But zoning as a method of control for conflicting land uses has been subjected to extensive, varied attacks.[53] First, zoning has been criticized as economically inefficient.[54] From a purely market-based

47 *Id.* at 1611.

48 Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

49 SONIA A. HIRT, ZONED IN THE USA: THE ORIGINS AND IMPLICATIONS OF AMERICAN LAND-USE REGULATION 31–39 (2014).

50 *See* Brady, *supra* note 22, at 1629, 1644, 1664; Edward Glaeser & Joseph Gyourko, *The Economic Implications of Housing Supply*, 32 J. ECON. PERSPS. 3, 6 (2018) ("[I]nitial zoning laws were enacted to limit negative externalities from spillovers between different kinds of land users.").

51 *See* Brady, *supra* note 22, at 1664–66.

52 *See* SALKIN, *supra* note 11.

53 Schleicher characterizes this as "broad agreement in economic and legal scholarship that land use controls in our richest regions and cities have gone much, much too far." Schleicher, *supra* note 10, at 1317; *see also id.* at 1317 n.7, 1320.

54 *See supra* note 15 and accompanying text.

perspective, any land use regulations might be expected to hamper the most efficient organization of land uses.[55] And, even without adopting this more libertarian position which, taken to its logical endpoint, would critique any regulation of land use, critics point out particular economic inefficiencies caused by today's exclusionary zoning models. Investment in infrastructure is more costly, social and economic activities become more costly, and poorer people in particular become concentrated in places from which they have less mobility and opportunity to contribute to the economy.[56] Second, these inefficiencies have environmentally destructive effects.[57] By spreading land use types over broader swathes of land, exclusionary zoning encourages environmentally costly commutes, especially via driving, and causes urban sprawl.[58] Third, restrictive zoning has condemnable racially discriminatory and inequitable effects.[59] From its inception, zoning was intended as a way to separate out socioeconomic classes and racial groups from each other, permitting stratification and grouping of economic opportunities in some zones, while putting these opportunities functionally out of reach for residents of other zones.[60] Given these factors, it's no surprise that a "sustained attack" on zoning has been conducted for

55 *See* Ellickson, *supra* note 13, at 683 ("Economists assert that if the market remains free of imperfections, market transactions will optimally allocate scarce resources. . . . According to this economic model, optimally efficient patterns of city development would evolve naturally if urban land development markets were to operate free of imperfections; city planning or public land use controls would only make matters worse from an efficiency standpoint.").

56 *See* Schleicher, *supra* note 10, at 1359 (quoting Richard Schragger, *Consuming Government*, 101 MICH. L. REV. 1824, 1836 (2003)).

57 Daniel Hoornweg, Lorraine Sugar & Claudia Lorena Trejos Gómez, *Cities and Greenhouse Gas Emissions: Moving Forward*, 23 ENV'T & URBANIZATION 207, 214 (2011).

58 *Id.*; *see also* Brady, *supra* note 22, at 1611 n.2 (listing sources).

59 *See* RICHARD ROTHSTEIN, THE COLOR OF LAW 43–57 (2017) (canvassing "government policies to isolate white families in all-white urban neighborhoods" in the *Euclid* era, *id.* at 44, and describing racially discriminatory intents and effects of zoning practices throughout the twentieth century in Baltimore, Atlanta, Louisville, Richmond, Birmingham, Orlando, Kansas City, Norfolk, St. Louis, Cleveland (home of the *Euclid* case), and Chicago). *See also* Christopher Silver, *The Racial Origins of Zoning: Southern Cities from 1910–40*, 6 PLAN. PERSPS. 189, 190 (1991); Werner Troesken & Randall Walsh, *Collective Action, White Flight, and the Origins of Racial Zoning Laws*, 35 J.L. ECON. & ORG. 289, 290 (2019); Serkin, *supra* note 14, at 754–55. For an examination of restrictive zoning's modern racially segregating effects, see Johnathan T. Rothwell, *Racial Enclaves and Density Zoning: The Institutionalized Segregation of Racial Minorities in the United States*, 13 AM. L. & ECON. REV. 290 (2011).

60 *See* ROTHSTEIN, *supra* note 59, at 50.

decades,[61] and academic and political consensus has coalesced against it.[62] Exclusionary zoning systems are being dismantled across the United States, though not without turmoil, and a turn away from exclusionary zoning as the dominant form of land use regulation in the United States seems at last underway.[63]

II. THE PROBLEM: THE REVITALIZATION OF CONFLICTING LAND USES

But this isn't a completely unmitigated good. This Part addresses the problem with today's resurging mixed-development zoning and other deregulatory regimes which seek denser development and more variety in proximate land uses. These regimes reignite the same concerns which led to zoning: increased conflicts between neighbors.[64]

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61 Brady, *supra* note 22, at 1611.

62 *See* Ganesh Sitaraman, Morgan Ricks & Christopher Serkin, *Regulation and the Geography of Inequality*, 70 DUKE L.J. 1763, 1768 (describing academic consensus); Schleicher, *supra* note 10, at 1318–19 (describing national political consensus).

63 *See supra* note 19.

64 *See, e.g.*, Lime Lounge, LLC v. City of Des Moines, No. 22-0473, 2023 WL 1813326 (Iowa Ct. App. Feb. 8, 2023) (city revoked mixed-use zone bar's license after noise complaints). A countervailing possibility (suggested by Professor Dan Kelly in conversation) is that today's conflicts aren't as severe as in the past. On this suggestion, the heavy industry uses that caused land use conflicts in the nineteenth and early twentieth centuries either remain separated from mixed-use zones or have been outsourced beyond the United States. Developers do still exclude more disruptive, heavy industrial uses from mixed-use projects. *See, e.g.*, Heine v. City of Patterson, No. A-1513-12T2, 2014 WL 4187473, at *1 (N.J. Super. Ct. App. Div. Aug. 26, 2014) (quoting PATERSON, N.J., MUN. CODE ch. 483, art. 5, § 500-2.1(K) (2016)) ("[T]he intent of the I–2 Heavy Industrial District is to provide land for more intense types of industrial and manufacturing uses excluding those with nuisance characteristics."). So a combination of private controls (developers' filtering of heavy industrial uses) and regulatory controls (since local zoning bodies can still control and exclude heavy industrial uses from mixed-use or other deregulated zones) serve to keep extremely disruptive land uses out of mixed-use zones and blunt the harshest inter-use conflicts. If the United States experienced a return to laissez-faire land use regulation, the question of whether land uses nationally are no longer as noxious, on the whole, would merit further exploration. This Note, for its own purposes, posits that mixed land use will tend to generate more nuisance type instances than traditional zoning. This follows logically, even if given disturbances don't rise to the level of heavy industry. First, cases show the phenomenon of mixed-use conflicts. Second, it's reasonable to think that mixed-use zones will necessarily generate increased conflicts, since certain uses of land (commercial, entertainment) tend to generate more externalities than others (residential), and users of a given type will be less likely to accommodate interferences of other uses than their own, even if their own type of use generates more nuisance-like interferences. If, on the other hand, mixed-use and other areas with proximate, disparate property uses do not create additional conflicts, this Note's proposals remain salient: applying a more demanding standard for nuisances when users experience interference from other use types will serve to decrease litigable conflicts and uphold the purpose of mixed use zones as areas where each use type is encouraged to operate as it normally would under an exclusionary zoning regime.

Apartments next to single family homes, above restaurants or bars, or commercial uses in proximity to any of these, are probably more efficient and generally beneficial uses of land.[65] National political sentiment, along with local governance and policy decisions suggest that this is at least a popular perception.[66] But bringing different land functions in close proximity can create real conflict as competing users resent the interferences of other types of uses. Even in the absence of greater actual interference, property users might take issue with types of interferences nonidentical to their own: a residential neighborhood might be willing to bear interferences arising out of "normal" residential use, and a business district might be willing to bear "normal" business-created interferences, since each user acknowledges that they themselves are creating the same type of interference. But when the two are brought into mixed-use zones, each type of user has the opportunity to claim privileges for its type of interference and call for sanctions of interferences arising from other use types.[67]

There are strong indicators of these actual renewed conflicts between mixed uses and development in the modern context, as well as anticipation of these conflicts in cases where fights over deregulation

65 *See* Katherine A. Woodward, Note, *Form over Use: Form-Based Codes and the Challenge of Existing Development*, 88 NOTRE DAME L. REV. 2627, 2638 (2013) (describing how mixed-use developments promote efficient, sustainable communities where residents can walk to work, shop, and eat); Edward H. Ziegler, *The Case for Megapolitan Growth Management in the 21st Century: Regional Urban Planning and Sustainable Development in the United States*, 41 URB. LAW. 147, 158 (2009) (describing how exclusionary zoning creates urban sprawl, "accelerat[ing] this country's resource and energy consumption" by forcing people to commute longer distances to and from work). The inefficiencies Ziegler describes in the commuter context extend to other use types. Users who live and work further from their places of recreation spend more time and resources moving between locations, while users who live or work nearer to their recreational uses are able to spend less time and resources when going about their day-to-day activities. Locating these uses next to each other generates benefits other than efficiency. For example, proximity decreases the risk of car accidents.

66 *See* Schleicher, *supra* note 10, at 1318 ("Pro-housing growth beliefs have become dominant in national politics."). For the rising unpopularity of single-family zoning, see Emily Badger & Quoctrung Bui, *Cities Start to Question an American Ideal: A House with a Yard on Every Lot*, N.Y. TIMES (June 18, 2019), https://www.nytimes.com/interactive/2019/06/18/upshot/cities-across-america-question-single-family-zoning.html [https://perma.cc/8SSB-JU8Y]; Tanza Loudenback, *America's Future Depends on the Death of the Single-Family Home*, BUS. INSIDER (Dec. 4, 2017) https://www.businessinsider.com/us-housing-crisis-homeownership-single-family-home-2017-12 [https://perma.cc/47JW-JXJR].

67 This kind of conflict can arise in same-use zones (some members of a residential neighborhood might consider their neighbors' music an unacceptable interference and try to privilege, for example, the interference they cause while barbequing), but the differences between uses are more similar and familiar in these circumstances. Plus, conflict in these cases can be solved by the easier yardstick of "normal residential use" and do not need to consider "normal" (reasonable) uses in a mixed zone.

occur.[68] As these conflicts arise, and where the ex ante controls of exclusionary zoning have been removed, parties to a conflict will begin to turn to active means, like nuisance suits, to resolve their differences.[69] This poses a serious problem for actors considering investments in mixed-use property, since the threat of liability for use of one's property in a mixed-use zone, especially when that use would not normally be attacked as a nuisance in an exclusionary district, serves to deter investment in otherwise beneficial developments.

III. THE SOLUTION: LIMIT THE SCOPE OF NUISANCE LAW

This Part argues for a targeted reevaluation of the common law nuisance doctrine in order to head off the challenges presented by revitalized conflict. One core idea underpins this solution: to solve conflicts between mixed-type users, nuisance liability should be eliminated in cases where a property user's interferences would rise to the current doctrinal level of nuisance only as applied to other kinds of property users but not to their own use type.[70] Sections A–C develop this basic idea and propose mechanisms by which judges, legislators, and private parties might implement it. Section D justifies this proposal, answering the question: why solve the problem this way?

A. The Judicial Response: Heighten Inter-use Nuisance Requirements

The most flexible, responsive limit to nuisance suits that arise in mixed-use conflicts is judicial. Where litigants bring nuisance claims into court, and where these users occupy different types of property in mixed-use, upzoned, or other deregulatory zoning regimes, the court can require plaintiffs to prove that the type of interference alleged would be substantial and unreasonable from the perspective of a similarly positioned plaintiff who uses their land for the same type of purpose as the defendant. In the archetypal case where a residential user sues a neighboring commercial user, the residential user would thus

68 *See supra* notes 1–9. For general discussions of the conflicts generated over whether to implement deregulatory zoning: often in anticipation of future conflicts between users, see *supra* notes 10, 19.

69 The problem of the return of nuisance litigation has not received much discussion. For a singular commercial newsletter highlighting it, see Kevin D. Hughes & Linda J. Kim, *Nuisance Liability in the Mixed-Use Context*, COM. LEASING LAW & STRATEGY: IN THE SPOTLIGHT (Nov. 2015), https://www.lawjournalnewsletters.com/sites/lawjournalnewsletters/2015/11/01/in-the-spotlight-nuisance-liability-in-the-mixed-use-context/ [https://perma.cc/VNW2-VFLJ]. Other commercial groups mention the problem of conflict between mixed-development users in passing, but do not give it much treatment.

70 Robert Ellickson proposed replacing zoning laws with an enhanced system of nuisance controls as early as 1973, see Ellickson, *supra* note 13, at 761–71, but this Note identifies the replacement of zoning with nuisance as a problem instead of as a solution.

need to allege and prove that the commercial user's interferences with its neighbors' use and enjoyment of their property would be substantial and unreasonable if its neighbor was another commercial user. In an upzoning case, where single-family home residents allege that an apartment building constitutes a nuisance, the court should require plaintiffs to allege that the offending apartment building's interferences would constitute a nuisance to neighboring apartment buildings in the plaintiffs' position.

This is the core purpose of the judicial response. Any nuisance case between same-use neighbors would be unchanged. A noise complaint made by one apartment resident about another, for example, would be actionable on a state's existing common law remedies, and this doctrinal requirement would only come into play when a legal challenge involves conflicting types of land uses. This solution has immediate advantages when applied to common types of land use conflicts. It isn't overinclusive or underinclusive. Plaintiffs in the upzoning scenario would almost never be able to allege that a standard apartment development would constitute a nuisance, unless the development would cause problems that even another apartment building would recognize as a substantial and unreasonable interference. So opposition to apartment buildings, one of the "original sin[s]" of zoning,[71] will be deprived of its ability under nuisance litigation. Broadly, any uses which constitute disturbances only to particular classes of users and not others might be judged as interferences that do not deserve the nuisance label. And on the other hand, cases where real interferences are being perpetrated will still be considered nuisances. A gym which causes significant noise and vibration will disturb neighboring commercial, recreational, and residential types equally, so any disturbance which causes nuisance to neighboring commercial users would also be actionable to residential users. Or, where a music venue causes noise and excessive traffic so that neighboring restaurants of the same (recreational or entertainment) use type experience substantial interference, this disturbance will remain actionable.

This possible judicial response is the most conceptually neat solution to the renewed conflict problem. It has the disadvantage of being a response that must adjudicate problems on a case-by-case basis,[72] which leads to litigant uncertainty as to when and how new doctrines will be applied, and judicial decisions have a tendency to move slowly and sporadically. But the judicial response forms, on the whole, are

71 Serkin, *supra* note 14, at 757.

72 For a discussion of the tradeoffs between ex ante and ex post regulation, see Brian Galle, *In Praise of Ex Ante Regulation*, 68 VAND. L. REV. 1715, 1716–19 (2015).

the simplest and most easily tested response to conflicts between users where they reach the courts.

B. The Legislative Response: Procedural Protections for Inter-use Claims

Legislators are also well positioned to lower conflict costs. And, more than judges, legislators have a direct mandate to make policy judgments and adjust laws accordingly.

Shifting procedure to favor defendants in mixed-development, inter-use nuisance claims is something legislators have analogous experience with. Lawmakers use procedural shifting laws to achieve policy goals in other areas. Anti-SLAPP laws, for example, protect freedom of speech by giving the plaintiff the burden of proving a "reasonable likelihood" of success on the merits, without discovery, when the defendant files a motion showing they are being sued for speech "in connection with a public issue."[73] "Stand your ground" laws are another example, where legislatures provide for procedures that entitle defendants to a presumption that their deadly force was justified, allowing defendants to shift the burden of proof to the prosecutor to show that the use of force was not justified.[74]

A similar legislative solution could be effective here. Lawmakers, under this solution, would introduce state-level legislation addressing inter-use nuisance causes of action in mixed-use zones. These laws could protect defendants via procedural shifts, like anti-SLAPP laws, without changing the substance of nuisance doctrine. Judges, then, would still manage the doctrinal aspect of nuisance litigation. As an example, using an anti-SLAPP framework: when a plaintiff alleges nuisance, the defendant would have the opportunity to allege that (1) plaintiff and defendant's properties are both located in a mixed-use zone accommodating both their property uses, and (2) plaintiff's property use is of a different type than the defendant.[75] Following the anti-SLAPP model further, this allegation might also serve to preclude discovery.[76] The burden would then shift to the plaintiff to prove, by a

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73 *E.g.* COLO. REV. STAT. § 13-20-1101(3)(a) (2023); s*ee also* CAL. CIV. PROC. CODE § 425.16(b)(1) (West 2016).

74 *E.g.* FLA. STAT. § 776.013 (2024) (creating a "presumption of fear" when defendant uses deadly force against trespassers); *see Self-Defense and 'Stand Your Ground*,' NAT'L CONF. OF STATE LEGISLATURES (Mar. 1, 2023), https://www.ncsl.org/civil-and-criminal-justice/self-defense-and-stand-your-ground [https://perma.cc/9CQR-PKXN].

75 In actions with multiple plaintiffs or defendants, only the opposing parties with different property use types would have a viable claim. For example, if an apartment tenant sues a neighboring business and its upstairs resident, only the commercial defendant would be able to take advantage of this procedural rule.

76 *See, e.g.*, COLO. REV. STAT. § 13-20-1101(6) (2023) ("All discovery proceedings in the action are stayed upon the filing of a notice of motion made pursuant to this section.").

preponderance of the evidence, that he or she is likely to succeed on the merits. Only if the plaintiff is successful at this stage would he or she be allowed to proceed with litigation.

This response is intended to be nearly identical in function to the judicial response, the only difference being the implementing actor. By placing the source of legal authority in legislatures' hands instead of the judiciary's, these changes to nuisance litigation would have the advantage of democratic control, and the changes would also be able to be implemented clearly on the statewide level instead of case-by-case scenarios.

C. The Private Response: The Reverse Nuisance Covenant

The covenant offers a method of private control which any developer or property owner could implement on their own accord. Private covenants against nuisances have been widely used,[77] and private actors aiming to reduce conflicts in mixed-use developments and similar situations would only need to flip these covenants to fulfill the purpose of reducing nuisance liability in disparate-use cases.

This proposal attempts to copy the structure of the judicial and legislative proposals, but with allowance for the nonpublic nature of covenants. Covenants not to sue are sometimes used between individual parties (in the easement context, for example).[78] These covenants serve to sort out the parties' legal rights through an agreement beforehand and thus reduce the risk of nuisance claims that might otherwise arise from the easement user's agreed use of their granted property right.[79] A covenant spanning an entire development would operate along the same lines, functioning to reduce future friction among neighbors by preemptively arranging each party's rights and creating certainty as to which property uses will not give rise to nuisance claims. Future owners can be held to covenants included in their property deed and running with the land, and these may include covenants not to sue.[80] Here, neighbors in mixed-use communities (businesses and residents alike) could sign "restrictive" nuisance covenants agreeing to release their neighbors from liability for specified types of interferences. For example, noise complaints outside of restricted times or any complaints based on lights or smell could be designated as per se non-nuisance uses. Commonly used restrictive covenants can function

77 *See* Brady, *supra* note 22, at 1617–23.

78 *See* Susan F. French, *Can Covenants Not to Sue, Covenants Against Competition and Spite Covenants Run with Land? Comparing Results Under the Touch or Concern Doctrine and the Restatement Third, Property (Servitudes)*, 38 REAL PROP., PROB. & TR. J. 267, 275 (2003).

79 *Id.*

80 *Id.* at 267.

similarly (by specifying, for example, noise disturbances as per se violations only within certain hours).[81] But the reverse covenant as a solution for mixed-zoning conflicts would function differently in two ways. First, its orientation would be permissive, not restrictive, so that substantive terms would tend to grant property users affirmative abilities without fear of liability. Second, by providing an explicit waiver of legal rights, an agreement like this would create less legal friction between parties moving forward.

From an economic standpoint, developers or landlords may not seem incentivized to implement these covenants. The presence of these covenants might be expected to drive down property values: businesses and apartment residences expect more frequent and severe interferences with their right of enjoyment, and will be willing to pay less for property covered by a reverse covenant. This can be thought of as compensation to the property owners (via reduction in rent) for the inconvenience they experience. But an agreement like this would also influence property value upward by creating a user's right to interfere, in specified ways which constitute their own "normal" use, with others' property uses. Consider, for example, the bar operating on the first floor which is released from noise liability in specified "normal" conditions. The bar might be willing to pay a premium for such space. If tenants living nearby similarly value their right to create minor or moderate disturbances without violating their lease, or enjoy (on the whole) the use of the bar more than they are inconvenienced by it, these property values would be expected to stabilize or even rise as various costs to parties (of litigation, fines, and so on) are removed as risks.[82]

Finally, it's worth noting that there are extralegal solutions to the identified problem of inter-use conflict which are outside the scope of this Note. Higher quality construction and soundproofing mechanisms, for example, can reduce noise interferences between property users,[83] or traffic congestion that might interfere with neighboring properties can be reduced through transit and other civic planning.[84]

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81 See, for example, the injunction granted in *Mirabella at ASU Inc. v. Peacocks Unlimited LLC*, No. 1 CA-CV 22-0318, 2022 WL 17983430, at *1 (Ariz. Ct. App. Dec. 29, 2022).

82 Mostly separate is the question of what cultural or other "intangible" shifts these (or other remedy-weakening) solutions might cause.

83 *See, e.g.*, Diego Hernandez, Felipe Tavera & Ethan C. Salter, *Experiences with Gym Noise and Vibration in Mixed-Use Buildings*, NOISE-CON 2019 (Aug. 26, 2019), https://www.salter-inc.com/wp-content/uploads/NOISE-CON-2019-Experiences-with-Gym-Noise-and-Vibration-in-Mixed-Use-Buildings.pdf [https://perma.cc/EZP8-YEVT] (industry presentation on soundproofing design challenges in mixed-use building).

84 *See, e.g.*, Reid Ewing, Michael Greenwald, Ming Zhang, Jerry Walters, Mark Feldman, Robert Cervero, Lawrence Frank & John Thomas, *Traffic Generated by Mixed-Use Developments—Six-Region Study Using Consistent Built Environmental Measures*, 137 J. URB. PLAN. &

D. Justifying the Solution: Why This Reduction to Nuisance Liability?

Two lines of argument support the desirability of these mechanisms. The first argument seeks to explain why this Note chooses such a targeted doctrinal solution in the first place. The second argument, zooming out, attempts to explicate the benefits of this solution in moral terms.

First, the problem of renewed conflicts between disparate property use types captures a set of conflicts which is narrower than *all* nuisance cases. Any doctrinal, regulatory, or private "loosening" of the nuisance doctrine would, to be effective, only need to capture instances of behavior that would not constitute "substantial and unreasonable" interferences in areas exclusively dedicated to the given type of use, but which become more severe interferences in mixed-use or upzoned developments. This Note does not propose solutions that would affect the core tests of nuisance law when addressing instances of problems between neighbors who engage in the same types of property uses. So, when a residential tenant plays music or TV loudly enough to disturb next door tenants, nuisance law would operate as usual. But when the restaurant next door plays music in the same disturbing way, this Note proposes that the restaurant owner be held liable *only if* their behavior would constitute nuisance to an adjacent commercial property.

There are a few interests at the core of this proposal. On first glance, it appears that these mechanisms favor types of uses (industrial, commercial, entertainment) which typically cause more interferences than residential users, and so impose costs of any interferences on residential users.[85] But, in the context of mixed-use developments, such interferences are built into and alongside the benefits of these developments as a whole. Users experiencing nuisance (residents, for example) also benefit from the nuisance-like behavior when they use the industrial, commercial, or entertainment services. Return to the *Mirabella* high-rise in Tempe, one of the cases described in the Introduction.[86] The lower court in *Mirabella* granted an injunction to high-rise residents against a neighboring restaurant whose live music events interfered with their daily lives.[87] The appellate court, on review,

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DEV. 248 (2011); Guang Tian, Keunhyun Park, Reid Ewing, Mackenzie Watten & Jerry Walters, *Traffic Generated by Mixed-Use Developments—A Follow-Up 31-Region Study*, 78 TRANSP. RSCH. PART D: TRANS. & ENV'T 102205 (2020) (finding high levels of internal walking trips in "well-designed" mixed-use developments).

85 At the same time, these mechanisms incentivize nonresidential users to create more such interferences by rewarding them with less likelihood of liability.

86 Mirabella at ASU Inc. v. Peacocks Unlimited LLC, No. 1 CA-CV 22-0318, 2022 WL 17983430, at *1 (Ariz. Ct. App. Dec. 29, 2022).

87 *Id.* at *2.

remanded on First Amendment grounds to determine whether the injunction was overly broad.[88] But the court there noted, while weighing its nuisance analysis, that "Tempe intended the Mill Avenue district, where Shady Park and Mirabella are located, to be a high-density, mixed-use area not subject to residential zone noise expectations."[89] The restaurant was not fully enjoined from creating disturbances, despite its interferences, but only during certain times and at certain volumes.[90] A key aspect of a mixed-use development, in *Mirabella* and elsewhere, is its full accommodation of each type of use involved. Users of dining and entertainment resources in non-exclusionary zoning areas receive the benefits of internal travel to these resources,[91] and so the benefits of these resources may also accumulate to them. Where an integrated, mixed-use land regulatory scheme intends for these benefits to accumulate in these ways, the law should also entitle users of these properties to the fullness of reasonable commercial, retail, residential, and other uses present in the given zone.

Second, since the basis for nuisance rests on collective societal judgments, parsed through the courts, about what constitutes "reasonable" or "substantial" interferences, some of these factual bases for liability are open to question. Apartment buildings, for example, are a historical example of "near-nuisances" that served to justify zoning,[92]

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88 *Id.* at *3–4.

89 *Id.* at *1.

90 *Id.* at *2.

91 *See* sources cited *infra* note 84 (discussing internal traffic in mixed-use developments).

92 The damning, classical formulation of this sentiment comes from Justice Sutherland's *Euclid* opinion:

> With particular reference to apartment houses, it is pointed out that the development of detached house sections is greatly retarded by the coming of apartment houses, which has sometimes resulted in destroying the entire section for private house purposes; that in such sections very often the apartment house is a mere parasite, constructed in order to take advantage of the open spaces and attractive surroundings created by the residential character of the district. Moreover, the coming of one apartment house is followed by others, interfering by their height and bulk with the free circulation of air and monopolizing the rays of the sun which otherwise would fall upon the smaller homes, and bringing, as their necessary accompaniments, the disturbing noises incident to increased traffic and business, and the occupation, by means of moving and parked automobiles, of larger portions of the streets, thus detracting from their safety and depriving children of the privilege of quiet and open spaces for play, enjoyed by those in more favored localities-until, finally, the residential character of the neighborhood and its desirability as a place of detached residences are utterly destroyed.

Vill. of Euclid v. Amber Realty Co., 272 U.S. 365, 394 (1926). Judges bring to bear their own circumstances and judgments about the world when they decide which property uses constitute substantial and unreasonable interferences in cases before them. A complaint

and apartment developments often remain heavily opposed today,[93] but the foundations of this consideration are highly questionable. At best, they rely on particular social and aesthetic judgments. At worst, they conceal classist and racist judgments.[94] In areas where nuisance law may stray from its remedial use of keeping neighbors from harming each other and instead extends to aid invasive and inefficient restrictions on property uses through noneconomic, discriminatory judgments, there appears to be little moral justification for extending the law's protection to plaintiffs.

This second argument forms a crucial underlying line of thought that serves to reframe some of the major objections which might be brought against the reduced-nuisance-liability proposal, and it serves as a theoretical and moral support for the type of solution this Note offers. Section IV.A below discusses this argument further as a response to the "value problem" objection.

IV. OBJECTIONS

If courts began interpreting nuisance and nuisance covenants cases with higher standards, there will be objections.

This Part examines the problem of possible reduced property values under the proposed legal rules, as well as the question of categorizing different use types and the objection that too little legal liability may be imposed, incentivizing users to create too many externalities.

A. The Value Problem

Curing increased conflict through reduced legal remedies runs into a challenge: why would conflicts be solved by taking away parties' solutions? Conflicts might even be exacerbated if the legal system doesn't provide recourse. Legal remedies, after all, originate as alternatives to private retribution with violent or otherwise harmful effects.[95] So if reducing legal remedies for property interferences in

about interferences with "the free circulation of air" as a nuisance characteristic does not constitute a timeless, unmalleable complaint, but instead reads as something that Justice Sutherland considered an interference with neighbors' uses of property. Some people would probably enjoy the protection from wind that an adjacent apartment building provides.

93 *See supra* notes 1–3 and accompanying discussion.

94 *See* Brady, *supra* note 22, at 1613, 1641–42; ROTHSTEIN, *supra* note 59, at 52–53. Justice Sutherland's rhetoric about apartments in *Euclid* is another often cited example. *See Euclid*, 272 U.S. at 392–94.

95 *See* Albert W. Alschuler, *The Changing Purposes of Criminal Punishment: A Retrospective on the Past Century and Some Thoughts about the Next*, 70 U. CHI. L. REV. 1, 16–17 (2003) ("A familiar consequentialist argument for retribution . . . is that law must accommodate the

mixed-use regimes permits certain conflicts to exist without liability, it is worth examining how these conflicts will play out.

So any solution that addresses the increased conflict in mixed-use areas through higher legal bars to nuisance claims can be challenged on the grounds that friction between neighbors isn't eliminated, but redirected. An apartment resident next-door to a restaurant, or single-family home residents next to a proposed development, might be unsatisfied if they have no legal recourse to prevent activities they consider interferences with their enjoyment of property, especially if the law refuses to consider these interferences actionable nuisance. This problem would manifest when property users resort to other means of dealing with inter-use conflict in the absence of legal vindication. People or businesses may choose to move out of mixed-use developments and move to neighborhoods where they deal with less interference from nonidentical use types. This would have the effect of reducing property values as demand for these properties drop. Less decisively, but still harmfully, these conflicts may simmer in these mixed-use locales, causing animosity and other local dysfunctions that could spark physical violence. Under this Note's proposed legal rule, these conflicts would need some path to resolution.[96]

There are two responses to this problem. First, it's an empirical question whether the benefits of a legal entitlement to "normal business," "normal residential," or "normal apartment" uses outweigh the costs of being unable to impose liability on others' interfering uses. In the mixed-use case, where "reasonable" retail, commercial, or entertainment uses of a property impose burdens on residential or other commercial users at times, users receiving the burdens of interference (particularly residents of the mixed-use zone) are the same users who are able to take advantage of the proximity of these uses, and thus receive their benefits, at other times. Where the benefits outweigh the costs, users will not choose to move away from these zones, and so properties wouldn't be expected to lose value. And in cases where the conflicts between neighbors are not so severe as to influence users to move away, the malleable nature of judgments about what constitutes "substantial" and "unreasonable" interferences may be enough to bring about socially normative positions that adjust to interferences. Instead, by reducing inter-use nuisance claims amidst the rise of mixed-use zoning, the proposed legal regime can serve to normalize the kinds of activities between disparate users which are already normalized within a particular use type. Whether the appearance of an apartment building

retributive sentiments of the public to prevent lynchings, blood feuds, and other ugly forms of self-help.").

96 Ellickson's proposal of local boards might have some purchase here, but alongside weaker nuisance controls. *See* Ellickson, *supra* note 13, at 762.

is considered a nuisance does not depend on a static nuisance doctrine, but on collective societal judgments about what is normal, and what sticks out to the "reasonable" person as an interference with his or her own enjoyment of his or her property. This may be especially possible in scenarios like upzoning, where it has become clear to reasonable people today that the interferences from such developments do not need to be judged as nuisances. Return to the *Euclid* case as an example. There, Justice Sutherland described apartment buildings as "parasite[s]" that "come very near to being nuisances."[97]

This leads into the second response to the value problem: where social judgments about what is or isn't an interference with one's enjoyment of property are based on such discriminatory judgments, the law should not protect such judgments.

The second response builds off the social norms argument, but goes further: under this argument, not only will social norms shift around what the law protects (and thus value will not drop, even though more behavior which may have previously been considered nuisance is protected), but the law *should not* protect some social judgments about what constitutes interference with property use, even when those judgments lead to lower property values in the absence of nuisance law's protection.

In cases where today's parties to a conflict are likely to move out of an area, threatening to drive down property values if conflicting property users' interferences are not stopped by the law, it is often the case that these users are defending their existing entitlements to a given use type.[98] Single-family homeowners assert their right to enjoy a neighborhood without lower-income apartment residents,[99] and racial segregation persists through neighborhoods zoned to exclude them generations ago.[100] Where existing land users object to incoming users in order to maintain their own entitlements, it is not clear why

97 *Euclid*, 272 U.S. at 394–95. The district court in *Euclid*, too, though striking down the ordinance at hand, recognized a connection between apartments, nuisance-like property disturbances, and (racially and economically) segregationist social goals of the time. *See* Ambler Realty Co. v. Vill. of Euclid, 297 F. 307, 313, 316 (N.D. Ohio 1924).

98 Serkin notes that this is especially the case with density regulations, and defends these regulations on the ground that they serve to protect existing property owners' expectation values. Serkin, *supra* note 14, at 773; *see also* Schragger, *supra* note 56, at 1836 (describing local land controls as "explicitly defensive and separationist").

99 *See supra* notes 1–3 and discussion; *see also* S. Burlington Cnty. NAACP v. Twp. of Mount Laurel, 336 A.2d 713, 716 (N.J. 1975) (challenging land use regulations on the grounds that they restricted anyone except single-family dwellers from the municipality).

100 *See* ROTHSTEIN, *supra* note 59.

the law should protect these existing entitlements at the expense of those who are less well-off.[101]

Further, even if there is a real loss of value to some property users, but this loss is contained within the subset of existing users, the value "problem" might work instead as an equalizing of value between all types of users in the zone. Thus imposing some costs on those users who hold entitlements (in *Bissonnet*,[102] for example, where affluent homeowners attempted to block an apartment development on nuisance grounds) might be necessary in order to let the competing use create more overall value.

B. The Categorization Problem

A second, less serious problem, is the question of what constitutes a particular use or type of use. So far, this Note has treated "types of uses" as given: "residential" uses compete with "business" uses, and so on. But these distinctions are not always so clear-cut. Take *Sturges v. Bridgman*,[103] a seminal case involving two "commercial" land users and the doctor's allegations that the confectioner's manufacturing processes constituted a nuisance to his business.[104] Would this kind of case be categorized as two varying uses (manufacturing and business?) or the same?

This kind of line-drawing problem is not an insurmountable barrier to adopting this Note's proposed regime. One response is that zoning regulators or developers can choose to categorize uses themselves. Even in mixed-zoning developments, particular units are designated by type, and definitions of "inter-use" would simply incorporate these categories. If these categories are functional, they would not need to be perfect. In situations where categories of use types are not defined beforehand or are otherwise unclear, courts would have the freedom (under the legislative or judicial proposals) to implement their own tests, taking into account the purpose of these adjustments to nuisance law: permitting actors who are engaged in a property use to reasonably engage in that use, subject to the expectations of a comparable user.

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101 *But see* Serkin, *supra* note 14, at 771–75 (positing the value of community stability as justification for regimes which operate like this).

102 1717 Bissonnet, LLC, v. Loughhead, 500 S.W.3d 488, 491 (Tex. App. 2016).

103 (1879) 11 Ch.D 852 (U.K.).

104 *Id.* at 838.

C. The Tort Reform Problem

A third challenge to the proposed solutions is that they might tend to limit liability too much, and tip the balance in favor of "tort reformers" in this area of the law.[105] Too much limit to nuisance liability, arguably, could have the negative effect of permitting property uses that cause too many externalities, especially by more powerful actors at the expense of less able neighbors (who, without the ability of a lawsuit, would be forced to endure such externalities).[106]

This Note's proposals are not intended to have such wide-reaching effects. First, the most egregious creators of externalities, heavy industrial users, will still be excluded from mixed-use and upzoned regimes.[107] Second, where a user's interferences create too many externalities, these will still be nuisances, as they will be substantial and unreasonable as applied to similar users: a business that takes advantage of a mixed-use regime to impose higher costs (in terms of traffic, noise, etc.) on their neighbors will necessarily be interfering with other businesses' operations to the same degree. Users will be held by definition to the same "neighborly" standards as they would be in a purely residential, high-rise, entertainment, office, or any other exclusionary district.

CONCLUSION

This Note proposes a particular type of solution—reducing availability of nuisance remedies—to conflicts between property users that occur in the presence of mixed-use developments and other land use deregulation that displaces exclusionary zoning. As long as the trend away from exclusionary zoning continues, and new developments that put different types of property users in proximity become more common, instances of conflict between these types of users will become more frequent. And since the current trend favors land use deregulation, it is imperative to consider what problems accompany the benefits that deregulation offers. Solutions to these problems are needed. Alterations to the law of nuisance offer a promising path forward.

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105 *See generally* Christy Bieber, *What is Tort Reform? (2024 Guide)*, FORBES (Feb. 3, 2023, 10:48 AM), https://www.forbes.com/advisor/legal/personal-injury/tort-reform/ [https://perma.cc/6X2A-KM8S]. Whether this is cause for concern depends on one's perception of this movement.

106 *See* CONG. BUDGET OFF., THE EFFECTS OF TORT REFORM: EVIDENCE FROM THE STATES 3 (2004) ("[O]pponents of reform argue that those costs, to the extent that they exist, are justified by the system's role in compensating victims, ensuring that injurers face the total costs of their actions, and improving safety.").

107 *See supra* note 64.