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CAN AMERICA'S FASTEST-GROWING CITY SAVE ITSELF? PROPERTY RIGHTS AND THE PLANNING ETHIC IN BOISE, IDAHO

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CAN AMERICA’S FASTEST-GROWING CITY SAVE ITSELF?: PROPERTY RIGHTS AND THE PLANNING ETHIC IN BOISE, IDAHO

STEPHEN R. MILLER*

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I. INTRODUCTION

In 1974, an article in Harper’s Magazine declared that “[i]f things go on as they are, Boise [,Idaho] stands an excellent chance of becoming the first American city to have deliberately eradicated itself.”¹ At the time, Boise had decided to try its hand at urban renewal, just as many other cities were abandoning the federally-funded decimation of American downtowns.² In Boise, the map of “blighted”

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1. L.J. Davis, *Tearing Down Boise*, HARPER’S MAG., Nov. 1974, at 32 [hereinafter *Tearing Down Boise*].

2. See generally CHESTER HARTMAN WITH SARAH CARNOCHAN, *CITY FOR SALE: THE TRANSFORMATION OF SAN FRANCISCO* 103–32 (rev. & updated ed. 2002) (discussing first injunction issued against a federal housing project in the country in 1972) [hereinafter *CITY FOR SALE*].

properties marked for demolition approximated over half of each of the 50 blocks of the city's downtown.³ In other words, Boise really was in the process of eradicating itself, and there wasn't a good plan for what would come next. There was a plan for a mall, but that was just a few of the blocks called out for demolition. A stagnant decade ensued in which the plan failed to gain momentum for its most ambitious plans, but the plan also exerted enough influence to make investors wary. Disinvestment followed the plan's release leaving a hollowed-out core and a bleak future for the city. The Harper's article, written by L.J. Davis, a Boise-born author turned Brooklynite, described the scene: "[O]n a recent warm, bright Tuesday morning—perfect shopper's weather—a cannonball, if fired the length of the sidewalk" along the "principal canyon of trade along Idaho Street," "would have struck exactly nineteen people."⁴

How times have changed. In 2018, Forbes declared Boise the fastest-growing city in America.⁵ In 2020, Meridian and Nampa, two of Boise's suburban communities, were named among the ten fastest-growing cities in the United States.⁶ In 2021, Zillow announced that Idaho was the state with the highest home price appreciation in the decade between 2010 and 2020.⁷ Almost all of that appreciation came in the Boise metropolitan region, which Zillow noted saw a jaw-dropping appreciation of "over three times" in that decade.⁸

In many ways, Boise's growth shouldn't be a surprise. It has been on numerous "best of" lists for decades.⁹ It has a four-season climate without the extremes of other parts of the country and has been named one of the cities with

3. BOISE REDEVELOPMENT AGENCY, CENTRAL DISTRICT GENERAL NEIGHBORHOOD RENEWAL PLAN, Exhibits B-2, B-4 (1967) [hereinafter URBAN RENEWAL PLAN].

4. *Tearing Down Boise*, *supra* note 1, at 34.

5. Katie Warren, *4 Days in the Fastest-Growing City in America: Microbreweries, Millennial Transplants — and Locals Who Are Already Afraid of Getting Priced Out*, BUS. INSIDER (Dec. 11, 2019), <https://www.businessinsider.com/boise-idaho-fastest-growing-city-in-us-photos-growth-cost-2019-12>; Samantha Sharf, *Full List: America's Fastest-Growing Cities 2018*, FORBES (Feb. 28, 2018), <https://www.forbes.com/sites/samanthasharf/2018/02/28/full-list-americas-fastest-growing-cities-2018/?sh=23d58ed57feb>.

6. *Meridian, Nampa among Top 10 Fastest Growing Cities in America*, KTVB (Oct. 13, 2020), <https://www.ktvb.com/article/news/local/growing-idaho/meridian-nampa-among-top-10-fastest-growing-cities-in-america/277-c157f4e3-655d-448c-a028-4e0081ef6a63>.

7. Michael Deeds, *Zillow: Idaho Surge in Housing Market Value Leads U.S. since 2011. Boise No. 1 Metro*, IDAHO STATESMAN (Jan. 28, 2021), <https://www.idahostatesman.com/article248839729.html>.

8. *Id.*

9. Don Day, *Oh Hey, Boise's on Another List. Why Isn't This Exciting Anymore?*, BOISEDEV (Dec. 20, 2019), <https://boisedev.com/news/2019/12/20/oh-hey-boises-on-another-list-why-isnt-this-exciting-anymore/>.

environments expected to adjust to climate change best.¹⁰ There is plenty to do outdoors,¹¹ and there is a generally congenial “let’s work together” attitude about most things.¹²

Boise’s rise also shouldn’t be that surprising given that there are not that many more places to develop in the Intermountain West.¹³ The Intermountain West region’s lands are dominated by federal land management agencies, which own and control sixty to eighty percent of land within state boundaries and are thus off-limits for private development.¹⁴ Despite this limited space for development, the Intermountain West has been one of the fastest growing regions in the country for several decades.¹⁵ The result is that Boise is the last of the major Mountain West communities to experience exponential growth.¹⁶ The city, and increasingly the broader region known as the Treasure Valley, faces increasingly rapid urbanization but without a history of land use planning tools to assist it or, it must also be noted, the planning spirit.¹⁷ Planning almost always requires tools afforded only to government, and Idaho—both on the right and left—tends to eschew government for private governance.¹⁸ The result has been a hodgepodge of development islands in the Treasure Valley that have led to the predictable problems: traffic, housing affordability, concerns over quality of life, crowded schools, strained infrastructure, and the usual fast-growth city complaints about the newcomers.¹⁹ Despite that, Boise’s growth is almost certainly still at the beginning of its hyperbolic rise.²⁰ The growth problems might be viewed, on the one hand, as a welcome problem given the city’s not-so-distant past when it nearly took a wrecking ball to downtown. The

10. Jonah Engel Bromwich, *Where Can You Escape the Harsh Effects of Climate Change?*, N.Y. TIMES (Oct. 20, 2016), <https://www.nytimes.com/2016/10/20/science/9-cities-to-live-in-if-youre-worried-about-climate-change.html>.

11. Kristen Bor, *10 Summer Outdoor Adventures for Your Boise and McCall Vacation*, VISIT IDAHO (June 21, 2018), <https://visitidaho.org/travel-tips/10-summer-outdoor-adventures-for-your-boise-and-mccall-vacation/>.

12. *Boise Kind Initiative Enters New Phase under Boise School District*, IDAHO NEWS 6, (Jan. 7, 2020), <https://www.kivitv.com/news/boise-kind-initiative-enters-new-phase-under-boise-school-district>. Boise even has a marketing campaign that touts its character as “Boise Kind.” The strategy, originating under then-Mayor David Bieter, is currently managed by the Boise School District.

13. CAROL HARDY VINCENT ET AL., CONG. RSCH. SERV., R42346, FEDERAL LAND OWNERSHIP: OVERVIEW AND DATA (2020), <https://fas.org/sgp/crs/misc/R42346.pdf>.

14. *Id.* at 7–8.

15. Press Release, U.S. Census, Southern and Western Regions Experienced Rapid Growth This Decade, (May 21, 2020), <https://www.census.gov/newsroom/press-releases/2020/south-west-fastest-growing.html>.

16. *See infra* note 57 (illustrating how little of the Mountain West is available for private development).

17. *See infra* Section III(B).

18. *See infra* Section III(C).

19. *See infra* Section III(D).

20. *See infra* Section II(A)-(C).

pace of change is fast, but there is still time to get growth right. The question is whether there is any will to do so and, if so, what that would look like.

While the changes growth has brought feel new to those who have lived in the city for a long time and sometimes create tension,²¹ the Boise region's moment isn't that different from mid-sized cities around the country and around the world that are finding themselves suddenly facing growth issues that had previously affected only a few of the world's largest cities.²² As a result, Boise presents a case study to evaluate the tools available for growing cities in Idaho and other Western states. It is also a useful case study to evaluate how other similarly situated mid-sized cities around the country, and perhaps even the world, can plan for sustainable development.²³ If a developed economy with a functioning rule of law cannot plan for growth in a place like Boise, how can we expect developing countries to plan for this century's crush of urbanization into new cities that hardly existed just decades ago?²⁴

What can Boise and these twenty-first century new cities learn from planning mistakes of the twentieth century? Land use controls first arose, in their modern context, to address the dual rise of urbanization and industrialization.²⁵ But planning and land use controls were largely useless in containing the sprawl and congestion of the automobile-dominated city, and arguably complicit in it.²⁶ Land use controls also struggled to keep up with changing relationships to government, taxation, and personal autonomy.²⁷ What policies were pursued created lop-sided results, whether it was poorly maintained federal public housing, racially segregated communities, or a midcentury embrace of community participation that devolved, all too often, into the "not in my back yard" ("NIMBY") and "build absolutely nothing anywhere near anything" ("BANANA") camps.²⁸

The twenty-first century will almost certainly bring unanticipated challenges to fast-growth cities in addition to those already inherited. Chief among them will be climate change, as growth almost always reaches into areas of environmental sensitivity and disaster, such as floods and wildfires, which will only increase as the planet warms.²⁹ At the same time, development patterns play a key role in

21. Conor Dougherty, *The Californians Are Coming. So Is Their Housing Crisis*, N.Y. TIMES (Feb. 12, 2021), <https://www.nytimes.com/2021/02/12/business/economy/california-housing-crisis.html>.

22. *See infra* Section III(A).

23. *See generally* INT'L PANEL ON CLIMATE CHANGE, WORKING GROUP II, AR5 CLIMATE CHANGE 2014: IMPACTS, ADAPTATION, AND VULNERABILITY (2014), <https://www.ipcc.ch/report/ar5/wg2/> (Chapters 8, 9 and 10 address human settlements).

24. *Id.*

25. *See infra* Section III(A).

26. *See infra* Section III(A).

27. *See infra* Section III(A).

28. *See infra* Section III(A).

29. *See infra* Section III(A).

addressing climate change because they dramatically affect energy consumption through building efficiency, transit options, and more.³⁰

Put simply, if a place like Boise can address growth effectively, there is great hope not just for this particular region's future as an exciting place to live and work, but for the hundreds—if not thousands—of twenty-first century new cities around the world facing rapid growth.

This article is broken into two parts. The first part of this article explores Boise and its options in great detail with a special exploration of its history and effective tools for growth used by other Western communities. This part focuses on two stories: Boise's downtown core, and the larger Boise region. Like all real estate stories, these are stories about a unique location, but the problems of how this place seeks to maintain its identity over time and with changing circumstances are universal.

The second part of this article investigates aspects of regional development and looks at how they have worked in the past in Boise and how they might work in the future. Here again, the choices are unique to the location, but also have a hint of universal problems that mid-sized cities face in growth.

II. PART I: WHAT GROWTH IN BOISE LOOKS LIKE

In 2020, Zillow named Boise its number one “up-and-coming” market, noting that home values continue to rise despite going up 11.8% in the previous year.³¹ By January, 2021, the median home price in Ada County had reached \$454,000,³² which was nearly triple what the median home cost in the county a decade ago.³³ In Canyon County, the median single-family home price hit a record \$321,000 in October, 2020, a 24% increase from the year before.³⁴

A recent study of land use patterns in the Treasure Valley found that if the Treasure Valley continued to develop at the same level of density as in 2011—the “Business as Usual” scenario—the assumed population of 1.5 million in 2100 would spread over an additional 220,000 acres with a loss of 190,000 acres of agricultural

30. See *infra* Section III(A).

31. Zillow Research, *A Dozen Mid-Sized Markets to Watch in 2020*, (Sept. 14, 2020), <https://www.zillow.com/research/12-mid-sized-markets-27918/>.

32. Cassie Zimmerman, *January 2021 Market Report*, BOISE REG'L REALTORS (Feb. 12, 2021), <https://www.boirealtors.com/january-2021-market-report/>.

33. Michael Deeds, *Zillow: Idaho Surge in Housing Market Value Leads U.S. since 2011. Boise No. 1 Metro*, IDAHO STATESMAN (Jan. 28, 2021), <https://www.idahostatesman.com/article248839729.html>.

34. Lisa Kohl, *Up Again; How Boise-Area Home Prices Jumped 17% in a Year*, WEKNOWBOISE.COM, (Nov. 10, 2020, 12:08 PM), <https://www.weknowboise.com/blog/home-prices-jump-17-percent.html#:~:text=Even%20more%20dramatically%2C%20Canyon%20County,a%20record%20%24321%2C000%20in%20October.>

lands.³⁵ Utilizing more compact development, or “smart growth” strategies, would increase urban land patterns by only 140,000 acres with a loss of 110,000 acres of agricultural land.³⁶

In 2019, Boise estimated it needed to generate about 1,000 new units to keep pace with growth within its city boundaries.³⁷ About a third of those need to be “affordable,” which the city views as 80% of the median income level or below.³⁸ A city planner estimated that “[w]e have 20 years worth of land inventory that we can accommodate. . . . That’s 1,000 units for 20 years.”³⁹ However, Boise’s long-term picture is more challenging. The city has annexed most of the land available to it; it now borders on the west the cities of Meridian, Garden City and Eagle. To the south, the city is constrained by the pathway of its airport and federal land, the latter of which also constrains the city’s growth to the north.⁴⁰ Several large corporate landowners control most of the developable land in the last direction the city can grow: to the east.⁴¹ To the extent that the region continues to grow, much of that growth will occur outside of the Boise city boundaries.⁴²

A. Boise’s Past and Its Region

Boise is located in southwestern Idaho, which has always been the State’s population center.⁴³ The city sits on the eastern edge of the “Treasure Valley,” a geographic region defined by mountains to the north, mountains and desert to the south, the eastern edge of Ada County where Boise is located, to the east, and the western edge of Canyon County to the west that is defined by a gorge cut by the Snake River.⁴⁴

35. LAURA MCSHERRY, ET AL., MODELING URBAN GROWTH IN THE TREASURE VALLEY, IDAHO, (2017) <https://www.boisestate.edu/hes/projects/modeling-urban-growth-in-the-treasure-valley-idaho/>; JENNA NARDUCCI, ET AL., PROJECTING URBAN EXPANSION IN THE TREASURE VALLEY TO 2100 (Oct. 2017), <https://d25vtythmtl3o.cloudfront.net/uploads/sites/157/2019/03/Whitepaper-Projecting-Urban-Expansion-in-the-Treasure-Valley-to-2100.pdf>.

36. JENNA NARDUCCI, ET AL., *supra* note 35, at 6.

37. Don Day, *Deep Dive: Where Will Boise Grow? Ownership, Geography, Affordability Drive Future Plans*, BOISEDEV (Aug. 14, 2019), <https://boisedev.com/news/2019/08/14/deep-dive-where-will-boise-grow-ownership-geography-affordability-drive-future-plans/>.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. CMTY. PLAN. ASS’N OF SOUTHWESTERN IDAHO, COMMUNITIES IN MOTION 2035 2-1 (Sept. 2010).

43. *Id.* at 2-2.

44. *Id.* at 2-3.

The Hudson's Bay Company established Fort Boise in 1834 nearby the current city of Boise but abandoned it in 1855.⁴⁵ Nineteenth century travelers on the Oregon Trail passed through the area of what would later become the Boise region, but the city officially began life as an army post in 1863.⁴⁶ In 1864, Boise became the state capital.⁴⁷ The city, located in a sagebrush desert hard by rugged mountains, did not see measurable population growth in its early years.⁴⁸ At that time, the growth was in the mountain mining towns, such as Idaho City, where gold had been discovered.⁴⁹ By the start of the twentieth century, Boise had just 6,000 residents.⁵⁰ When railroads were routed through the area, the Union Pacific chose a path that bypassed Boise but followed easier terrain.⁵¹ The city did not have rail service—and then only by means of a spur line—until 1926.⁵² Boise's population grew slowly through the mid-twentieth century, reaching a population of 100,000 for the first time in the 1980 census.⁵³

The geographic isolation of the region cannot be overstated; by many accounts, Boise is the most geographically isolated major American city.⁵⁴ Although there are some small cities nearby not also in the Treasure Valley, the nearest major cities are Salt Lake City, Utah (a five-hour drive); Portland, Oregon (a nine-hour drive); and Seattle, Washington (an eleven-hour drive). Much of the land between these cities is federal land meaning that there are very few options for development in the region that does not flow to one of these metropolitan areas.⁵⁵ The map below (Figure 1) shows the federal land ownership in the Western United States, color-coded to indicate management by the Bureau of Land Management, Department of Defense, Forest Service, Fish and Wildlife Service, and National Parks Service.⁵⁶

45. *Id.* at 2-2.

46. *Id.* at 2-1.

47. *Id.*

48. CMTY. PLAN. ASS'N OF SOUTHWESTERN IDAHO, *supra* note 42, at 2-1.

49. CMTY. PLAN. ASS'N OF SOUTHWESTERN IDAHO, *supra* note 42, at 2-1.

50. CMTY. PLAN. ASS'N OF SOUTHWESTERN IDAHO, *supra* note 42, at 2-1.

51. CMTY. PLAN. ASS'N OF SOUTHWESTERN IDAHO, *supra* note 42, at 2-3.

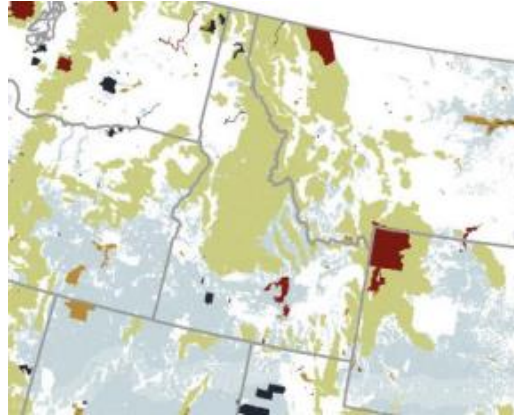
52. CMTY. PLAN. ASS'N OF SOUTHWESTERN IDAHO, *supra* note 42, at 2-3.

53. CMTY. PLAN. ASS'N OF SOUTHWESTERN IDAHO, *supra* note 42, at 2-4.

54. See, e.g., Adrian Rehn, *How Does Idaho Innovate?*, VALLEY VISION, <https://www.valleyvision.org/how-does-idaho-innovate/> (last visited Feb. 19, 2022) ("Boise is the most geographically isolated of all mid-size cities in the contiguous U.S.").

55. See CAROL HARDY VINCENT ET AL., *supra* note 13, at 12, Fig. 1.

56. HARDY VINCENT ET AL., *supra* note 13, at 12.



Federal Agencies



Fig. 1. Federal Land Ownership in Idaho.⁵⁷

In other words, any development that is going to occur in the northern Intermountain West has a good chance of heading for Boise and the Treasure

57. HARDY VINCENT ET AL., *supra* note 13, at 12, fig. 1.

Valley.⁵⁸ Similarly, population migration to Boise is primarily from other large cities in the American West, as shown in the map below.⁵⁹

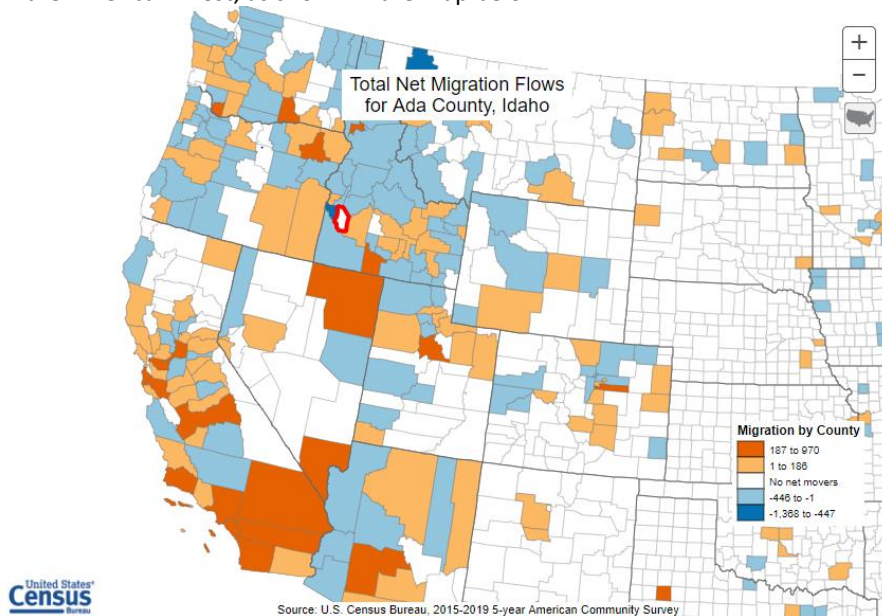


Fig 2. 2015-2019 In-Migration and Out-Migration for Ada County, Idaho.⁶⁰

B. Case Study: Boise's Downtown

Boise is remarkable for a smaller Western city in that it maintains an active downtown core with a significant number of historic buildings. There are several reasons contributing to this unusual success of the downtown. Among them is that Boise is also Idaho's capital and has benefitted from the on-going presence of those state workers in the downtown core, many of which live in the surrounding areas. In addition, Boise State University, which is located south of the downtown core

58. It is also worth noting that the Boise region is separated from Montana by the second largest wilderness area in the lower forty-eight states, which is called the Frank Church Wilderness of No Return Wilderness Area. That wilderness, coupled with the Bitterroot Mountain range, which runs along the Idaho and Montana border, creates a boundary to development between the two states. *See Frank Church River of No Return Wilderness*, USDA FOREST SERV., <https://www.fs.usda.gov/detail/scnf/specialplaces/?cid=stelprdb5360033> (“[The Frank Church] is the largest contiguous wilderness in the Lower 48 and the second largest unit of the National Wilderness Preservation System in the Lower 48 (second in size only to California’s Death Valley Wilderness”).

59. *Census Flow Mapper*, U.S. CENSUS BUREAU, <https://flowmapper.geo.census.gov/map.html> (last visited Jan. 20, 2022) (search for “Ada County, Idaho: under “Search for a county” then click “Inbound: under “Choose a type of migration flow”).

60. *Id.*

and separated from it by the Boise River, has become a large campus with over 24,000 students.⁶¹ There was also a time that Boise hosted a surprising number of headquarters for major American corporations, though those days are largely gone due to industry mergers that took such headquarters to major cities.⁶² Despite these advantages and the downtown core's active street life today, there was a time just a few decades ago that the downtown struggled and demolition of the entire core of the city was considered a *fait accompli*.⁶³

The historic buildings in downtown Boise that still stand were mostly built in the late-nineteenth and early twentieth-century.⁶⁴ Most of those buildings were one- or two-story buildings with ground floor retail and typically an office use on the second floor.⁶⁵ In the late 1940s, downtown Boise consisted of about thirty blocks of business buildings that serviced an immediate urban area population of 50,000 and a secondary trade area of the same population.⁶⁶ As with many central business districts, Boise prospered until a series of events—first streetcar suburbs⁶⁷ and then the automobile and a highway, I-84, built in the 1950s and 1960s—made suburban living a possibility and, increasingly, a preferred option for many people in the mid-twentieth century.⁶⁸ There were virtually no planning efforts to prevent city sprawl, as many of the city's most important citizens, including the city's mayor, were developers deeply involved in building out the suburban areas.⁶⁹ By the mid-1960s, the downtown area was in decline.

61. *About Boise State, 2020-2021 Figures*, BOISE STATE UNIV., <https://www.boisestate.edu/about/facts/> (last visited Jan. 20, 2022).

62. Major corporations headquartered in Boise include Micron, Albertson's, Simplot, Scentsy and formerly Morrison-Knudsen. Others with significant presences include Hewlett-Packard, TSheets (purchased by Intuit), and a number of Silicon Valley-style tech startups. See, e.g., L. J. Davis, *Unlikely, but Boise Means Big Business*, N.Y. TIMES (June 11, 1989), <https://www.nytimes.com/1989/06/11/magazine/unlikely-but-boise-means-big-business.html>; Emily Canal, *Boise Set Out to Become the Next Austin or Seattle. Instead, It's On Track to Become the Next Silicon Valley*, INC.COM (Feb. 14, 2022), <https://www.inc.com/christine-lagorio-chafkin/nataly-kogan-happiness-what-i-know-podcast.html>; see NARDUCCI, ET AL., *supra* note 35, at p. 3.

63. See *Tearing Down Boise*, *supra* note 1.

64. See generally IDAHO ARCHITECTURE PROJECT, <https://www.idahoarchitectureproject.org/> (last visited Jan. 20, 2022) (Internet-based index of residential, commercial and institutional historic buildings); see also SHAPING BOISE: A SELECTION OF BOISE'S LANDMARK BUILDINGS (2010), <https://www.cityofboise.org/media/7053/shaping-boise-landmarks.pdf> (providing short histories of many Boise-designated historical landmarks).

65. URBAN RENEWAL PLAN, *supra* note 3, at 11-19.

66. AM. INST. OF ARCHITECTS, BOISE R/UDAT 7 (1985) [hereinafter R/UDAT].

67. Sharon Fisher, *A Look Back at the Interurban*, TERRITORY MAG. (Winter 2019), <https://territory-mag.com/articles/a-look-back-at-the-interurban/>.

68. *Id.*

69. *Tearing Down Boise*, *supra* note 1, at 38.

Soon after passage of the Idaho Urban Renewal Law of 1965,⁷⁰ the Boise Redevelopment Agency (BRA) was created.⁷¹ From 1965 to June 1969, BRA surveyed, planned, acquired and cleared buildings that could not be “rehabilitated” or interfered with large-scale projects.⁷² The guiding document for the BRA’s redevelopment plans was the 1967 *General Neighborhood Renewal Plan* (the “Plan”). The Plan placed fifty-five blocks of downtown Boise, excluding the Capitol and its mall, which are state property, within the BRA’s jurisdiction.⁷³

The Plan listed four development objectives: a “regional size shopping center”; regional cultural improvements that provide diversified educational, social, and entertainment facilities; a new “governmental complex” for city, county, and state offices; and “surrounding and supporting” commercial service and residential facilities.⁷⁴ Foremost among the Plan’s objectives was the “acquisitions and clearance of structures which are structurally substandard, have a blighting influence upon the GNR Area, and are incompatible with the overall objectives of the GNRP.”⁷⁵

The Plan explicitly acknowledged that the “development of retail facilities outside of the Central District has made heavy inroads in a function which was formerly conducted in the Central District.”⁷⁶ Most new development was occurring south and west of the Central District and drawing businesses away from the area.⁷⁷ If the Central District did not act to revitalize itself, the outer growth would further challenge the then-dominance of the Central District in commercial and governmental activities.⁷⁸

A survey found that ninety percent of existing businesses wished to remain, but that “the lack of available space for expansion and a limited concentration of land use functions make it difficult for these firms to remain.”⁷⁹ As such, the “substantial reorientation of space which is required could only be accomplished through the urban renewal process.”⁸⁰ Because the downtown core was located on the eastern edge of a metropolitan area sprawling to the east, it would need to make the downtown accessible by highways to encourage shoppers and commuters to make the trip.⁸¹ There were not enough parking spaces for the

70. Idaho Urban Renewal Act, ch. 246, § 1, 1965 Idaho Sess. Laws 600 (codified as IDAHO CODE § 50-2001 (West 2021)).

71. R/UDAT, *supra* note 66, at 7.

72. R/UDAT, *supra* note 66, at 7.

73. *See infra* Fig. 3.

74. URBAN RENEWAL PLAN, *supra* note 65, at 7.

75. URBAN RENEWAL PLAN, *supra* note 65, at 8.

76. URBAN RENEWAL PLAN, *supra* note 65, at 11–12.

77. URBAN RENEWAL PLAN, *supra* note 65, at 12.

78. URBAN RENEWAL PLAN, *supra* note 65, at 12.

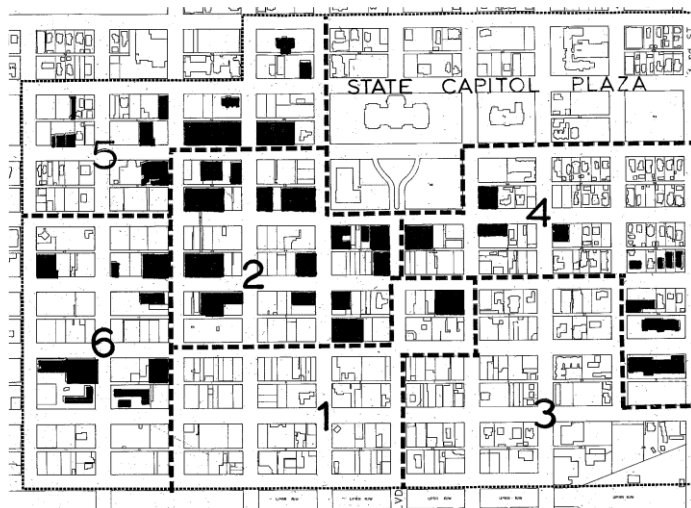
79. URBAN RENEWAL PLAN, *supra* note 65, at 12.

80. URBAN RENEWAL PLAN, *supra* note 65, at 12.

81. URBAN RENEWAL PLAN, *supra* note 65, at 12.

new automobile-dependent age.⁸² Traffic circulation would need to be improved, which meant replacing two-way streets with one-way thoroughfares.

According to the Plan, more than sixty percent of the buildings in the Plan area “have deficiencies which, if corrected, would require rent payment levels that are beyond the abilities of local business to afford,” something that “indicates that substantial redevelopment will be required to correct this problem.”⁸³ The buildings were “outmoded and unsuitable for their present function,” and the plan concluded that “demolition and clearance will be required if maximum use” of the Plan area was to be achieved.⁸⁴ The buildings were classified into “dilapidated,” or those with “no possibility for rehabilitation”; “marginal,” or “those structures warranted for clearance to remove blighting influences”; and structures which may be either standard or “rehabilitatable” but do not conform with the proposed redevelopment land uses.⁸⁵ On the basis of those determinations, the Plan then slated almost the entirety of the 55-block area for demolition.⁸⁶



82. URBAN RENEWAL PLAN, *supra* note 65, at 12.

83. URBAN RENEWAL PLAN, *supra* note 65, at 12, 17. *See* Fig. 3.

84. URBAN RENEWAL PLAN, *supra* note 65, at 17.

85. URBAN RENEWAL PLAN, *supra* note 65, at 40.

86. *See* Fig. 3.

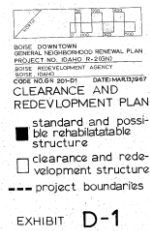


Fig. 3. 1967 General Neighborhood Renewal Plan, Exhibit D-1, Clearance and Redevelopment Plan, Boise Redevelopment Agency.

In place of the existing structures, the Plan proposed then-popular multi-story super-block structures with less than full-block coverage to permit greenery, an approach in line with Le Corbusier's vision of skyscrapers in gardens.⁸⁷

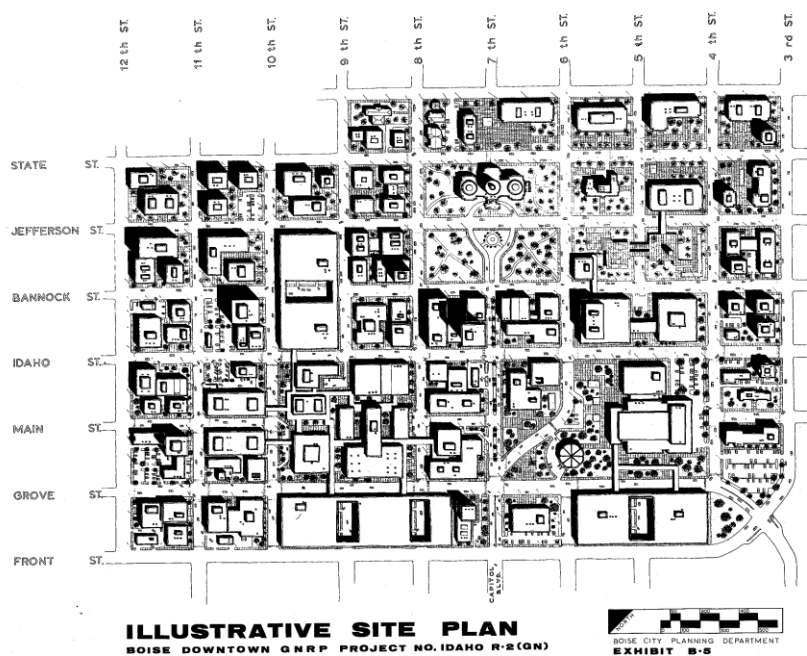


Fig. 4. 1967 General Neighborhood Renewal Plan, Exhibit B-5, Illustrative Site Plan, Boise Redevelopment Agency.

87. See generally LE CORBUSIER, ILLUSTRATIONS in PLAN VOISIN, PARIS, FRANCE (1925), <http://www.fondationlecorbusier.fr/corbuweb/morpheus.aspx?sysId=13&IrisObjectId=6159&sysLanguage=en-en&itemPos=2&itemCount=2&sysParentName=Home&sysParentId=65>. See Fig. 4.

The Plan immediately froze any investment in downtown, as developers and investors now saw a proposal to use eminent domain to take specific properties.⁸⁸ But one of the great ironies of the Plan was its timing. By the late sixties, the kind of wholesale clearance it proposed was already in disrepute. If urban renewal, funded by federal dollars, had begun in earnest with the U.S. Supreme Court's 1952 blessing of such projects in *Berman v. Parker*,⁸⁹ the beginning of the end of urban renewal in most cities came in 1972, when a federal judge, for the first time, issued an injunction stopping precisely the kind of urban renewal clearance proposed for Boise in San Francisco's Western Addition.⁹⁰ The winds of change in the country as a whole did not alter Boise's direction.

But even if by 1974, the urban renewal Plan of a distant Western city could be derided nationally in an elite publication of record like *Harper's*, that did not lessen the Plan's stranglehold on the downtown. The Plan area was divided into six phases to be completed sequentially rather than demolishing all fifty-some blocks at the same time.⁹¹ In 1972, the BRA moved ahead with the purchase and demolition of the properties in the Phase I area.⁹²

As was the case in many other cities, the area where demolition was slated to begin was an area of racial minorities;⁹³ in this case, it was Boise's Chinatown.⁹⁴ A number of Chinese had come to Idaho in the nineteenth century to work in the mines and on the railroads.⁹⁵ The Exclusion Acts of 1882, 1892, and 1902 did much to reduce the numbers however, and by 1922, a report in the *Idaho Statesman* noted that "The colony at present numbers about 200 souls, fully 100 having returned to China in the past year."⁹⁶ By the time that the BRA came for what was left of Boise's Chinatown, it was centered around the block north of Front Street and west of Capitol Street.⁹⁷

Despite its small numbers, the Chinese community was the first real opposition to BRA's power. When the Chinese community center, the Hop Sing Tong,⁹⁸ was slated for demolition, a member of the Chinese community, Billy Fong,

88. See *Tearing Down Boise*, *supra* note 1; see also Spencer Holm, *What's the Tif about TIFF?*, 50 IDAHO L. REV. 273, 279 (2014).

89. *Berman v. Parker*, 348 U.S. 26 (1954).

90. *W. Addition Cmty. Org. v. Weaver*, 294 F. Supp. 433, 435 (N.D. Cal. 1968).

91. See URBAN RENEWAL PLAN, *supra* note 65, at 40; see also Fig. 3.

92. John T. Reuter, *Razed and Confused: Boise's Turbulent History of Urban Renewal*, BOISE WEEKLY 13—14 (Aug. 4, 2010), <https://issuu.com/boiseweekly/docs/1906> [hereinafter *Razed and Confused*].

93. *Id.*

94. *Id.*

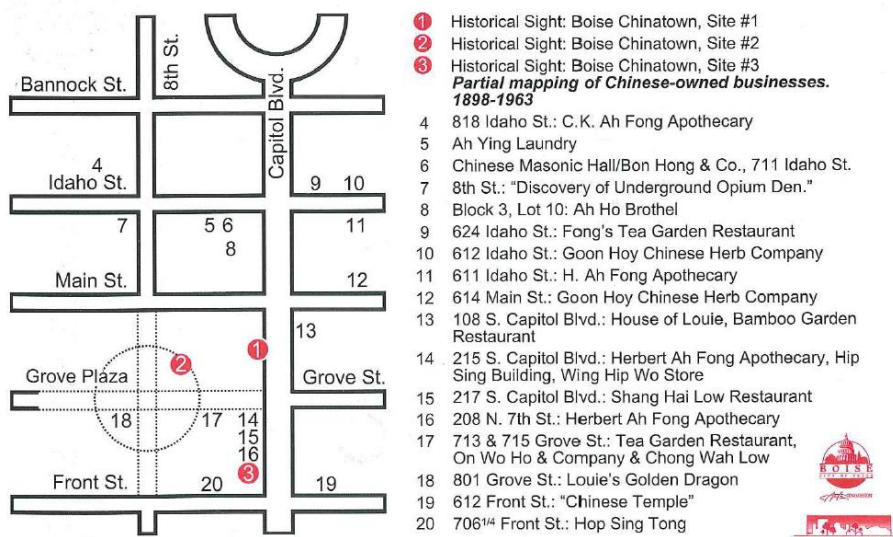
95. ARTHUR A. HART, CHINATOWN: BOISE, IDAHO, 1870-1970 119 (2002) [hereinafter BOISE CHINATOWN].

96. *Id.*

97. City of Boise, Historical Sight: Boise Chinatown at 3.

98. *Id.* at 4; Fig. 5, No. 20

took up residence in the building.⁹⁹ The building, which was owned by a Chinese cultural group out of Seattle, the Yick Kong Corporation, sued the BRA challenging its authority to condemn the building under Idaho's Urban Renewal Law. In *Boise Redevelopment Agency v. Yick Kong Corp.*, the Idaho Supreme Court upheld the state's Urban Renewal Law and BRA's taking of the Hop Sing Tong relying heavily



upon the U.S. Supreme Court's rationale, some twenty years prior, in *Berman*.¹⁰⁰ Fong still refused to leave, though Charles Newhouse, a BRA board member, purportedly told the *Idaho Statesman*, "He'll leave. Wait'll they swing the iron ball a few times. He'll break a few track records getting outta there."¹⁰¹ As the wrecking ball came for him, Fong reportedly threw out a white flag of surrender and left the building.¹⁰²

Fig. 5. Location of Chinese establishments in Boise.¹⁰³

With Chinatown gone and the area cleared in Phase I, it seemed there was little that could stop the BRA from accomplishing its goal of establishing a shopping center complex on the site. But while Chinatown was easily demolished, the shopping mall remained elusive. The mall immediately ran into logistical difficulties that would ultimately shut down planning in the downtown core for almost twenty

99. See *BOISE CHINATOWN*, *supra* note 95, at 122.

100. *Boise Redevelopment Agency v. Yick Kong Corp.*, 499 P.2d 575, 94 Idaho 876 (1972); IDAHO CODE §§ 50-2001–2033 (West 2021).

101. *BOISE CHINATOWN*, *supra* note 95, at 122.

102. *Razed and Confused*, *supra* note 92, at 14.

103. City of Boise, Capital City Development Corp. (on file with author).

years.¹⁰⁴ Five major developers attempted to carry out the redevelopment plan's vision of a shopping center and none of them succeeded.¹⁰⁵ The first developer, Urban Properties, Inc., decided it could not afford the project.¹⁰⁶ The second developer, Boise Cascade, overextended itself in other fields and withdrew.¹⁰⁷ Despite those failures, BRA continued to push for a megastructure in its first phase: a single building housing under one roof with an air-conditioned shopping mall, over 800,000 square feet of commercial space (including three department stores), 300,000 square feet of office space, a hotel of over 250 rooms, and 2,444 parking spaces with an additional 1,800 parking places planned for satellite structures around the site.¹⁰⁸ All of this for a city whose population was just 75,000 in 1970.¹⁰⁹ At the same time that the BRA was linking Boise's downtown to a mall megastructure, a private developer, Harry Daum, began proposing to build a large mall west of the city center and closer to the suburbs. The center he proposed, nicknamed "Daumtown" by his opponents, proposed to include over 800,000 square feet of commercial space on 600 acres that would also have included "light industry, office space, a golf course, and 1,200 units of housing."¹¹⁰

Despite the inability to proceed with development of the cleared Phase 1, the BRA began condemning sites in the Phase 2 project area, which was supposed to house new governmental buildings. The most controversial acquisition occurred in 1975 when the BRA acquired the 1927 Egyptian Theatre, the city's only movie palace built in the grand early-twentieth century tradition.¹¹¹ This launched a historic preservation movement in the city, a movement that, like urban renewal, seemed to arrive late to Boise but, as was common in other cities in a time of gendered institutions, was led by the wives of important men who organized through clubs like the Junior League.¹¹² The theater was re-sold to a private individual in 1977.¹¹³ Although polls in the late 1970s showed a continued support for demolishing several prominent historic buildings they still needed to build the proposed mall, times and attitudes began to change by the early 1980s.¹¹⁴

104. See *Razed and Confused*, *supra* note 92, at 14.

105. R/UDAT, *supra* note 66, at 7.

106. *Tearing Down Boise*, *supra* note 1, at 38.

107. *Tearing Down Boise*, *supra* note 1, at 38.

108. *Tearing Down Boise*, *supra* note 1, at 38.

109. U.S. CENSUS BUREAU, POPULATION AND HOUSING CHARACTERISTICS FOR BOISE CITY, ID, 1970 CENSUS OF POPULATION & HOUS.: CENSUS TRACTS (1972), <https://www.census.gov/library/publications/1972/dec/phc-1.html>.

110. *Tearing Down Boise*, *supra* note 1, at 40.

111. *Razed and Confused*, *supra* note 92, at 14.

112. *Razed and Confused*, *supra* note 92, at 14.

113. *Razed and Confused*, *supra* note 92, at 14.

114. *Razed and Confused*, *supra* note 92, at 14–15.

The end of the pursuit of the shopping mall came with the election of Dirk Kempthorne as mayor of the city in 1985.¹¹⁵ Kempthorne, who would later serve as Idaho's governor, its U.S. senator, and U.S. Secretary of the Interior, ran on a platform of building a mall, but not in the city's center.¹¹⁶ Kempthorne was not the only reason the mall died; retailers, too, had told the city that the mall simply would not work and had refused to participate with any of the mall plans proposed by any of the five developers who proposed a mall on the site.¹¹⁷ While the BRA was insisting on a mall in the city's center, four community-size centers and another dozen neighborhood shopping plazas, as well as a spat of business plazas and suburban office parks were built in the suburbs of the city.¹¹⁸ Kempthorne noted in an interview, "A lot of folks who were part of the old urban renewal block wanted me to keep tearing down buildings in the name of progress. . . . I said, 'Absolutely not. We've torn enough of our history down.'"¹¹⁹ Kempthorne began a process of renovating historic buildings and, perhaps most importantly, finding a use for the still vacant Phase 1 site that was slated for the mall. He brought together elected officials from all of the agencies that had a say in the site—BRA, the Ada County Highway District, and the City Council—and led discussions resulting in a decision to create a convention center on the site.¹²⁰

In 1985, "the BRA board adopted a new policy, calling for a development of downtown Boise with a wide mix of uses."¹²¹ Also in 1985, the BRA commissioned the American Institute of Architects to bring its Regional/Urban Design Assistance Team (R/UDAT) of specialists to provide a conceptual approach to developing downtown.¹²² The R/UDAT study proposed to use 8th Street as a north/south spine to link the Capitol mall, the downtown core, and the Boise River, which forms the southern boundary of the downtown core.¹²³ The approach stuck and became the strategy by which Boise began to revive itself, not from one overarching vision of itself but through numerous small projects that work together.¹²⁴

115. *Razed and Confused*, *supra* note 92, at 14–15.

116. *Razed and Confused*, *supra* note 92, at 14–15.

117. R/UDAT, *supra* note 66, at 1, 7; *Razed and Confused*, *supra* note 92, at 15.

118. R/UDAT, *supra* note 66, at 8.

119. *Razed and Confused*, *supra* note 92, at 15.

120. *Razed and Confused*, *supra* note 92, at 15.

121. R/UDAT, *supra* note 66, at 8.

122. R/UDAT, *supra* note 66, at 8.

123. R/UDAT, *supra* note 66, at 11.

124. *See infra* Fig. 6.

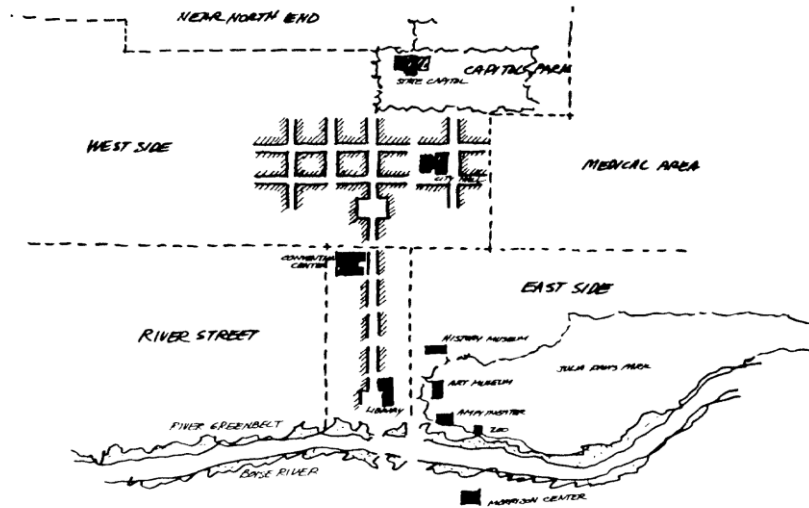


Fig. 6. 8th Street Pedestrian Mall, Concept Plan¹²⁵

As an epilogue to the era of clearance-based urban renewal, in 1989, BRA changed its name to the Capital City Development Corporation (CCDC).¹²⁶ The new CCDC operates in a manner that is almost antithetical to the BRA's approaches.¹²⁷



125. R/UDAT, *supra* note 64, at 11.

126. CCDC History, CAP. CITY DEV. CORP., <https://ccdcboise.com/the-agency/history/> (last visited Feb. 22, 2022).

127. See generally *id.*

Figs. 7 and 8. Before and after improvements on Boise’s 8th Street, which now forms the spine of the revitalized downtown.¹²⁸

In recent years, Downtown Boise is resurgent. The Boise Metropolitan Statistical Area (Boise MSA) is the economic center of the state, hosting over 45% of Idaho’s employment in October 2021.¹²⁹ Downtown Boise is the heart of the Boise MSA economic engine. According to a Downtown Boise Association study in 2018 (the latest data available as of this writing), the downtown core hosted 43,533 jobs, which accounted for 26% of all jobs in the city of Boise.¹³⁰ Further, employment growth downtown between 2010–2015 was robust, resulting in a 26% increase in Downtown Boise jobs and 39% of all Boise’s “knowledge jobs.”¹³¹ At the time, half of the office space to be built in the subsequent three years was to be built downtown.¹³²

Boise’s comprehensive plan, *Blueprint Boise*, which was last updated in 2010, notes similar data. At that time, almost 22% of Boise jobs were located in the Downtown Planning Area.¹³³ Downtown Planning Area jobs were projected to increase by 63.5%, increasing from 33,707 in 2005 to 55,175 in 2030.¹³⁴ Population in the city, and in the Treasure Valley, doubled between 1990 and 2010, and could double—or triple—again by the end of the century.¹³⁵ The city is consistently listed on “Top 10” lists of the best places to live in the United States.¹³⁶

C. Where the Region’s Growth is Now

Boise’s downtown core, and the easy access to it from its first-ring residential communities—the North End, East End, and Boise Bench—are the region’s

128. City of Boise, *supra* note 103.

129. *Current Employment Statistics*, IDAHO DEP’T OF LAB., (Aug. 20, 2021), <https://lmi.idaho.gov/ces> (noting that the Boise City MSA accounted for 347,700 of 765,700 jobs in Idaho).

130. *Economic Impact One Sheet*, DOWNTOWN BOISE ASS’N 2 (2019), https://ctycms.com/id-boise/docs/dba-one-sheet_2019_v2.pdf.

131. *Id.*

132. *Id.*

133. *Planning Area Policies*, BLUEPRINT BOISE DT-2, https://www.cityofboise.org/media/3033/bb_chapter_4_downtown-05232021.pdf (last visited Jan. 21, 2022).

134. *Id.*

135. See HISTORIC POPULATION ESTIMATES BY CITY LIMITS, CMTY PLAN. ASS’N OF SOUTHWESTERN IDAHO 1, <https://www.compassidaho.org/documents/prodserv/demo/2021PopulationEstimateOfficialHistoric.pdf>, (last visited Oct. 25, 2021) [hereinafter COMPASS POPULATION ESTIMATES]; J. Brandt et al., *Urban Growth in the Treasure Valley, Idaho*, ENV’T SYS. RSCH. INST., <https://www.arcgis.com/apps/Cascade/index.html?appid=e3a6b19aec4042038501795d23cdefd1> (last visited Sep. 21, 2021).

136. See Day, *supra* note 9.

signature appeal.¹³⁷ But the city of Boise is located at the eastern edge of the developable land in the larger region of private land bounded by mountain ranges owned by the federal government.¹³⁸ That larger area, locally referred to as the Treasure Valley, is largely covered by two counties, Ada County and Canyon County.¹³⁹ While Boise remains the capital city, the site of the largest university in the state and most of the region's cultural resources, the population growth is shifting quickly westward into suburbs that barely existed fifty years ago but that are now increasingly seeking to be more than just bedroom communities to Boise.¹⁴⁰

The Treasure Valley is shaped like a backwards-leaning parallelogram that has over 50% of Idaho's population.¹⁴¹ The region is bounded on all sides by federal land, as well as the Owyhee Mountains to the south and foothills of several larger mountain ranges to the north. Politically, the Treasure Valley consists of two large counties—Ada County and Canyon County. Ada County is the more populous of the two and has seen the majority of the fast growth in the previous decades. Population in Ada County has doubled in the last three decades (1990 population: 205,775; 2020 population: 502,970).¹⁴² Canyon County's population has more than doubled in the last three decades, as well, though it is still about half Ada County's current overall population (1990 population: 90,076; 2020 population: 234,820).¹⁴³ That means the weight of the Treasure Valley's population (1990 population: 295,851; 2020 population: 737,790),¹⁴⁴ which has more than doubled in three decades, falls on the region's eastern side by an almost two-to-one ratio.

The region's fastest-growing cities have generally been in Ada County. While Boise's population has nearly doubled over the last three decades (1990 population: 125,738; 2020 population: 240,380),¹⁴⁵ its growth pales in comparison to its two primary suburbs, which mostly did not exist in 1990. Meridian's growth

137. Katie Warren, *Boise, Idaho Has Been Named the Best Place to Buy a House in 2019*, BUS. INSIDER (Dec. 18, 2019, 9:30 AM), <https://www.businessinsider.com/boise-idaho-best-neighborhood-buy-a-home-real-estate-2019-12>.

138. See Fig. 1.

139. Lisa Kohl, *Treasure Valley Idaho: A Guide to the Greater Boise Metro Area*, WE KNOW BOISE (July 28, 2020, 12:38 PM), <https://www.weknowboise.com/blog/treasure-valley-idaho.html>.

140. COMPASS POPULATION ESTIMATES, *supra* note 135.

141. COMPASS POPULATION ESTIMATES, *supra* note 135 ; U.S. CENSUS, QUICK FACTS: IDAHO (noting Idaho's 2019 population was 1,787,065), <https://www.census.gov/quickfacts/ID> (last visited Oct. 25, 2021). According to the COMPASS Population Estimates, the estimated 2019 populations of Ada County and Canyon County were 712,200 and 224,500, respectively, or 936,700 of the State's 1,787,065 residents, which is 52% of the State's population. See Warren, *supra* note 137.

142. See COMPASS POPULATION ESTIMATES, *supra* note 135.

143. COMPASS POPULATION ESTIMATES, *supra* note 135.

144. COMPASS POPULATION ESTIMATES, *supra* note 135.

145. COMPASS POPULATION ESTIMATES, *supra* note 135.

has been nothing but exponential (1990 population: 9,596; 2020 population: 119,350),¹⁴⁶ as has that of Eagle (1990 population: 3,327; 2020 population: 32,560).¹⁴⁷ Canyon County's two major cities, Nampa (1990 population: 28,365; 2020 population: 106,860)¹⁴⁸ and Caldwell (1990 population: 18,586; 2020 population: 61,210)¹⁴⁹ also saw significant growth.

Kuna, a historically remote community at the southern edge of Ada County but near the Canyon County border, has built a host of subdivisions on its northern fringe, which have fueled its rapid growth (1990 population: 1,955; 2020 population: 24,890).¹⁵⁰

Other smaller cities in the two counties saw more modest growth. In Ada County, growth-constrained Garden City (1990 population: 6,369; 2020 population: 12,460)¹⁵¹ and Star (1990 population: 648; 2020 population: 11,860)¹⁵² both increased population significantly relative to their size but still remained small.¹⁵³ The same was true for the Canyon County cities of Greenleaf (1990 population: 648; 2020 population: 870),¹⁵⁴ Melba (1990 population: 252; 2020 population: 590),¹⁵⁵ Middleton (1990 population: 1,851; 2020 population: 9,780),¹⁵⁶ Notus (1990 population: 380; 2020 population: 570),¹⁵⁷ Parma (1990 population: 1,597; 2020 population: 2,160),¹⁵⁸ and Wilder (1990 population: 1,232; 2020 population: 1,810).¹⁵⁹

Population in the unincorporated areas of the Treasure Valley has remained constant, in large part because new developments in the unincorporated areas of the counties are routinely annexed into cities. As a result, population in Ada County's unincorporated areas (1990 population: 58,142; 2020 population: 61,480)¹⁶⁰ and Canyon County's unincorporated areas (1990 population: 37,165; 2020 population: 50,960) did not see significant change.¹⁶¹

146. COMPASS POPULATION ESTIMATES, *supra* note 135.

147. COMPASS POPULATION ESTIMATES, *supra* note 135.

148. COMPASS POPULATION ESTIMATES, *supra* note 135.

149. COMPASS POPULATION ESTIMATES, *supra* note 135.

150. COMPASS POPULATION ESTIMATES, *supra* note 135.

151. COMPASS POPULATION ESTIMATES, *supra* note 135.

152. COMPASS POPULATION ESTIMATES, *supra* note 135.

153. *About Ada County*, ADA CNTY. IDAHO, <https://adacounty.id.gov/about-ada-county/> (last visited Nov. 30, 2021).

154. COMPASS POPULATION ESTIMATES, *supra* note 135.

155. COMPASS POPULATION ESTIMATES, *supra* note 135.

156. COMPASS POPULATION ESTIMATES, *supra* note 135.

157. COMPASS POPULATION ESTIMATES, *supra* note 135.

158. COMPASS POPULATION ESTIMATES, *supra* note 135.

159. COMPASS POPULATION ESTIMATES, *supra* note 135.

160. COMPASS POPULATION ESTIMATES, *supra* note 135.

161. COMPASS POPULATION ESTIMATES, *supra* note 135.

Both Ada and Canyon County are also served by a number of local special districts, which are popular in Idaho despite its general anti-government rhetoric.¹⁶²

Through coincidence, there are sixty-six special districts operating in each county, according to a 2014 survey of special districts conducted by Idaho's Legislative Analysts' Office.¹⁶³ In 2012, the latest data available, special district funding in the counties varied substantially.¹⁶⁴ School districts received the highest level of funding; indeed, school district funding (Ada: \$327 million; Canyon: \$173 million)¹⁶⁵ was more than general-purpose cities (Ada: \$233 million; Canyon: \$95 million)¹⁶⁶ or counties (Ada: \$146 million; Canyon: \$59 million) in that year.¹⁶⁷ Other special districts common in both counties include sewer and water districts (Ada: \$7 million; Canyon: \$1.5 million);¹⁶⁸ library districts (Ada: \$7.5 million; Canyon: \$900,000);¹⁶⁹ fire districts (Ada: \$16 million; Canyon: \$11 million);¹⁷⁰ and cemetery districts (Ada: \$2.1 million; Canyon: \$600,000).¹⁷¹

The most important of these special districts is the Ada County Highway District, which is the country's only district that controls all of the roads in both unincorporated and incorporated parts of the county.¹⁷² As a former mayor of Boise, David Bieter was fond of saying that he was the only mayor in the country "who does not have control of his or her streets."¹⁷³ The highway district is contentious—former-Mayor Bieter called it a "failed model"¹⁷⁴—and will be

162. U.S. CENSUS BUREAU, EXPLORING THE INTRICATE LAYERS OF STATE AND LOCAL GOVERNMENTS: IDAHO (Mar. 2011), https://www2.census.gov/govs/pubs/state_snapshot/gov07-id.pdf.

163. APRIL RENFRO, IDAHO LEGIS. SERVS. OFF., SPECIAL DISTRICTS IN IDAHO (2014), <https://legislature.idaho.gov/wp-content/uploads/audit/special-reports/2014SpecialDistrictsinIdaho.pdf>.

164. *Id.* at 4–6.

165. *Id.* at 4–5.

166. *Id.*

167. *Id.*

168. *Id.*

169. RENFRO, *supra* note 163, at 4–5.

170. RENFRO, *supra* note 163, at 4–5.

171. RENFRO, *supra* note 163, at 4–5.

172. John Sowell, *Arnold Says She Would Improve Relations Between Boise and ACHD*, IDAHO STATESMAN, <https://www.idahostatesman.com/news/politics-government/state-politics/article235774692.html> (Oct. 10, 2019, 7:18 PM).

173. *Id.*

174. *Id.*

discussed later in the article. The ACHD budget was \$89 million in 2012.¹⁷⁵ In 2021, the ACHD budget was \$134 million.¹⁷⁶

A related issue is the increased importance of private land use governance in Idaho and across the country. A recent study found that 86% of new housing in Intermountain West states was subject to covenants, conditions and, restrictions (CC&Rs) and managed by a homeowner's association.¹⁷⁷ While there is not data on CC&Rs and HOAs for Idaho housing, in particular, the regional data is a strong indicator that most new housing—especially single-family residential housing—is also regulated through an additional layer of private governance that, in many instances, may be far greater than what a local government might otherwise impose.¹⁷⁸ Similarly, HOA fees can be substantial and operate as another form of quasi-taxing district—one that benefits just the small community of owners therein.¹⁷⁹

The statistics about Boise's growth are heady stuff.¹⁸⁰ By percentages, Boise and its suburbs are perennially among the fastest-growing in the country. For instance, in 2019, the U.S. Census Bureau estimated 749,002 people lived in the Boise MSA, which includes Ada and Canyon Counties, and the far less populated Owyhee and Gem counties.¹⁸¹ That was an increase of 2.78% from 2018, which was enough to rank Boise the eighth-fastest growing MSA in the country.¹⁸² By real numbers, that growth was 20,291 people¹⁸³—a substantial sum for a region this size. On the other hand, it is important to distinguish this level of growth, even if it lands at the top of the growth charts by percentages, from the kind of meteoric

175. RENFRO, *supra* note 163, at 4–5.

176. ADA CNTY. HIGHWAY DIST., ACHD BUDGET: FISCAL YEAR 2021, <https://www.achdidaho.org/Departments/ChiefOstaff/Budget.aspx> (last visited Apr. 9, 2022).

177. Wyatt Clarke & Matthew Freedman, *The Rise and Effects of Homeowners Associations*, 112 J.URB. ECONS. 1, 9 (Fig. 5) (2019).

178. *See e.g.*, ARDEN H. RATHKOPF, ET AL., RATHKOPF'S THE LAW OF ZONING AND PLANNING § 82:2 (4th ed., 2021) ("The most significant type of public land use control, zoning ordinances, regulate the use of land through the exercise of the police power in accordance with a comprehensive plan for the entire community. As an exercise of the state police power to promote the general welfare, zoning is largely divorced in concept, creation, enforcement, and administration from restrictions arising out of agreements between private parties who, in the exercise of their constitutional right of freedom of contract, can impose whatever lawful restrictions upon the use of their lands that they deem advantageous or desirable. Zoning restrictions and restrictions imposed by private covenants are independent controls upon the use of land, the one imposed by the municipality for the public welfare, the other privately imposed for private benefit.").

179. *See* Clarke & Freedman, *supra* note 177.

180. Warren, *supra* note 5.

181. Don Day, *Data: New Data Shows Boise Area 8th Fastest-Growing in the US*, BOISEDEV (Mar. 30, 2020), <https://boisedev.com/news/2020/03/30/boise-idaho-growth-rate/>.

182. *Id.*

183. *Id.*

growth that created cities like Chicago with the rush of industrialization. For instance, between 1870 and 1900, Chicago's population went from just below 300,000 to almost 1.7 million.¹⁸⁴ The Treasure Valley's growth, by comparison, is significant but manageable should the region choose to do so.

Another recent study using U.S. Census data found that in 2016 the region had 257,561 housing units, with 180,888 units in Ada County and 76,676 units in Canyon County.¹⁸⁵ That was almost a 40% increase from 2000, when there were just 166,481 housing units in the Treasure Valley, with 118,516 units in Ada County and 47,965 units in Canyon County.¹⁸⁶ Not surprisingly, the growth was largely in the Ada County suburbs of Boise, with Meridian (2000: 12,293 units; 2016: 35,355 units), Boise (2000: 77,850 units; 2016: 94,810 units), Eagle (2000: 4,048 units; 2016: 9,188 units), Kuna (2000: 1,793 units; 2016: 5,970 units), and Star (2000: 681 units; 2016: 3,192 units) leading the way in housing production.¹⁸⁷ In most locations, the housing type is almost always single-family.¹⁸⁸ For instance, Meridian's percentage of single-family housing has increased over the last several decades (1990: 65%; 2000: 85%; 2015: 87%).¹⁸⁹ Because of the growth, the vacancy rates for housing in most of the Treasure Valley's jurisdictions hover between 2-7%, while the national average for housing vacancy is around 12%.¹⁹⁰

A current zoning map reflects the dominance of residential zoning in these suburbs. For instance, in Meridian, 71.13% of the land area currently incorporated is zoned residential.¹⁹¹ These residential neighborhoods are primarily developed at three to five dwelling units per acre with single-family detached homes.¹⁹²

It is probably also no surprise that almost all of the development in the suburbs is automobile-dependent. There is one federal highway in the Treasure Valley—I-84—with a connector—I-184—that services Boise.¹⁹³ That highway provides the primary east-west mode of communication in the Treasure Valley.¹⁹⁴ As development moves into more northern communities, access to I-84 becomes more problematic and traffic from new, northern suburbs, such as Eagle, is also problematic. The only other alternative east-west roads are State Street, a large

184. JEFFREY STEIN, *NORTHEAST AND MIDWEST: AN ENVIRONMENTAL HISTORY* 139 (2005).

185. CITY OF MERIDIAN PLAN. DIV., *EXISTING CONDITIONS REPORT 2017: ADDENDUM TO THE CITY OF MERIDIAN COMPREHENSIVE PLAN 2-9, MERIDIAN CITY, IDAHO* (2017), <https://meridiancity.org/planning/files/180220%20Existing%20Conditions%20Report.pdf>.

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

191. CITY OF MERIDIAN PLAN. DIV., *supra* note 185 at 3-2.

192. CITY OF MERIDIAN PLAN. DIV., *supra* note 185, at 3-2.

193. *See infra* Figs. 9 & 10.

194. *See infra* Figs. 9 & 10.

arterial, or Hill Road, a winding two-lane road that snakes along the northern foothills before directing cars, controversially, down Harrison Boulevard—the region’s toniest address—and into downtown Boise.¹⁹⁵ The problematic traffic has made certain needs for transportation development painfully obvious.¹⁹⁶ The region needs more north-south connections; Eagle Road, which is the primary commercial shopping district in Meridian,¹⁹⁷ is the state’s busiest roadway as it connects many of the suburbs to the highway.¹⁹⁸ It also makes clear that westward expansion of the population will almost certainly necessitate a westward expansion of jobs. Of course, economically speaking, Boise wants to retain its dominant position in the region’s economy but doing so will mean resolving the transportation problem. A recent report found Boise’s traffic problems to be the worst in the nation.¹⁹⁹ While that report was met with local skepticism, it highlights that at certain times of the day, and in certain locations, living in Boise has already begun to feel like Phoenix, or even Los Angeles.²⁰⁰

195. See *infra* Figs. 9 & 10.

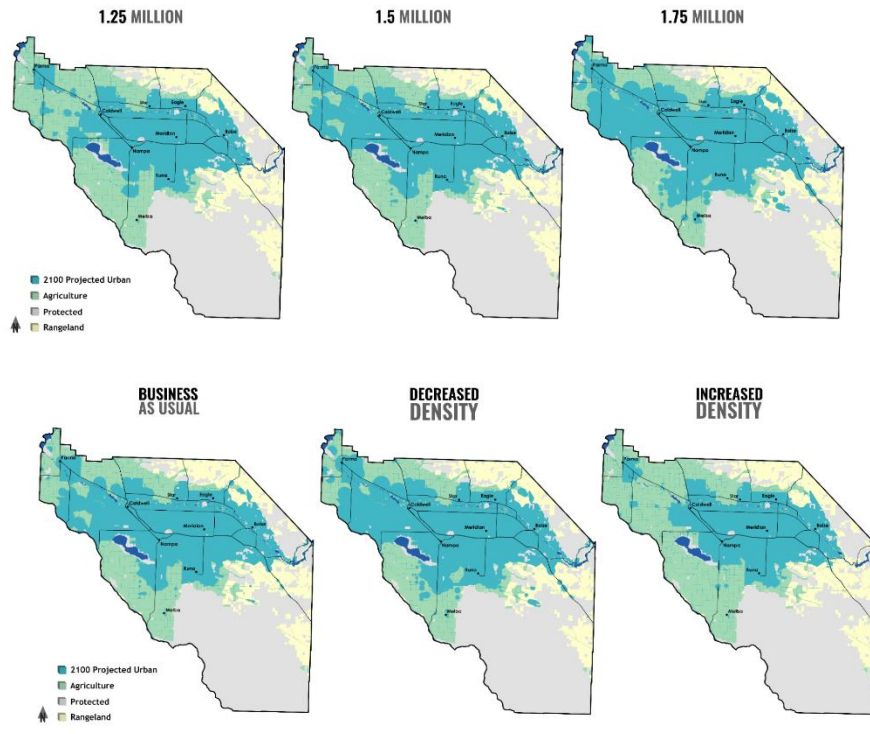
196. See, e.g., *Harrison Boulevard*, THE NORTH END, <https://northend.org/harrison-boulevard/> (last visited Nov. 18, 2021) (“Harrison Boulevard symbolizes Boise’s rich and diverse history; however, it is at risk due to its position at the base of the Boise Front, in the path of foothills development. Such development will result in increased traffic and congestion on the boulevard. We are united in finding solutions to these and other challenges.”).

197. Patty Bowen, *Officials Estimate 14K More Cars on Eagle Road Daily by 2040*, IDAHO PRESS (July 2, 2019), https://www.idahopress.com/meridian/news/planning_and_construction/officials-estimate-14k-more-cars-on-eagle-road-daily-by-2040/article_6ec60b84-e527-57a7-a02b-8d5e1e19dbb0.html.

198. *Id.*

199. Anna Rahmanan, *Boise in Idaho Officially Ranks as the Worst City for Rush Hour Traffic in the United States*, TIMEOUT (Feb. 16, 2021), <https://www.timeout.com/usa/news/boise-in-idaho-officially-ranks-as-the-worst-city-for-rush-hour-traffic-in-the-united-states-021621>.

200. *Id.*



Figs. 9 and 10. Growth projections for 2100 in the Treasure Valley.²⁰¹

A 2011 study by professors at Boise State University²⁰² modeled the growth of the region's urban growth through 2100 under three regional population scenarios (1.25 million, 1.5 million, and 1.75 million people in 2100) and how those populations would play onto the region's rectilinear form in the coming years under three density scenarios: business as usual (the existing, lax planning approach); a decrease in existing density, which would follow exurban development patterns; and an increase in existing density, following so-called "smart growth" strategies.²⁰³ The results are important for the broader region to more fully understand the immensity of growth almost certain to come to this place. Under even the increased density model, the entire existing regional area, which is now separated by

201. NARDUCCI ET AL., *supra* note 35, at 5, Fig. 1.

202. Brandt et al., *supra* note 135, at Figs. 8 and 9.

203. Brandt et al., *supra* note 135.

significant agricultural lands and open spaces, would be urbanized.²⁰⁴ That includes every open piece of land from the far reaches of Boise on the eastern side of the valley to the still-small communities of Nampa and Caldwell on the western side of the valley.²⁰⁵ Similarly, development would stretch all the way from Star and Eagle in the northern edge of the valley to Kuna at its southern tip.²⁰⁶ The scenarios re-direct thought away from whether the areas between the historically-existing cities of the region will fill in; the maps foresee that even development that proceeds under a smart growth approach will fill in with certainty.²⁰⁷ Instead, attention shifts to how far beyond existing communities on the western fringe—the Caldwells and Nampas of Canyon County—the growth will go.²⁰⁸ Attention also shifts to the character of the development that will, in as short as eighty years, blanket the community that still enjoys a relatively rural way of life with new urbanized spaces.²⁰⁹ The character of that urbanism, and how that development proceeds, will play a significant role in the quality of life that the region enjoys by the century's end, not to mention the interstitial moments along the way. The problems of growth can creep up slowly, but in many ways, they have already arrived, such as the traffic problems previously noted.²¹⁰ Is there a way to plan the growth so that transportation needs are met; that open space and outdoor activities remain readily available and accessible; that the place retains the character that makes it so attractive now, as it grows and the problems, and the solutions, become more complex?

III. PART II: LAW AND POLICY OF FAST-GROWTH CITIES

Boise presents an opportunity to think about whether these 21st century growth cities have a chance to get ahead of any of the major issues—to actually do planning—or if the necessity of planning is only accepted by communities after it is too late. What are the tools available, and what are needed, to help such communities learn from past mistakes of growth before the communities make them anew? How does that work in a place like the Treasure Valley, where a comparatively liberal urban core is surrounded by very conservative, property rights-focused suburban and exurban majority?

A. Lessons of Planning's First Century for Mid-Sized Cities

Everything about Boise's growth is predictable and expected; American cities, especially its Western cities, have been at this point of development so many times

204. Brandt et al., *supra* note 135.

205. Brandt et al., *supra* note 135.

206. Brandt et al., *supra* note 135.

207. Brandt et al., *supra* note 135.

208. Brandt et al., *supra* note 135.

209. Brandt et al., *supra* note 135.

210. See Rahmanaman, *supra* note 199, and accompanying text.

before. The only question is whether anything can be done about it to build a more functional community. This problem of the mid-sized growth city is not just an American dilemma; in its Fifth Assessment, the Intergovernmental Panel on Climate Change's noted that "[t]he urban institution conundrum" is that "rapidly urbanizing cities—cities with the greatest potential to reduce future GHG emissions—are the cities where the current lack of institutional capacity will most obstruct mitigation efforts."²¹¹ The same is true with regard to adaptation efforts as well.²¹² In other words, the problems of growth faced by places like Boise are almost universal in the growth of cities worldwide. There is a threshold at which growth arrives, and a community can either respond to it effectively, or continue on in a variety of dysfunctional ways: endless real estate speculation of greenfields; corruption of urban politicians; boondoggle projects; infrastructure that serves only the wealthy; and the long list goes on.

The threshold moment of growth faced by many of these mid-sized cities, though, should not be a moment for resignation. Taken in the grand scheme of urbanism, the kinds of growth faced by these mid-sized cities the world over were, until recently, the problems of only the world's largest cities. In 1800, Beijing, China, was the only city in the world with a population over one million.²¹³ At that time, London, England, was the next largest city in the world with a population of 750,000, or about the size that Boise is now.²¹⁴ Most of the problems of the contemporary growth city are post-industrial in origin.²¹⁵ The idea that a region would grow from 50,000 to 750,000 in seventy years, as the Boise region has, was incomprehensible prior to the Industrial Revolution.

With this in mind, when confronted with the problems of urbanism that face places like Boise today, it is important to temper doubt or resignation with historical perspective. There is little precedent for the widespread infrastructural needs of mid-sized cities in this moment in history; there are also few good models for these cities to follow. The majority of world cities have struggled to manage the last two hundred years' transitions of urbanism and industrialization, not to mention the

211. SHOBHAKAR DHAKAL ET AL., CLIMATE CHANGE 2014: MITIGATION OF CLIMATE CHANGE, CONTRIBUTION OF WORKING GROUP III TO THE FIFTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE § 12.6.1 (2014) https://www.ipcc.ch/site/assets/uploads/2018/02/ipcc_wg3_ar5_full.pdf [hereinafter IPCC AR5 WG III].

212. AROMAR REVI ET AL., CLIMATE CHANGE 2014: IMPACTS, ADAPTATION, AND VULNERABILITY, CONTRIBUTION OF WORKING GROUP II TO THE FIFTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE § 8.4.3.4 (2014), https://www.ipcc.ch/site/assets/uploads/2018/02/WGIIAR5-PartA_FINAL.pdf [hereinafter IPCC AR5 WG II].

213. Jeff Desjardins, *Ranking the World's Most Populous Cities, over 500 Years of History*, VISUAL CAPITALIST (July 18, 2019), <https://www.visualcapitalist.com/worlds-most-populous-cities-500-years-history/>.

214. *Id.*

215. *Id.*

automobile and several revolutions around work that have passed city economies through stages of factory-based industrialism, service work, and Internet-based economies.²¹⁶ If the physical manifestation of these transformations in our cities have failed to keep up, it is understandable.

This is true, at least in part, because property institutions prioritize stability over time. Real property is, for most people, their single-largest investment. Institutions of property have usually sought to stabilize that investment. All too often, that stability had a social impact, such as the fee tail male's draconian bundling of property of a family's estate into the hands of the first-born male child, or racially restrictive covenants that sought to stabilize white property values at the cost of limiting African-Americans' access to the same mortgage tools that have financed the American Dream.²¹⁷

The same issues have played out at the urban scale. Cities have tried to stabilize their growth through tools like zoning and subdivisions that often are required to have homeowners associations, a private land use governance tool that usually far exceeds the limits of the types of regulation individuals would accept from a local government.²¹⁸ Zoning and HOAs, however, though usually facially neutral, have locked in patterns of development that favor the kinds of investment usually offered to white, middle-class Americans, most notably in the single-family district that, like cities in Boise, is routinely half of American cities' land use by area.²¹⁹ Such areas usually prohibit things like duplexes or multi-family housing products, such as the apartment building, which America's most famous zoning case, *Euclid v. Ambler*, referred to as a nuisance.²²⁰

If American planning began, in earnest, with New York City's first zoning code in 1916, the shape of where most Americans lived was defined by suburban single-family districts serviced by neighborhood commercial districts at best, strip malls and superstores surrounded by acres of parking lots, in the all-too-common scenario.²²¹ While planning could create places like New York City, Chicago and San Francisco, most of the time its highest manifestations were exclusive suburban enclaves like Westchester County, Chicago's North Shore, and San Francisco's

216. See, e.g., PETER HALL, *CITIES OF TOMORROW: AN INTELLECTUAL HISTORY OF URBAN PLANNING AND DESIGN SINCE 1880* 12–48 (4th ed. 2014) (describing the rise of planning in response to industrialism and the urban “slum”).

217. Paige Glotzer, *How the Suburbs Were Segregated: Developers and the Business of Exclusionary Housing, 1890–1960* 53–54 (2020); see also Stephen R. Miller, *Baltimore and the Legal History of Housing Segregation*, 30 J. AFFORDABLE HOUS. AND CMTY. DEV. L. 137, 140–43 (2021).

218. See, e.g., ARDEN H. RATHKOPF ET. AL., *RATHKOPF'S THE LAW OF ZONING AND PLANNING* 5 (2021).

219. See GLOTZER, *supra* note 217, at 39–50.

220. *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926) (“[A]partment houses, which in a different environment would be not only entirely unobjectionable but highly desirable, come very near to being nuisances” when they become pervasive in single-family districts.).

221. David W. Dunlap, *Zoning Arrived 100 Years Ago. It Changed New York City Forever*, N.Y. TIMES (July 25, 2016), <https://www.nytimes.com/2016/07/26/nyregion/new-yorks-first-zoning-resolution-which-brought-order-to-a-chaotic-building-boom-turns-100.html>.

southern peninsula developments that became the templates followed by developers seeking to offer middle-class white Americans some version of that country-urbanism, or garden city life, that were perfected in the early twenty-century in inner-ring suburbs servicing the wealthy.²²² After the Levittown was built for middle-class white Americans on Long Island, it was replicated tirelessly across the country in waves of successive suburbanization.²²³ These places were given access to whatever core of urbanism once existed in the region by the great highways that divided parks and low-income communities, not to mention cities from their waterfronts and jobs from housing.²²⁴ That development pattern, in so many places, is encased—literally—in the concrete of the roads, as well as by invisible boundaries, like those of school districts that maintain property values, and make change in the existing physical environment something akin to social revolution.²²⁵

But it may be coming to that. It is no coincidence that the greatest racial awakening in some time occurred with the death of an African-American man, George Floyd, in a city that had just begun to reckon with how its pattern of single-family residential development had led to an extraordinary inequality of opportunity for its white and black communities. In its most recent comprehensive plan amendment, passed just before the summer of revolt resulting from Floyd's death, Minneapolis had expressly linked its pattern of development to this century of complicated property rules reinforced by structures of local government that placed the American Dream out of the reach of its African American community.²²⁶

222. KENNETH T. JACKSON, *CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES passim* (1987).

223. *Id.* at 237.

224. *Id.*; see also Leland Ware, *Plessy's Legacy: The Government's Role in the Development and Perpetuation of Segregated Neighborhoods*, 7 RSF: THE RUSSELL SAGE FOUNDATION J. SOC. SCI. 92, 93 (2021) ("In the 1950 and 1960s, the federal government subsidized the construction of the interstate highway system. Highways were frequently built through black neighborhoods, many of which were physically destroyed in the process. Some local officials used highways to separate black and white neighborhoods, reinforcing residential segregation."); Anne Taufen, *Urban Blue Space and "The Project of the Century": Doing Justice on the Seattle Waterfront and for Local Residents*, 4 BLDGS. 764, 767 (2014) (noting that highway construction in Seattle created "heavy traffic on the viaduct highway separate[ed] downtown from the waterfront" and "loomed as the true impediment to waterfront change").

225. See, e.g., Kendra Bischoff, *School District Fragmentation and Racial Residential Segregation How Do Boundaries Matter?*, 44 URB. AFF. REV. 182 (2008) (finding that school district "fragmentation does increase multiracial segregation between districts").

226. CITY OF MINNEAPOLIS, MINN., MINNEAPOLIS 2040, POLICY 1: ACCESS TO HOUSING: INCREASE THE SUPPLY OF HOUSING AND ITS DIVERSITY OF LOCATION AND TYPES., <https://minneapolis2040.com/policies/access-to-housing/>.

The fast-growth American cities of this generation can take several lessons from this last century of planning. These lessons could be summarized something like this:

Zoning was a powerful tool for solving the obvious problems of industrial uses located too close to residential or commercial districts.²²⁷ The environmental effects of that industrialization were not acknowledged meaningfully until major environmental laws of the Sixties and Seventies, and the placement of those environmental effects next to communities of color and low-income communities has only begun to be fully acknowledged and addressed through the environmental justice movement.²²⁸

Land use controls were routinely complicit in causing sprawl, even as advocates of land use planning sought to utilize such tools to contain rapid urban expansion with tools like adequate public facilities ordinances, green belts, and tempo controls.²²⁹ Those efforts to contain sprawl were almost always no match for the generally-applicable provisions of zoning codes that called for generous parking (often tied, for commercial districts, to the most trafficked day of the year, which was usually the shopping day after Thanksgiving known colloquially as Black Friday), as well as large setback requirements that routinely left suburban commercial

227. *See, e.g.*, *Hadacheck v. Sebastian*, 239 U.S. 394, 410 (1915) (upholding zoning ordinance that shut down a brickyard because of its proximity to residential neighborhoods, holding that “there must be progress, and if in its march private interests are in the way, they must yield to the good of the community”).

228. LUKE W. COLE & SHEILA R. FOSTER, *FROM THE GROUND UP: ENVIRONMENTAL RACISM AND THE RISE OF THE ENVIRONMENTAL JUSTICE MOVEMENT* 64 (2001).

229. As but one example typical of late-twentieth century development contradictions, suburban land use controls routinely locked in low-density single-family residential development districts and suburban strip-mall retail, all-the-while anti-sprawl land use advocates were inventing strategies to encourage density. *See, e.g.*, R Pendall, *Do Land-Use Controls Cause Sprawl?*, 26 ENV'T AND PLAN. B: PLAN, AND DESIGN 555, 567 (1999) (“In 1982, 5.4 persons lived on the average urban acre in these 159 growing counties. By 1992, that population density had slipped to just 5.0 persons per acre, after a decade of urbanization at densities averaging 3.8 people per acre. Although California, Maryland, and Arizona maintained or increased their historic population density in the 1980s, in all other states the density decreased. Had all the states simply maintained their 1982 density throughout the 1980s, these metropolitan areas would have required 900,000 fewer acres for urbanization, more than a quarter of the 3.2 million acres actually newly urbanized. Some counties in these metropolitan areas were excluded from the analysis because they lost population. Even those counties in which the population declined experienced growth in urbanized area between 1982 and 1992, suggesting even more sprawl than is suggested by the statistics presented here. Public policy very clearly and importantly affects sprawl. It matters how local governments pay for new growth. Counties widely covered with adequate public facilities ordinances, which require that developers maintain the level of service in major off-site infrastructure systems, grew more compactly than those without APFOs.”).

developments sitting in acres of useless space covered in a sea of Kentucky bluegrass.²³⁰

Federal policy was routinely heavy-handed throughout the twentieth-century, and seldom respected the nuance and patterns of local development needed to build integrated cities. Some of these policies expressly stated the prejudices of the country at the time, such as mortgage policies of the Federal Home Loan Bank in the thirties that canvassed American cities and refused to offer federally-backed mortgages in areas where African-American, and other un-favored ethnicities, lived.²³¹ Federal public housing projects were, from the beginning, segregated, and the lack of bi-partisan support for federal housing doomed necessary maintenance funds for the projects.²³² Federal highways went the way of the least-expensive route, often destroying low-income communities, communities of color, and destroying public property like parks and access to ports.²³³ Federal urban renewal funds incentivized state and local governments to take extraordinary urban renewal funds by tearing down, rather than improving, existing community structures.²³⁴ This led to flawed, unthoughtful urban renewal that left many American cities scarred with massive parking lots where neighborhoods once were.²³⁵

Structures of local government, special districts, and private land use tools like restrictive covenants, have been used to create boundaries and often invisible lines that define access to opportunity and, very often, where development will go. The most obvious is the proliferation of the suburb as its own city once contract for services from counties—often called the “Lakewood Plan” based upon the city in Los Angeles County that was the first to perfect this approach—became common.²³⁶ Less obvious is the school district, which often is an invisible boundary that defines which side of the street will have access to a prestigious school, and

230. *What Is Black Friday Parking?*, STRONG TOWNS, <https://www.strongtowns.org/blackfridayparking> (last visited Sept. 9, 2021).

231. *Mapping Inequality: Redlining in New Deal America*, <https://dsl.richmond.edu/panorama/redlining/#loc=5/39.1/-94.58> (Map is interactive. Click on specific locations for more information.).

232. RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* 17–38 (2017).

233. *Id.* at 93–100.

234. There are many excellent studies of this period, most of which focus on the legacies of specific cities. Two recent titles of note are WALTER JOHNSON, *THE BROKEN HEART OF AMERICA: ST. LOUIS AND THE VIOLENT HISTORY OF THE UNITED STATES* 291–336 (2020) (telling the history of urban renewal in St. Louis); LIZABETH COHEN, *SAVING AMERICA'S CITIES: ED LOGUE AND THE STRUGGLE TO RENEW URBAN AMERICA IN THE SUBURBAN AGE* (2019) (telling the history of urban renewal in Boston and New York City and other New England cities through the career of a prominent practitioner).

235. See JOHNSON, *supra* note 234, at 291–336

236. *The Lakewood Plan*, CITY OF LAKEWOOD, CAL., <https://www.lakewoodcity.org/About/Our-History/The-Lakewood-Plan> (last visited Jan. 20, 2022).

which will have to make do with something less.²³⁷ In western communities, equally important invisible lines are often drawn by irrigation districts, which provide access to water in arid landscapes.²³⁸ These special districts, often created to fund infrastructure by developers who transfer upfront costs to future homeowners through assessments that pay off bonds, can significantly alter the taxing burdens even within a city.

A response to this decentralization were notable efforts at regionalism. In *The Quiet Revolution in Land Use*, Fred Bosselman and David Callies declared the “ancient regime” of local control over.²³⁹ The post-mortem for local government control of land use, with hindsight, was premature. In the late sixties, it was possible to believe there was a new era ahead. There was a national land use bill floating around in Congress, that would have given the American land use system a more national approach like those of many European countries.²⁴⁰ There were also a bevy of new interstate compacts, such as the Tahoe Regional Planning Authority, to address inter-state land use and resource planning issues that usually involved water resources as well.²⁴¹ Regional governments proliferated, like the California Coastal Commission, but most routinely lacked actual decision-making authority on land use.²⁴² Fifty years later, regionalism, as a salve for decentralization of local governments, remains elusive in terms of general purpose governments, but may still be possible in special purpose districts that can cross urban boundaries, if there is a will to do so.

Twenty-first century cities must also contend with the legacy of Euclidean zoning’s failures. By the fifties, it was obvious to most local governments that Euclidean zoning could not reproduce the kinds of urban spaces that were routinely the most popular in cities’ pre-zoning land use patterns and also were inflexible to permit the type of suburban subdivision that increasingly was popular with Americans and speculative greenfield developers.²⁴³ The result were a series of tools that fundamentally undercut the rationality of Euclideanism, if it also yielded a workable development option.²⁴⁴ The first of these was the planned unit development, or PUD,²⁴⁵ which can sound like just another of alphabet soup

237. *Nice White Parents*, N.Y. TIMES (July 23, 2020), <https://www.nytimes.com/2020/07/23/podcasts/nice-white-parents-serial.html>.

238. IDAHO CODE §§ 43-101–43-119 (governing irrigation districts).

239. FRED BOSSELMAN & DAVID CALLIES, *THE QUIET REVOLUTION IN LAND USE CONTROL* 12 (1971), <https://eric.ed.gov/?id=ED067272>.

240. H.R. 10294, 93rd Cong. (1974).

241. TAHOE REG’L PLAN. AGENCY, <https://www.trpa.gov/> (last visited Sept. 21, 2021).

242. CAL. COASTAL COMM’N, <http://www.coastal.ca.gov/> (last visited Sept. 21, 2021).

243. Daniel R. Mandelker, *Legislation for Planned Unit Developments and Master-Planned Communities*, 40 THE URB. LAW. 419, 420 (2008).

244. *Id.* at 428 n. 31 (noting that planned unit developments were based on the premise of a “floating zone,” which defied the logic of Euclidean zoning, but which was upheld as legal by state courts).

245. *See generally id.*; *see infra* note 395.

abbreviations that litter land use planning. In practice, the PUD was the “release valve” to permit bargaining and discretion where even the most discretionary of permits in a local government’s code wouldn’t allow a particular development.²⁴⁶ Useful as it was, the PUD challenged the rational nature of Euclideanism—the general applicability of regulations in a district—through wide-ranging discretion.²⁴⁷ In some states, the use of a PUD was limited to just large scale developments, but in other states, PUDs could be granted for almost any development.²⁴⁸ The end result was a code with hundreds of pages of regulations, many of which could be waived and altered through a single-permit that operated like a secret code only doled out to the well-connected or most-professionalized of developers.²⁴⁹ Similarly, the rise of development agreements in many states permitted the land use permitting process to be facilitated by—or even overtaken—by a contract-based document that could elaborate in extraordinary details the future of a decades-long development project.²⁵⁰

These tools of discretion became increasingly important for local governments because they were, simultaneously, often facing backlash on the basic systems of funding growth and infrastructure. In most local governments, the property tax is the most efficient method to pay for infrastructure installation and upkeep.²⁵¹ By the seventies, however, a series of property tax revolts, led by Proposition 13’s passage in California, upended that usual approach by freezing the valuation and tax burden of property by local governments.²⁵² This hit fast-growing Western cities the hardest because they needed funding to build new infrastructure, but they couldn’t provide it on property tax roles that were lessened.²⁵³ This led to an increasingly byzantine and contentious effort to place

246. Mandelker, *supra* note 243, at 420; *see infra* note 395.

247. Mandelker, *supra* note 243, at 420; *see infra* note 395.

248. Mandelker, *supra* note 243, at 420; *see infra* note 395.

249. Mandelker, *supra* note 243, at 420; *see infra* note 395.

250. Daniel P. Selmi, *The Contract Transformation in Land Use Regulation*, 63 STAN. L. REV. 591, 593–94 (2011).

251. *Understanding Proposition 13*, OFF. OF THE ASSESSOR, CNTY. OF SANTA CLARA, <https://www.sccassessor.org/index.php/faq/understanding-proposition-13> (last visited Sept. 10, 2021).

252. Jared Walczak, *Property Tax Limitation Regimes: A Primer*, TAX FOUND. (Apr. 23, 2018), <https://taxfoundation.org/property-tax-limitation-regimes-primer/#:~:text=There%20are%20three%20broad%20categories,burdens%20across%20similarly%20situated%20properties> (“The revolt that began in California spread quickly, with fifty-eight property tax limitation measures appearing on ballots between 1979 and 1984.”).

253. *See generally* JEFFREY I. CHAPMAN, THE CONTINUING REDISTRIBUTION OF FISCAL STRESS, THE LONG RUN CONSEQUENCES OF PROPOSITION 13 (Jan. 1998) (Lincoln Inst. of Land Pol’y, Working Paper), <https://www.lincolninst.edu/publications/working-papers/continuing-redistribution-fiscal-stress>; *see*

development costs onto the developer who, the theory went, would pass those costs along to the new homeowner.²⁵⁴ This system of impact fees and exactions, however, placed considerable strain on all but the largest developers, who balked at these requirements and still do. The root cause, however, remains the structural funding problems of infrastructure, which are best paid by larger pools of individuals, but which have become toxic in American politics.

This, finally, is also an exhibit of how poor state and local government relations can also significantly alter the future of fast-growth urban regions. States, in both blue and red states, are increasingly turning to preemption to address what they perceive of as inadequacies to address regulations by local governments they do not like.²⁵⁵ Since at least *Hunter v. Pittsburgh* announced that local governments are “creatures of the state,”²⁵⁶ local governments have been subject to these desires of state government. The dysfunction of the American state and local government system is important because states—should they wish to do so—could be a natural ally in helping to address regional issues in urban areas when local governments cannot. This seems harder, though, as state legislatures are increasingly gerrymandered, and in red states, tend to place power in the hands of rural constituents that dislike the agglomeration of power and influence in urban centers.²⁵⁷

B. Property Rights

In Idaho, the conversation about planning for growth always begins and ends with property rights. By law, it must. As for beginnings, Idaho’s Local Land Use Planning Act, or LLUPA (pronounced “loop-a”),²⁵⁸ requires that every mandatory comprehensive plan for the State’s cities and counties begin with an analysis of

also Iris J. Lav & Michael Leachman, *State Limits on Property Taxes Hamstring Local Services and Should Be Relaxed or Repealed*, *CTR. ON BUDGET AND POL’Y PRIORITIES* (July 18, 2018), <https://www.cbpp.org/research/state-budget-and-tax/state-limits-on-property-taxes-hamstring-local-services-and-should-be>.

254. In Idaho, the community infrastructure district is the most obvious such tool, which has also become a matter of great dispute because it allows the developer to place costs of public improvements onto future homeowners who pay assessments for the improvements. See *IDAHO CODE* § 50-3102 (West 2021) (enabling community infrastructure districts); see also Don Day, *Some Boise Homeowners Pay Hefty Extra Tax while Neighbors Don’t: How Idaho’s Largest CID Works*, *BOISEDEV* (Oct. 5, 2021), <https://boisedev.com/news/2020/10/05/harris-ranch-boise-taxes/>.

255. See generally Richard Schragger, *The Attack on American Cities*, 96 *TEXAS L. REV.* 1163 (2018).

256. See *Hunter v. City of Pittsburgh*, 207 U.S. 161, 179–80 (1907).

257. Alvin Chang & Sam Levine, *As Biden Won the Presidency, Republicans Cemented their Grip on Power for the Next Decade*, *THE GUARDIAN* (Dec. 15, 2020, 07:00 EST), <https://www.theguardian.com/us-news/2020/dec/15/gerrymandering-republicans-map-charts-states>.

258. *IDAHO CODE ANN.* §§ 67-6501–6539 (West 1975).

property rights.²⁵⁹ The comprehensive plan of Canyon County, the western and less-developed of the Treasure Valley's two counties, puts property rights at the forefront of the discussion in the plan's first pages by listing policies for growth as follows:²⁶⁰

1. No person shall be deprived of private property without due process of law.
2. Canyon County will use the evaluation process developed by the Attorney General to determine whether property rights are being protected.
3. Canyon County should ask the questions on the checklist to determine potential impact of regulation on property.
4. Canyon County will consult with legal counsel if there appears to be potential adverse impact.
5. Private property shall not be taken for public use without just compensation.
6. The objectives provided in this section shall have priority over any other section contained in this Plan in the event of a conflict or contradiction that may result in an unconstitutional taking of private property.
7. Develop ordinances that identify or define uses associated with each land use zone to promote clear understanding of property rights. . . .
10. Land use laws and decisions should avoid imposing unnecessary conditions or procedures on development approvals.
11. Property owners shall not use their property in a manner that negatively impacts upon the surrounding neighbors or neighborhoods.
12. Property owners acknowledge and expect that Canyon County will preserve private property rights and values by enforcing regulations that will ensure against incompatible and detrimental neighboring land uses.

259. IDAHO CODE ANN. § 67-6003 (West 2016) (regulatory takings); IDAHO CODE ANN. § 67-6508(a) (West 2014) (property rights in comprehensive plan).

260. DEV. SERVS. DEP'T, CANYON CNTY., 2020 COMPREHENSIVE PLAN 2, 16 (2020).

13. Canyon County will take appropriate measures to enforce all nuisance ordinances to protect quality of life and private property rights.²⁶¹

To those who are well-versed in land use law and takings law, there is nothing extraordinary about the propositions here. Policies 1 through 7 and 10 essentially state the basic tenets of U.S. Supreme Court regulatory takings analysis that bind the county anyway.²⁶² Policies 11 through 13 essentially re-state black-letter common law nuisance ideas that have been in effect since the beginning of the seventeenth century in England and imported to the American colonies.²⁶³ Keep in mind, though, that these are the overarching policies that the county has announced for its entire effort to regulate land policy.²⁶⁴ There is no word about sustainability, resilience, or climate change.²⁶⁵ There is no paean to linking land use and transportation planning and no goal to steer growth into well-functioning cities.²⁶⁶ There isn't even a cowboy brim-nod to preserving agricultural lands or the rural way of life.²⁶⁷ All there is are rights; and to be clear, we are not talking about civil rights, individual rights, or anything but one type of right: private property rights.²⁶⁸

As for the last word, the same state statute requires that any person whose discretionary permit is denied by a local planning and zoning commission can request a statutory regulatory takings analysis, which has been put in place by the Idaho Attorney General.²⁶⁹ Again, to those with a knowledge of land use and planning law, the Idaho Attorney General's checklist will not look unfamiliar; it is identical, without a single state-level change, to the analysis required for any regulatory takings under the Idaho Supreme Court.²⁷⁰ It is the same analysis, for instance, that approved of, and continues to approve of, zonings like in *Euclid v. Ambler*, that reduced property values by 74% when a property owner's land in a

261. *Id.*

262. *Compare* DEV. SERVS. DEP'T, CANYON CNTY., 2020 COMPREHENSIVE PLAN 2, 16 (2020) with *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978).

263. *Compare* DEV. SERVS. DEP'T, CANYON CNTY., 2020 COMPREHENSIVE PLAN 2, 16 (2020) with *Aldred's Case* (1611) 77 Eng. Rep. 816 (KB) (among the first modern nuisance cases regarding air and odor pollution from pig sty).

264. *See* DEV. SERVS. DEP'T, CANYON CNTY., 2020 COMPREHENSIVE PLAN 2, 16 (2020).

265. *See id.*

266. *See id.*

267. *See id.*

268. *See id.*

269. Idaho Att'y Gen. Off., Idaho Regulatory Takings Act Guidelines 1, 5 (2020), <https://www.ag.idaho.gov/content/uploads/2018/04/RegulatoryTakings.pdf>.

270. *See id.*

Cleveland suburb designated for industrial development was re-zoned for single-family residential.²⁷¹

Taken in the light of these broader constitutional provisions, there is nothing unique about the constitutional law that frames the discussion of land use regulation in Idaho. The provisions are universally applicable all over the country; they apply even in liberal strongholds, like California or New York, and every other state. But Idaho is not a state where, for all its interest in property rights, there is a deep understanding of the intricacies of how property rights are treated by the legal system. In that vacuum of knowledge, the policies in Canyon County's comprehensive plan do have very real effect—a chilling effect—on land use planning. They appear intentionally poised to cabin any grand plans and warn of challenge. Similarly, the opportunity for the regulatory takings analysis should have no influence on commissioners because it is simply a restatement of existing law. However, it also operates as having a chilling effect on project denials because it places the threat of takings analysis front-and-center. In truth, such analysis and legal challenge is always present for any land use decision anywhere in the United States. By emphasizing it, though, Idaho tilts the scale of the perception about what regulation can do handily in the favor of the project applicant.

The choice by Idaho to bookend its planning process in property rights rhetoric is likely not a surprise. In his book *Order without Law*, Professor Robert Ellickson highlights ranchers in far-northern California that are adamantly adverse to following federal regulations for their herds but that, at the same time, are punctilious in ensuring they abide by private codes among the same ranchers for how they will manage the land.²⁷²

This attitude, which favors private governance over public government, is endemic to the culture of rural life of the great sagebrush steppe that spreads across eleven of the northwestern states.²⁷³ This last gasp of the Sagebrush Rebellion is led by members of the Bundy family, which tussled with federal land officials over payment for grazing permits in Nevada several decades ago.²⁷⁴ Today, it is Ammon Bundy who leads this charge, which increasingly is aimed at driving

271. Christopher Serkin, *Divergence in Land Use Regulations and Property Rights*, 92 S. CAL. L. REV. 1055, 1058 (2019); *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 384 (1926).

272. ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES passim* (Harvard University Press, 1991).

273. *Why Care About America's Sagebrush?*, U.S. FISH & WILDLIFE SERV. (Feb. 2014), https://web.archive.org/web/20211119163819/https://www.fws.gov/mountain-prairie/factsheets/Sage-steppe_022814.pdf; *North American Sagebrush Steppe*, WRANGLE, <https://wrangle.org/ecotype/north-american-sagebrush-steppe-and-shrubland> (last visited June 1, 2022) (providing map of sagebrush steppe ecosystem in Western United States).

274. Kirk Siegler, *Cliven Bundy Armed Standoff Case Going Back to Court*, NPR (May 29, 2020, 6:13 AM), <https://www.npr.org/2020/05/29/863906893/cliven-bundy-armed-standoff-case-going-back-to-court>.

attention through social media-worthy stunts like the take-over of the Malheur bird refuge in eastern Oregon.²⁷⁵ Bundy now makes his adopted home in Emmett, a small town at the far northern end of the Treasure Valley, and he has sought to expand his brand of imposing conservatism, which is steeped in a property rights message,²⁷⁶ through intimidation where law will not bend to him. He and his followers' increasingly violent antics have included shutting down public health meetings during the pandemic,²⁷⁷ shattering glass at the Idaho State Capitol, and other Capitol antics that led to him being wheeled out of the Capitol after being handcuffed to an office chair.²⁷⁸

While Bundy is an extremist, he finds an audience locally in part because there is a desire here to live a vision of life that is often summed up in the terms freedom and liberty.²⁷⁹ What that means in terms of property rights is an ability to build without oversight.²⁸⁰ What is less clear is how that political vision, one which aligns more closely with a natural law, pre-industrialized worldview of property rights,²⁸¹ has any relation to the actual functioning of development law or economics. In practice, the application of property rights to the development process in Idaho has the desired chilling effect—the ever-present equivalent of a heavily-armed man singing Christmas carols outside your house at night—while also insisting that none of the externalities of the development project should be considered. If it works as planned, the developer heralding property rights at a meeting in the Treasure Valley will convince the local officials to, as the columnist Thomas Friedman put it, permit “privatizing the gains and socializing the losses.”²⁸²

There is probably no better example of an effort to privatize gains and subsidize losses in Treasure Valley development than a recently proposed 2,000-

275. *Oregon Standoff Timeline: 41 Days of the Malheur Refuge Occupation and the Aftermath*, THE OREGONIAN (Feb 14, 2017, 11:23 AM), https://www.oregonlive.com/portland/2017/02/oregon_standoff_timeline_41_da.html.

276. Ryan Suppe & Tommy Simmons, *Bundy Group, People's Rights, Training to Defend from Government 'Force'*, KTVB (Dec. 16, 2020, 5:11 PM), <https://www.ktvb.com/article/news/local/bundy-peoples-rights-training-protest/277-fa74a2ed-58dc-4fac-bd09-896b88f3ef79>.

277. Madelyn Beck, *Idaho's Ammon Bundy Seizes on COVID-19 to Grow His Far-Right Network*, NPR (Oct. 16, 2020, 2:48 PM), <https://www.boisestatepublicradio.org/post/idahos-ammon-bundy-seizes-covid-19-grow-his-far-right-network#stream/0>.

278. Kirk Siegler, *Ammon Bundy Is Arrested and Wheeled Out of The Idaho Statehouse — Again*, NPR (Aug 25, 2020, 10:11 PM), <https://www.npr.org/2020/08/25/906046911/ammon-bundy-is-arrested-and-wheeled-out-of-the-idaho-statehouse>.

279. See, e.g., IDAHO FREEDOM FOUNDATION, <https://idahofreedom.org/> (last visited Nov. 18, 2021).

280. See generally Tony Arnold, *The Structure of the Land Use Regulatory System in the United States*, 22 J. LAND USE & ENV'T L. 441 (2007).

281. 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 471 (William D. Lewis ed., Rees Welsh & Company 1915) (1765).

282. Thomas L. Friedman, Opinion, *Can You Believe This Is Happening in America?*, N.Y. TIMES (Feb. 23, 2021), <https://www.nytimes.com/2021/02/23/opinion/us-politics-texas-mars.html>.

unit subdivision at the far-southern area of the Treasure Valley near Kuna.²⁸³ The developer submitted a proposal for the far-flung development to the local highway district, ACHD.²⁸⁴ Two commissioners noted that servicing the development would require all of the highway district's discretionary funding for years, leaving no such funding for the numerous other large projects underway.²⁸⁵ But pro-property rights members of the commission balked at the suggestion of even basic contributions from the developer beyond the extremely modest—and insufficient—minimums required by the highway district's code.²⁸⁶ To paraphrase the property rights-oriented commissioners, the expansion of the urbanism would be funded by the taxpayer; the profits would go to the developer, who had bought the distant land cheap, and would now profit from the improved roads the taxpayers would give him that would also substantially increase the value of the developer's investment.²⁸⁷

In truth, the Anglo-American property rights system was never supposed to work this way. Even in the age of Blackstone's proclamation that private property is a "sole and despotic dominion,"²⁸⁸ there were numerous ways that property law sought public benefit in exchange for permission to develop. Subdivision regulations, for instance, have always required dedications of roadways and other common areas, without compensation.²⁸⁹ Courts have, for centuries, viewed such subdivision as a privilege, rather than a right, for which the functioning of the new development must demand grants to the public for access and the provision of other private and public benefits, such as electrical and water easements,

283. Kate Talerico, *That 2,000-House Subdivision Just Proposed in Kuna? ACHD Says it Can't Afford Roadwork*, IDAHO STATESMAN (Dec. 13, 2019), <https://www.idahostatesman.com/news/local/community/west-ada/article238297458.html>; Kate Talerico, *ACHD Warns of the Cost of 1,900 New Houses in Kuna. The City Could Approve Them Anyway*, IDAHO STATESMAN (Jan. 22, 2020), <https://www.idahostatesman.com/news/local/community/west-ada/article239549883.html> [hereinafter *ACHD Warns of the Cost*].

284. *ACHD Warns of the Cost*, *supra* note 283.

285. *ACHD Warns of the Cost*, *supra* note 283.

286. *ACHD Warns of the Cost*, *supra* note 283.

287. *ACHD Warns of the Cost*, *supra* note 283.

288. *See, e.g.*, 2 BLACKSTONE, *supra* note 281.

289. *See, e.g.*, *Ross v. United States ex rel. Goodfellow*, 7 App. D.C. 1, 10–11 (D.C. Cir. 1895). That subdivision is a privilege, not a right, has been long established. *Id.* ("[I]t must be remembered that each owner has the undoubted right to lay off his land in any manner that he pleases, or not to subdivide it at all. . . . But he has no corresponding right to have his plat of subdivision so made admitted to the records. . . . [A local government may require] practical conformity in all subdivisions of land into squares, streets and avenues, with the general plan of the city as originally established, and this, regardless of the fact that it might, in instances, practically coerce the dedication of streets to public use which would otherwise have to be paid for.").

sidewalks, and open space or common area.²⁹⁰ Nuisance law has long prevented a property owner from using land in a way that jeopardizes the using of a neighbor's land,²⁹¹ and implied easement doctrines have permitted unwanted access by neighbors to permit active use of landlocked parcels and those parcels where reliance upon promises may have led to a non-possessory interest through estoppel.²⁹² Such provisions in common law, which limit property rights, could go on and on.

It must also be noted that the origins of the Anglo-American common law system—for instance, the days of Blackstone's eighteenth-century despotic dominion—were rooted in pre-industrial small-town rural life.²⁹³ The presumptions of that life vary considerably from those of a post-industrialized urban world, even in a mid-sized city like Boise that prizes its rural heritage. Part of what fast-growth cities, such as Boise, are up against is an urban reality that requires a more nuanced approach to property rights that is less absolute but ultimately permits the value of the property to rise due to inter-related benefits of the growth. At the same time, such communities remain hamstrung by inherited ideologies that are tied to a rural way of life. On the one hand, urbanism permits property development that raises the value of property; however, it also demands more regulation to make urban systems function adequately. On the other hand, if urbanism proceeds under the guise of a rural property rights approach, the necessary infrastructure to build out urban life—and thus maximize property values while minimizing externalities like traffic congestion and environmental pollution—cannot occur. That is the very real problem faced by Boise today, evinced by a local libertarian group's pronouncement that Boise's affordable housing shortage would solve itself if Boise's government would just “step aside and let private citizens and private

290. See generally JOHN R. NOLAN ET AL., *LAND USE AND SUSTAINABLE DEVELOPMENT LAW* 242–77 (9th ed. 2017).

291. *Slaughter-House Cases*, 83 U.S. 36, 62 (1872) (“Unwholesome trades, slaughter-houses, operations offensive to the senses, the deposit of powder, the application of steam power to propel cars, the building with combustible materials, and the burial of the dead, may all’ . . . ‘be interdicted by law, in the midst of dense masses of population, on the general and rational principle, that every person ought so to use his property as not to injure his neighbors”).

292. *Eliopoulos v. Kondo Farms*, 643 P.2d 1085, 1087, 102 Idaho 915, 917 (Ct. App. 1982) (“Our Supreme Court, in *McReynolds v. Harrigfeld*, 26 Idaho 26, 140 P. 1096 (1914), held that a license not reduced to writing would be deemed revocable, but could become irrevocable either (a) by estoppel, where the licensor allows the licensee to incur considerable expense in the belief that the license would be perpetual, or (b) by oral agreement between the licensor and licensee, coupled with consideration to support a perpetual license.”).

293. See, e.g., *A Population History of London*, THE PROC. OF THE OLD BAILEY, <https://www.oldbaileyonline.org/static/Population-history-of-london.jsp> (last visited Nov. 21, 2021). London, England, did not reach a population of 1 million until 1801. *Id.* By that time, the common law was already centuries old. *Id.*

developers make their own housing decisions.”²⁹⁴ Anyone who follows Boise development politics closely knows that the city hardly ever turns down a project, and so the bluster about the market is almost certainly false on the facts.

Those places that have succeeded in addressing the transition from rural to urban development fast enough to plan for growth have all managed to find ways to build authentic, local approaches. This has never been easy, in part, because it necessarily entails reenvisioning those longstanding notions of property that are purposefully intended to be stable and resist change. But the difficulties of a solid growth strategy are even more profound. Planning for urban growth is, itself, presently in disarray if it ever had a solid center. At one time, the forces of central planning gained steam under those like Lewis Mumford whose “city in history”²⁹⁵ concept gave vision to broad government powers. Housers like Catherine Bauer²⁹⁶ offered a vision of federal involvement in housing that had never previously occurred. Subsequent practitioners like Robert Moses in New York,²⁹⁷ Ed Logue in Boston,²⁹⁸ and Justin Herman in San Francisco²⁹⁹ utilized the tools of urban renewal to dramatically reshape fine-scaled cities in modernist terms. It is unfortunate that the post–World War II era was the only time of significant central planning the American city has ever known, for it was also a time that was also imbued with post-war notions of modernism that were too heavily tinged with brutalism on the one hand, and the academic repose of those like Le Corbusier who reenvisioned the city as a machine without concern for human emotion.³⁰⁰ It was a coalescence of power and aesthetics that produced banal results the planning profession has tried to live down for a long while.³⁰¹

294. Matt Tobeck, *In Its Bid to Address Affordable Housing, Boise Continues to Move Full Steam Ahead—In the Wrong Direction*, IDAHO FREEDOM FOUND. (Oct. 20, 2020), <https://idahofreedom.org/in-its-bid-to-address-affordable-housing-boise-continues-to-move-full-steam-ahead-in-the-wrong-direction/>.

295. See LEWIS MUMFORD, *THE CITY IN HISTORY: ITS ORIGINS, ITS TRANSFORMATIONS, AND ITS PROSPECTS* (1961).

296. See CATHERINE BAUER, *MODERN HOUSING* (1934).

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

298. See LIZABETH COHEN, *SAVING AMERICA'S CITIES: ED LOGUE AND THE STRUGGLE TO RENEW URBAN AMERICA IN THE SUBURBAN AGE* (2019).

299. See CITY FOR SALE, *supra* note 2; Adam Brinklow, *City Officially Removes Justin Herman's Name from Plaza*, CURBED S.F. (Nov. 17, 2017), <https://sf.curbed.com/2017/11/17/16669802/justin-herman-plaza-name-sf>.

300. See CITY FOR SALE, *supra* note 2.

301. See, e.g., Francesca Russello Ammon, *Commemoration Amid Criticism: The Mixed Legacy of Urban Renewal in Southwest Washington, D.C.*, 8 J. PLAN. HIST. 175, 202–08 (2009).

Although Jane Jacobs was an unlikely antagonist to Moses' worldview,³⁰² it is not surprising that opposition to concrete brutalism's impersonal aesthetic was forthcoming. Inevitably, the rebuke of Moses and his ilk was harsh, but what Jacobs could offer in its place as a form of growth governance beyond "eyes on the street" and "Mrs. Roosevelts" was also somewhat muddled.³⁰³ Her work ushered in the rise of community participation, an emphasis on the human experience and street life, all of which was a powerful antidote to the development machine of the day. But some years on, what started with Jacobs' insistence on community participation can be traced directly to what is today often derided as the NIMBY—or "not in my back yard"—problem.³⁰⁴ Jacobs, much like academics such as Professor Judith Innes,³⁰⁵ posited that what mattered most in development politics was the involvement of the community.³⁰⁶ Today, the idea of community of participation has become sullied by the activists who have sought to enforce *Euclid's* dividing line: the single-family district against the world.³⁰⁷ In fact, a recent study found that greater community participation in the planning process has one of the highest correlations with racially segregated neighborhoods.³⁰⁸

302. See, e.g., Anthony Paletta, *Story of Cities #32: Jane Jacobs v Robert Moses, Battle of New York's Urban Titans*, THE GUARDIAN (Apr. 28, 2016), <https://www.theguardian.com/cities/2016/apr/28/story-cities-32-new-york-jane-jacobs-robert-moses>; see generally JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* (1961).

303. Jacobs was intently focused on the effects neighbors could have in shaping their communities at a hyper-local level. See, e.g., JACOBS *supra* note 302, at 134 ("It takes surprisingly few hop-skip people, relative to a whole population, to weld a district into a real Thing. A hundred or so people do it in a population a thousand times their size. But these people must have time to find each other, time to try expedient cooperation—as well as time to have rooted themselves, too, in various smaller neighborhoods of place or special interest.").

304. Frank Chiachiere, *Jane Jacobs, Original NIMBY*, SEATTLE TRANSIT BLOG (Sept. 8, 2009), <https://seattletransitblog.com/2009/09/08/jane-jacobs-original-nimby/>.

305. See, e.g., JUDITH E. INNES & DANIEL E. BOOHER, *PLANNING WITH COMPLEXITY: AN INTRODUCTION TO COLLABORATIVE RATIONALITY FOR PUBLIC POLICY* (2010).

306. JACOBS, *supra* notes 302–303.

307. *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 394 (1926) ("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.").

308. Michael C. Lens & Paavo Monkkonen, *Do Strict Land Use Regulations Make Metropolitan Areas More Segregated by Income?*, 82 J. AM. PLAN. ASS'N 6, 12 (2016) ("We find that particular types of regulation, such as density restrictions, more independent reviews for project approval and zoning changes, and a greater level of involvement by local government and citizenry in the permitting process, are significantly associated with segregation overall and of the affluent, specifically when we control for a range of metropolitan area characteristics.").

Derision by academics has not stopped these “community-minded” forces, but we should not be surprised at NIMBYs playing the hand they were dealt. Land use patterns have been established, school district boundaries have been invisibly overlaid above them, and so have all other forms of funding for things like the arts, the sewers, the conservation of nearby open spaces, and on and on. To be surprised by NIMBYs use of those longstanding tools to achieve exclusionary objectives that have been in place for a century is simply exasperation that there are allocations of wealth through special districts and discretionary land use decisions that power—and prejudice—can bend to its will. And for those who have watched the long arc of land use over the past half century, it has become harder to discern where the power of community to stop the growth machine ends and the exclusionary forces of NIMBYism begin. As Professor William A. Fischel noted, homeowners vote to protect their property value, whatever their national political allegiances, because for most it is their singular source of financial independence.³⁰⁹ When individual financial futures are so closely tied to social norms about whom is welcome in a community, not to mention the architectural form of the development in which such newcomers arrive (apartments rather than houses), it is obvious that prejudices of the community—regardless of whether they are individually subscribed to—become personal financial choices for all but the naïve and the brave.³¹⁰ Most middle-class Americans are neither.

The result is that there are no obvious means of educating Americans into a better planning future. Also challenged is the Euclidean zoning model that emphasizes community involvement primarily in the form of project opposition.³¹¹ In communities that do not take effort to give themselves another form of engagement, the most vocal parts of the community will almost certainly show up at the moment of project opposition—the permit hearing—at the end of the project’s planning. This is a failure of the government, not the community. Governments that prevent participation early in development processes, which most do to placate developers who are usually reluctant to engage early on, should expect that opposition will not shrink away, but instead come full force to the hearing.³¹² Still, far too many local governments seek to placate nervous developers who would rather proceed through the stations of the development process, routinely undermining processes like the pre-application neighborhood meeting requirements by failing to show up with the right people or avoiding hard

309. WILLIAM A. FISCHEL, *THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES* 4 (2005).

310. *Id.*

311. *See, e.g.*, BOISE, IDAHO, CITY CODE § 11-03-03 (2019) (highlighting procedures for discretionary permits permitting community participation at neighborhood meetings and permit adjudicatory hearings).

312. *Id.*

questions.³¹³ While some developers may slip through, such an approach is never a useful prospect for a fast-growth community. The developer of a project that upsets the community today means problems for tomorrow's developer. That may be fine for a city where the next development is a distant horizon. A fast growth city, however, needs to maintain a constant appetite for the good things growth can bring among its citizens. Otherwise, the city may face a political revolt that can jeopardize the approval of future development. Few developers contemplate such systems, but city officials must.

There are at least four efforts that local governments, and states, can take to ensure communities embrace both growth and the regulation necessary to keep growth going. One such tool is a statewide office that provides planning assistance to growth regions. Many states have a statewide planning office; Idaho currently does not, though it maintained a Bureau of State Planning and Community Affairs until 2009.³¹⁴ As those times change, it is incumbent on the state government to continue to provide resources to plan for growth, even if that only includes assistance with statistical data and best practices. The Treasure Valley's federal metropolitan planning organization (MPO), which is called COMPASS and has no land use authority, does provide some of these services already.³¹⁵ COMPASS currently provides significant assistance to the region's smaller local governments who cannot perform their own statistical analyses.³¹⁶ A better model, however, is likely something similar to Colorado's Department of Local Affairs (DOLA), which provides detailed assistance in drafting policies that also affect structures of governance.³¹⁷ While land use is arguably the most important function of local government decision-making, a state agency could assist the region in thinking through alternative structures to governance. Such alternatives are sorely needed in this region where so few structures have been tried and resistance to government makes even the most modest experiment tenuous.

In addition, the region needs to work to educate its citizens—existing and newcomers—about the importance of planning for growth. Historically, this has worked through organizations such as Idaho Smart Growth, which recently put in place a Citizen's Planning Academy that provides knowledge about the planning process to local residents.³¹⁸ The process works, but the emphasis is on learning to

313. See, e.g., Anika Singh Lemar, *Overparticipation: Designing Effective Land Use Processes*, 90 *FORDHAM L. REV.* 1083, 1138 (2021) (arguing for the importance of early community participation and in exchange providing less voice later in discretionary permitting).

314. IDAHO LAND USE ANALYSIS STEERING COMMITTEE, *IDAHO LAND USE ANALYSIS 1*, 5 (2010), https://www.idahosmartgrowth.org/app/uploads/2014/04/idaho_land_use_analysis-final_summary.pdf.

315. About Us, *CMTY. PLAN. ASS'N OF SW. IDAHO*, <https://www.compassidaho.org/about.htm> (last visited Nov. 19, 2021).

316. *Id.*

317. *COLO. DEP'T OF LOC. AFFS.*, <https://cdola.colorado.gov/> (last visited Nov. 19, 2021).

318. *Citizens Planning Academy*, IDAHO SMART GROWTH, <https://www.idahosmartgrowth.org/citizens-planning-academy/> (last visited Nov. 19, 2021).

work within the existing system. Part of the problem is that the existing system is not capable of addressing the growth of the twenty-first century. While getting residents up to speed on how the process works now is important, so, too, is building some coalescence around regional ideas for growth.

There is likely no place in the world that has done this better than Copenhagen. After World War II, the city announced a "Five Finger Plan," a decision to grow the city in five linear development strands along which high-value transportation infrastructure could be built.³¹⁹ To this day, Copenhagen still uses that plan, which has allowed it to preserve access to open space in the interstices of the "fingers" of development.³²⁰ Otherwise, the priority might have been short-term developments that would have benefitted a few individuals.

Similar, but non-regulatory approaches have occurred in the United States, most notably in the Envision Utah program.³²¹ In the late 1990s, the Salt Lake City region was growing exponentially and with few growth controls in a region adverse to regulation.³²² The leaders of the community, however, noted a "brain drain" as their children were choosing to leave for other places that did not have the region's traffic, not to mention better community amenities.³²³ The business and religious leaders joined with government officials at all levels to create Envision Utah.³²⁴ The program, which has received widespread attention, does not have land use authority and does not participate in individual development decisions.³²⁵ Instead, it seeks primarily to help the region understand the need for growth management and the kinds of options that are available to the region.³²⁶ Sometimes this means playing growth management games with government officials or stakeholders, sometimes it means bringing in lecturers, and sometimes it means giving tours of developments that showcase the kinds of developments that can lead to a sustainable region.³²⁷ The San Francisco Planning and Urban Research (SPUR) organization is a similar organization in a more liberal city.³²⁸

319. DANISH NATURE AGENCY, DANISH MINISTRY OF THE ENV'T, *THE FINGER PLAN: A STRATEGY FOR THE DEVELOPMENT OF THE GREATER COPENHAGEN AREA* 1, 5 (2015), https://danishbusinessauthority.dk/sites/default/files/fp-eng_31_13052015.pdf.

320. *See generally id.*

321. ENVISION UTAH, <https://envisionutah.org/> (last visited Sept. 10, 2021).

322. ENVISION UTAH, *20TH ANNIVERSARY HISTORY BOOKLET* 1, 9 (2017), <https://static1.squarespace.com/static/5c059ead36099b1445c1d246/t/5d3f5c5698ec4a00011163e0/1564433530055/EnvisionUtah20thAnniversaryBook+Decreased+Size.pdf>.

323. *Id.*

324. *Id.*

325. *About*, ENVISION UTAH, <https://envisionutah.org/about> (last visited Oct. 25, 2021).

326. *Id.*

327. *Id.*

328. SPUR, <https://www.spur.org/> (last visited Sept. 10, 2021).

The need for education, though, begins in childhood where, at present, most localities do almost no training to understand what choices must be made for a city to grow. Several options here are worth noting. Boulder, Colorado has created a program called Growing Up Boulder, which works with young children to help them understand planning issues and even participate in them.³²⁹ For instance, some previous projects have included children working with city officials to plan a new park by helping the planning officials understand how the children like to use the space.³³⁰ The children have even testified at planning commission hearings.³³¹ Giving children this experience of not just working on planning issues, but participating in them, is a remarkable effort at inculcating the planning ethic early on. Similarly, there are a variety of programs that have sprung up across the country to help high school students understand urbanism. Perhaps the best known is the Urban Land Institute's UrbanPlan,³³² which brings real estate developers and local officials into classrooms to work on a development problem, which is then judged by a mock city council.³³³

Of course, the best of all these options is one that is home grown and fits with the ethos of the region. That could mean a long-term approach to educating the population about the benefits of growth, and what it takes to get there, that the region's local governments, as well as its business and nonprofit communities, can work toward together. That is a generational commitment, but one that is necessary to move from the simplistic vision of property rights as all, to one that creates value in property through coordination, regulation, and commitment to growth.

C. Government Structure

The contours of local government law are notoriously convoluted, and the politics can be arcane. However, there is probably no more important place to start in addressing growth than deciding how a fast-growth region will be governed. Since the U.S. Supreme Court upheld the rule that local governments are creatures of the state in *Hunter v. Pittsburgh*,³³⁴ it has been axiomatic in most states that states breathe life into local governments and get to decide what their powers will be.³³⁵ As a result, the local government question in fast-growth communities plays out in several important dimensions. The most obvious is how local governments

329. GROWING UP BOULDER, <http://www.growingupboulder.org/> (last visited Sept. 10, 2021).

330. GUB Publications, GROWING UP BOULDER, <http://www.growingupboulder.org/press.html> (last visited Nov. 19, 2021) (detailing numerous such engagements).

331. *Id.*

332. Urban Land Institute, *A Behind-the-Scenes Look at the UrbanPlan for Public Officials Workshops*, YOUTUBE (May 7, 2018), <https://www.youtube.com/watch?v=Qa4RSdHeYUs>.

333. *Id.*

334. *Hunter v. City of Pittsburgh*, 207 U.S. 161 (1907).

335. *See, e.g.*, 2 MCQUILLIN MUN. CORP. § 4:3 (3d ed. 2022) (discussing evolution of cities as "creatures of the state").

relate to the state.³³⁶ Another relatively obvious dimension is how local municipal corporations or cities relate to each other, as well as to the counties from whose land the cities are ultimately formed in most Western states, including Idaho.³³⁷ Less obvious, however, is the role of special districts in gluing the region together.³³⁸ The general purpose local governments—cities and counties—increasingly rely upon these special districts to fund both existing infrastructure, as well as new projects, as limitations on general purpose borrowing have proliferated.³³⁹ This section provides an overview of the kinds of problems that face fast growth cities in both governance as well as land use management.

The Treasure Valley's proliferation of local governments is emblematic of the broader trend away from general purpose governments toward special districts. The region has just two counties, fifteen cities, but over 130 special districts as of 2014.³⁴⁰ That doesn't include the proliferation of homeowner's associations (HOAs) that act as private governance for almost all new residential development in the region.³⁴¹ The complexity of the region is further exemplified by many suburban general purpose governments, such as Meridian and Eagle, receiving many of their services—such as fire and police—from Ada County.³⁴² As a result, even what appears like a general purpose government, such as the cities of Meridian and Eagle, are really hybrid governments. Thinking through growth problems, which almost always have externalities that cross local boundaries, necessitates engagement between general purpose cities and counties as well as special districts and private land use authorities.

At present, Idaho's tools for engaging growth through governance are singular: the area of city impact agreement (AOIs).³⁴³ Idaho statutes permit cities and counties to agree on the terms for which development will be approved in unincorporated areas of the county.³⁴⁴ Ostensibly, such agreements exist because the land in the AOI would someday be annexed into the city; however, while AOIs are necessary for annexation, cities and counties can negotiate AOIs for reasons

336. RICHARD BRIFFAULT & LAURIE REYNOLDS, *CASES AND MATERIALS ON STATE AND LOCAL GOVERNMENT LAW* 1–71 (8th ed. 2016).

337. See STEPHEN R. MILLER, UNIV. OF IDAHO COLL. OF L., ECON. DEV. CLINIC, *AREA OF CITY IMPACT AGREEMENTS IN IDAHO* (2013), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2200198.

338. BRIFFAULT & REYNOLDS, *supra* note 336, at 279–87.

339. See KATHRYN A. FOSTER, *POLITICAL ECONOMY OF SPECIAL-PURPOSE GOVERNMENT 20 (1997)* (finding states imposing debt limits also had a greater reliance on special district governments).

340. STATE OF IDAHO, LEGIS. SERV'S OFF., *SPECIAL DISTRICTS IN IDAHO*, REP. SR102113 at App. B (Jan. 14, 2014), <https://legislature.idaho.gov/iso/audit/special-reports/>.

341. Clarke & Freedman, *supra* note 177.

342. See, e.g., W. ADA SCH. DIST., <https://www.westada.org/> (last visited Sept. 11, 2021) (serving Meridian and Eagle incorporated areas, as well as unincorporated areas).

343. See MILLER, *supra* note 337.

344. IDAHO CODE ANN. §§ 50–222, 67–6526 (West 2021).

beyond the scope of annexations.³⁴⁵ A review of extant AOs, however, shows that almost all are extraordinarily basic agreements that do not offer significant advanced thinking about future growth.³⁴⁶

The state has also been more interested in ideologically limiting local government control without any real thought about the impact on long-term growth. The examples of this could go on for pages; a few examples suffice to prove the rule. In a recent legislative session, a legislator proposed limiting property tax collection in a manner that disincentivizes cities from approving dense, urban projects.³⁴⁷ The state has repeatedly rebuffed requests for a local option tax, which would permit cities to fund infrastructure.³⁴⁸ Like many legislatures across the country, the state has also engaged in preemption legislation to prevent a wide variety of local action. Examples include preempting regulation of ride-sharing companies and short-term rentals.³⁴⁹ Further, the state has sought to limit power in Democratic strongholds, requiring the districting of elections in cities over 100,000 in population.³⁵⁰ At present, this provision only applies to Boise and Meridian but will also soon apply to Nampa.³⁵¹ In other words, these special election provisions, which seem to limit Democratic control because Democratic council members tend to live in just several neighborhoods of those cities despite routinely winning city-wide elections, is yet another effort to undermine the will of urban residents for local control by the rural-dominated state legislature.³⁵²

At the same time, the state continues to focus on de-regulation efforts all-the-while never stopping to consider how rapid growth is negatively affecting the region as a whole.³⁵³ The state offers no solutions to urban problems, instead insisting that the increasingly complex urban environment should be managed in a

345. *Id.*

346. See MILLER, *supra* note 337.

347. H.R. 243, 65th, 1st Sess. (Idaho 2019).

348. Sven Berg, *Bieter Wants Transit. State Won't Let Boiseans Tax Themselves. Now Bieter Sees End Run*, IDAHO STATESMAN (Oct. 8, 2018, 12:39 PM), <https://www.idahostatesman.com/news/politics-government/state-politics/article219518990.html>.

349. IDAHO CODE ANN. § 49-2431 (West 2021) (ride-sharing companies); IDAHO CODE ANN. § 55-115 (West 2021) (short-term rentals).

350. Margaret Carmel, *New Idaho Law Will Force Boise to Adopt City Council Districts. It's Not Clear How That Will Work*, BOISE DEV (June 29, 2020), <https://boisedev.com/news/2020/06/29/boise-city-council-districts/>.

351. *Id.*

352. See *id.*

353. Recent deregulatory efforts include state laws preempting and limiting local regulation of short-term rentals, IDAHO CODE ANN. § 55-115(3) (West 2022), oil and gas exploration, IDAHO CODE ANN. § 47-315(6) (West 2022), and property tax assessment, IDAHO CODE ANN. § 63-602G (West 2022), to name but a few. In addition, the legislature has tried to challenge perceived liberalism in larger cities by requiring districting in cities with populations over 100,000. IDAHO CODE ANN. § 50-707A (West 2022).

manner similar to the small cities—usually with shrinking populations from which the majority of state legislators come.³⁵⁴

It is hard to imagine this state animus for local efforts to address growth management changing any time soon. But it is worth thinking through what would need to be done to make an effective planning environment in the region as a counterpoint to the current anti-local government approach. Foremost, the state government needs to accept that growing communities have legitimate reasons for taking on debt that facilitates growth. That acceptance would have several effects. First, an amendment to the Idaho Constitution's Article VIII, section 3, which governs the issuance of general obligation bonds, should be amended.³⁵⁵ An Idaho Supreme Court decision held that the "proviso clause" of that section required that the issuance of bonds without a supermajority approval of the local government's population required an expense to be both "ordinary" and "necessary"—a two-prong test—reversing a century of more lenient interpretation of the provision as just a one-prong test.³⁵⁶ Notably, the provision has not stopped the local governments faced with growth from borrowing, but it has forced them into increasingly more byzantine financing structures, as evidenced by an elaborate funding scheme for an update to Boise's convention center that was eventually

354. The most divisive issue that rural legislators refuse to grant urban communities is the local option tax, which rural legislators have blocked for decades. See *Rural and Urban Idaho Divided on Possible Local Sales Tax Bill*, BOISE STATE PUB. RADIO, (Jan. 4, 2019), <https://www.boisestatepublicradio.org/politics-government/2019-01-04/rural-and-urban-idaho-divided-on-possible-local-sales-tax-bill>. This anti-urbanism is pervasive in the political culture of the state. For an even more extreme version of this divide, see also the plan of Idaho gubernatorial candidate Ammon Bundy, *The Keep Idaho IDAHO Plan*:

History and human nature demonstrate that if we go down the path we are on now and build up and create dense and congested cities with large populations, traffic, and pollution, we will lose our conservative, traditional values. It's just what happens. If we are going to maintain our historic and traditional values, and ultimately Keep Idaho IDAHO, we must spread out and make Idaho's land available to the people while simultaneously ensuring that necessary land remains public land for multiple use purposes (under local jurisdiction). Then we can enjoy the fruits of prosperity and land ownership while maintaining our culturally conservative identity.

The Keep Idaho IDAHO Plan, AMMON BUNDY FOR GOVERNOR, <https://www.votebundy.com/about/keep-idaho-idaho-plan/> (last visited March 11, 2022) (expand subtitle "Solving the Affordable Housing Crisis").

355. IDAHO CONST. art. VIII, § 3.

356. *City of Boise v. Frazier*, 137 P.3d 388, 391, 143 Idaho 1, 4 (2006).

upheld.³⁵⁷ While the state has a legitimate concern that local governments do not become conduits for private developers' risky loan needs, they must also recognize that development almost always requires some kind of public investment. Making that public investment harder to fulfill does little to improve the public environment.

Similarly, the state should consider re-tooling its subdivision regulations for fast-growth areas. Subdivisions provide a manner for addressing growth that can be extremely powerful, perhaps even equally powerful to zoning regulation. Houston, Texas, for instance, relies almost exclusively on subdivisions regulations and restrictive covenants imposed through that process to provide land use governance in a city that has no zoning.³⁵⁸ Similarly, Idaho could provide a structure for governance through subdivision regulations that could encourage for more planning to occur in this phase of development. Subdivisions are also advantageous for development regulation because courts have routinely held that such subdivisions are a privilege rather than a right, and thus the public has a right to seek dedications and other public commitments that would make the project livable and contribute to the broader community at that time.³⁵⁹ A state statute that provided more context for this kind of analysis, such as requiring findings illustrating consideration of different types of externalities common from suburban development, would be a common approach pursued by larger population states that could also work here.

The state should also consider how best to facilitate growth management across the region. There are a variety of approaches. Many states have "graded" their cities; for instance, it is common to provide "tiers" of cities—A, B, and C-tiered cities—and provide different powers and obligations from each of those cities.³⁶⁰ This approach would potentially provide a way for those rural legislators opposed to certain government or land use rules and regulations from having those tools apply in their jurisdiction. But it would also require them to allow other jurisdictions, such as those in the Treasure Valley, to be able to live by different rules that the legislators may be ideologically opposed to. Idaho legislators have,

357. *Greater Boise Auditorium Dist. v. Frazier*, 360 P.3d 275, 285–86, 159 Idaho 266, 276–77 (2015).

358. Bill Fulton, *Houston Doesn't Have Zoning, but There Are Workarounds*, THE KINDER INST. FOR URB. RSCH. (Jan. 12, 2020), <https://kinder.rice.edu/urbanedge/2020/01/09/no-zoning-in-Houston-there-are-workarounds>.

359. See, e.g., James C. Nicholas & Julian C. Juergensmeyer, *A Rational Nexus Approach to Workforce Housing Land Development Conditions*, 52 UIC J. MARSHALL L. REV. 647, 650 (2019) (discussing a dedications approach to subdivision regulation with mitigation requirements and a policy of allowing developers to pay in lieu of constructing the infrastructure needed for mitigations).

360. Several states that classify cities include Alabama, Alaska, Indiana, Kansas, Kentucky, Michigan, Minnesota, Missouri, Montana, Nebraska, New Jersey, New Mexico, South Dakota, Utah, Virginia, and Washington. [Research on file with author].

historically, not been willing to allow such local autonomy, despite routinely making the argument that power should reside close to the people.³⁶¹

A re-tooling of infrastructure finance tools could, ultimately, make lending less expensive and more transparent. Today, urban renewal districts are the only real vehicle left for local governments to finance infrastructure improvement. Urban renewal districts, however, were not built for the task of large-scale infrastructure deployment across a region; rather, they were meant to address already urbanized areas that need reinvestment.³⁶² By providing a financing mechanism that was specifically aimed at cross-jurisdictional growth, the Idaho legislature could show leadership in providing a tool for forward-looking governance and finance.

Similarly, providing additional methods of inter-governmental coordination would be helpful. Regional government is not always a panacea; the Ada County Highway District (ACHD), a regional entity that is the only transportation district at a county level to control roads inside all the county's cities anywhere in the United States, is notoriously dysfunctional.³⁶³ The ACHD is also controlled by suburban constituents that favor the continued expansion of growth into suburban and exurban areas.³⁶⁴ The result is that despite its regional reach, ACHD has not been a force for long-term planning that would facilitate meaningful inter-jurisdictional transportation growth. This illustrates that governmental design matters as much as its statutory character. ACHD, on paper, should be the kind of growing-city dream that would permit investments today for certain growth tomorrow. Its failure is also one of government structure, in part because there is little accountability in its arcane structure. Moreover, there is deep uncertainty about how the district's review of individual projects are to be received by local governments in their land use review. For instance, every major development project in the county must first go to ACHD, where an analysis is conducted and proposed traffic mitigations are

361. See *supra* note 354 regarding state option tax. The Legislature has also increasingly used statewide preemption to prohibit local regulation in urban areas when opposed by the majority of state legislators that are from more rural areas; see, e.g., IDAHO CODE ANN. § 49-2431 (West 2021) (ride-sharing companies); IDAHO CODE ANN. § 55-115 (West 2021) (short-term rentals), and even extremely modest issues, such as plastic bags, IDAHO CODE ANN. § 67-2340 (West 2021).

362. IDAHO CODE ANN. §§ 50-2001—33 (West 2021).

363. See Cynthia Sewell, *Boise Mayor Bieter: 'ACHD is a Failed Model. I Want them all Gone.'*, NEWSWIRES (Oct. 17, 2014), <https://insurancenewsnet.com/oarticle/Boise-Mayor-Bieter-ACHD-is-a-failed-model-i-want-them-all-gone-a-568910>. The dysfunctionality reached a zenith under former-Mayor David Bieter, who declared ACHD a "failed model" and stated that he "wanted them all gone." *Id.*

364. Margaret Carmel, *ACHD Candidates Debate Public Transit at Boise Bicycle Project Forum*, BOISE DEV (Sept. 29, 2020), <https://boisedev.com/news/2020/09/28/achd-candidates-debate-public-transit-at-boise-bicycle-project-forum/>.

made.³⁶⁵ That report is then attached to the staff report in the respective city's staff report for a land use determination.³⁶⁶ But that is where any certainty in the process stops. Local officials are routinely unsure whether they can remand a project to ACHD to consider additional traffic mitigations; whether the local officials have power to add additional traffic mitigations that were not required by ACHD; and whether the officials can make ACHD engage in growth management transportation planning in line with a local community's preferences, such as for bicycle lane planning.

While ACHD is a cautionary tale, it is hard to see how the Treasure Valley plans effectively for growth without more regional tools to help it do so. If the state fails to act, local governments could band together through the use of intergovernmental agreements, which are already permitted in the state.³⁶⁷ Such agreements require negotiation and, quite often, do not have any meaningful enforcement remedies for a local government that fails to abide by the terms of the agreement. All of that could be fixed and could work, but it would take a coalescence of local leaders to maintain the agreement through changes in administrations that would be necessary to see any real inter-jurisdictional approach to growth emerge over time.

The state could also work to more effectively promote the use of private governance tools, especially homeowner's associations (HOAs). Right now, such HOAs are reviewed by courts as contracts without any special regard to the unique property interests that HOAs embody.³⁶⁸ That needs to change because the rapid proliferation of HOAs means that more individuals are living with poorly managed HOAs that do not have certainty of parameters or interpretation. If Idaho is going to continue to permit the broad use of HOAs, then it needs to provide at minimum provisions to ensure they work effectively. In addition, the HOAs should be evaluated for compliance with long-term growth management goals.³⁶⁹ It may be that such private governance tools are inappropriate for locations where a rapidly changing market may consider redevelopment of existing patterns within just a few short decades.³⁷⁰

It is unlikely that Idaho will ever adopt tools of the "smart growth" era to forestall exurban growth. Things like adequate public facilities ordinances (APFOs),

365. *New Multi-Family Buildings & Additions Guide*, CITY OF BOISE (Oct. 2008), https://www.cityofboise.org/media/3817/506b_multi-family_handout.pdf (noting usual process by which ACHD approves transportation infrastructure for a project prior to its review by cities or the county).

366. *Id.*

367. IDAHO CODE ANN. § 67-8204A (West 2022).

368. *Nordstrom v. Guindon*, 17 P.3d 287, 289–90, 135 Idaho 343, 345–46 (2000).

369. *Compare* JOHN PAUL HANNA & DAVID VAN ATTA, CALIFORNIA COMMON INTEREST DEVELOPMENTS: LAW & PRACTICE (2021 ed.) (noting numerous statutory provisions in other states) *with* Idaho's lack of any such statutory provisions.

370. ROBERT H. FREILICH ET AL., FROM SPRAWL TO SUSTAINABILITY: SMART GROWTH, NEW URBANISM, GREEN DEVELOPMENT, AND RENEWABLE ENERGY (2nd ed. 2010).

³⁷¹ timing controls (regulating the number of building permits per year), ³⁷² and tempo controls (deciding a certain time frame for development of a particular area)³⁷³ are all likely to be viewed as governmental overreach. Still, it is useful to mention these tools because they illustrate the kinds of measures that could be taken in Idaho, just as they can work almost anywhere, and begin to challenge notions about how far regulation can go without constituting a taking.

In all but the largest cities, including most fast-growth cities like Boise, local officials are volunteers that hold other jobs and typically receive little, if any, compensation for their governmental work.³⁷⁴ This is true even for those local officials, members of the planning commission and the city council, most directly related to development of the city, arguably the most important long-term decisions that will shape the cities' future. For those commissioners and council members, merely reading the weekly staff reports that accompany individual projects that require adjudications and engaging in the more comprehensive legislative actions related to specific plans, neighborhood plans, or business districts can be an overwhelming task.³⁷⁵ Further, public meetings often begin right after work and can last into the wee hours of the morning.

It is in the hands of these local officials, however, that the task of forming the land use patterns in the United States rests.³⁷⁶ Indeed, it is also because of the fact that the land use pattern of the country relies so heavily upon this patchwork of volunteers, most of whom are not experts in development, that there has long been a skepticism about whether the country can ever have a coherent land use policy.³⁷⁷ This is notable in the context of climate change. Although it is well known that climate change is affected through land use patterns—particularly in the relation between land use development and transportation infrastructure—even the most aggressive efforts to address climate change have largely ignored land use. For instance, California's Global Warming Solutions Act of 2006,³⁷⁸ the most significant greenhouse gas (GHG) emission reduction strategy in force at present, places

371. *Id.*

372. *Id.*

373. *Id.*

374. C. GREGORY DALE ET AL., THE PLANNING COMMISSIONERS GUIDE 1–3 (2013); *see also* BOISE, IDAHO, CITY CODE § 2-1-5 (2021) (“Unless otherwise provided in this ordinance, all members of any Boise City Boards and Commissions shall serve without compensation.”).

375. DALE ET AL., *supra* note 374 (“Unless otherwise provided in this ordinance, all members of any Boise City Boards and Commissions shall serve without compensation.”).

376. DALE ET AL., *supra* note 374, at 5–15.

377. *See* PAUL G. LEWIS, SHAPING SUBURBIA: HOW POLITICAL INSTITUTIONS ORGANIZE URBAN DEVELOPMENT 32 (1996).

378. Assemb. 32, 2006 Leg., 2005-2006 Reg. Sess. (Cal. 2006) (California's Global Warming Solutions Act of 2006) (codified at CAL. HEALTH & SAFETY CODE § 38500 et seq.).

almost no importance on land use in GHG emissions reductions.³⁷⁹ This is true even with the fact that the State had adopted the country's most aggressive mandate to link land use and transportation planning.³⁸⁰

This disconcerting disconnect—that those with the power to alter land use patterns are those least likely to actually affect such change—found its way into the International Panel on Climate Change's (IPCC) most recent series of reports, which are collectively referenced as the Fifth Assessment.³⁸¹

One of the more obscure parts of local government arcana is Dillon's Rule, which still applies in Idaho. Dillon's Rule was the creation of Justice John F. Dillon, an Iowa Supreme Court justice in the nineteenth century, who was looking for a way to reign in the power of local governments that were packed with railroad boosters, who then saddled the local governments with debt to finance railroad projects.³⁸² His solution was a now-famous three-part rule of statutory construction, which he published in his Commentaries on the Law of Municipal Corporations as follows:

A municipal corporation possesses and can exercise only the following powers: (1) those granted in express words; (2) those necessarily or fairly implied in or incident to the powers expressly granted; (3) those essential to the accomplishment of the declared objects and purposes of the corporation—not simply convenient, but indispensable. Any fair, reasonable, substantial doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied.³⁸³

Dillon's Rule was adopted by courts throughout the country and the rule has played a significant impact in the operation of local governments since that time. Although the impact of the rule is waning and many states have repudiated the rule,³⁸⁴ it still applies in Idaho.³⁸⁵ The Idaho Supreme Court has adopted Dillon's Rule, though there is no seminal case first announcing its arrival.³⁸⁶ Indeed, there

379. *Id.*

380. S. 375, 2007-2008 Reg. Sess. (Cal. 2008) (Sustainable Communities and Climate Protection Act of 2008).

381. IPCC AR5 WG II, *supra* note 212.

382. RICHARD BRIFFAULT & LAURIE REYNOLDS, CASES AND MATERIALS ON STATE AND LOCAL GOVERNMENT LAW 328 (8th ed. 2016).

383. *Id.* at 327.

384. See John R. Nolon, *Death of Dillon's Rule: Local Autonomy to Control Land Use*, 36 J. LAND USE & ENV'T L. 7 (2020); State v. Hutchinson, 624 P.2d 1116, 1120 (Utah 1980) ("If there were once valid policy reasons supporting the rule, we think they have largely lost their force and that effective local self-government, as an important constituent part of our system of government, must have sufficient power to deal effectively with the problems with which it must deal.").

385. Caesar v. State, 610 P.2d 517, 519, 101 Idaho 158, 160 (1980).

386. *Id.*

are very few cases that have applied the rule at all and the rule has never been formalized in any statute. Those cases that have mentioned Dillon's Rule have not, ultimately, relied upon it to decide a case.³⁸⁷ The best statement of the rule in Idaho is in *Caesar v. State*, where the court noted:

Idaho has long recognized the proposition that a municipal corporation, as a creature of the state, possesses and exercises only those powers either expressly or impliedly granted to it. . . . This position, also known as "Dillon's Rule," has been generally recognized as the prevailing view in Idaho.³⁸⁸

Nonetheless, Dillon's Rule retains a stranglehold on local government action, perhaps if only because of fear of its application. The rule, in practice, invites anyone aggrieved with a city's action to insist upon a state statute that authorizes such action through express words. Any well-trained lawyer can parse a state enabling statute and begin to poke holes in a local ordinance given enough time and creativity. If the action cannot trace itself back to the statutory language in express terms, or those necessary and fairly implied, or otherwise necessary to implement the statutory purpose, then the local ordinance or action is ultra vires and thus void.³⁸⁹ For instance, the Idaho state statute authorizing a variance says it must be issued by a "governing board" of land use in a local jurisdiction;³⁹⁰ Boise's code permits the "director" to authorize administrative variances under certain circumstances.³⁹¹ Similarly, Idaho's variance statute authorizes area variances;

387. *Id.*; see also *Sun Valley Co. v. City of Sun Valley*, 708 P.2d 147, 166–67, 109 Idaho 424, 443–44 (1985), abrogated by *Moon v. N. Idaho Farmers Ass'n*, 96 P.3d 637, 140 Idaho 536 (2004) (reviewing the scant history of the doctrine in Idaho).

388. *Caesar*, 610 P.2d at 519, 101 Idaho at 160.

389. As a general rule, see Richard Briffault, *Our Localism: Part I—the Structure of Local Government Law*, 90 COLUM. L. REV. 1, 8 (1990):

Dillon's Rule operates as a standard of delegation, a canon of construction and a rule of limited power. It reflects the view of local governments as agents of the state by requiring that all local powers be traced back to a specific delegation: whenever it is uncertain whether a locality possesses a particular power, a court should assume that the locality lacks that power. By denying localities broad authority, Dillon's Rule limits the number of entities that may regulate private activity. Only through a clear and express state delegation may a locality obtain power to govern.

Id. Idaho courts have never articulated Dillon's Rule in such a clear fashion as Professor Briffault and have not applied the doctrine in this manner to resolve a case.

390. IDAHO CODE ANN. § 67–6516 (West 2021).

391. BOISE, IDAHO, CITY CODE § 11–03–04 (2021).

Boise's variance ordinance permits the issuance of a variance for "unique circumstances relating to the intended use" of land, the hallmark test for a use variance.³⁹² These may seem like incidental issues, but they are the kinds of picayune details that routinely are the stuff of Dillon's Rule cases for aggrieved parties.³⁹³

The indeterminacy of the rule's application, coupled with its potential extraordinary breadth and power to invalidate city enactments, has always been its calling card for those who favor small government. The rule purposefully seeks to have a chilling effect on local government action and, it works. There are few city attorneys in Idaho, or in any other state where Dillon's Rule applies, who do not think about the rule almost daily.

D. Land Use Policies

If the Boise region is going to produce a more dynamic and livable long-term urban environment, there are certain changes that need to be made that are obvious: cities and counties cannot continue to give sixty to seventy percent of land over to single-family housing, small subdivisions chopped off farms deep in the middle of agricultural lands—often called wildcat subdivisions in the West—have to stop.³⁹⁴ This section, however, seeks to provide a way to think about the kinds of structural changes that could yield significant long-term benefits but that are not evident in the daily course of local government business.

i. Zoning

If ever there were a time to kiss Euclidean zoning goodbye, it would be in a fast-growth city. In the years since World War II, American cities have grown, not through compliance with Euclideanism, but instead through exceptions to it. Conditional use permits, and especially planned unit developments, have been the necessary tools to make a broken system work, especially for large scale developments that are the primary means of meeting the demands of growth in a fast-growth city.³⁹⁵ Perhaps the best modern example of this is Denver, Colorado,

392. IDAHO CODE ANN. § 67-6516 (West 2021); BOISE, IDAHO, CITY CODE § 11-03-04 (2021).

393. See 2 MCQUILLIN MUN. CORP. §§ 4:1-4:16 (3d ed. 2022).

394. BOISE, IDAHO, CITY CODE § 11-03-04 (2021). In 2020, 79.1% of all housing units in Ada County were single-family residential. *Indicators Idaho: Ada: Housing Types*, UNIV. OF IDAHO EXTENSION, <http://indicatorsidaho.org/DrawRegion.aspx?IndicatorID=100014&RegionID=16001> (last visited June 2, 2022).

395. See DANIEL MANDELKER, *PLANNED UNIT DEVELOPMENTS* (2007). Blueprint Boise, the city's comprehensive plan, also discusses each planning area and noting percentage of area in single-family use. See, e.g., BOISE CITY PLAN. & DEV. SERVS. DEP'T, *BLUEPRINT BOISE: BOISE'S COMPREHENSIVE PLAN*, at NW-2 (Jan. 12, 2021), https://www.cityofboise.org/media/3021/bb_all_05232021.pdf (noting 60 percent of this planning area is in single-family use, which is typical of most areas outside of the Downtown Planning Area).

which had an antiquated Euclidean zoning code that, by the early 2000s, was requiring a conditional use permit for almost any sizeable development.³⁹⁶ Even if the city processed those permits in an expedited manner, the mere paperwork of the processing, coupled with the discretionary permitting process, led then-Mayor Hickenlooper to seek a new approach.³⁹⁷ The result, some years later, was one of the first major-American cities' efforts to eliminate discretionary permitting based on use from its regulation of land.³⁹⁸ The resulting code, which in many instances utilizes a form-based code approach, has unleashed growth in the city while still permitting site plan reviews.³⁹⁹ The Denver form-based code gave the development community a better sense of what types of projects they could pursue without significant permitting risk.⁴⁰⁰

In the Treasure Valley, the city of Boise has begun to pursue a zoning re-write that—if passed—will largely mimic the successes of Denver.⁴⁰¹ The city has, in fact, hired the very same consultant who was a leading architect of the Denver plan to help it achieve this vision.⁴⁰² That said, the rest of the Treasure Valley cities and counties are largely working with the most basic of Euclidean zoning codes that largely are dependent on discretionary permitting to permit any project of substance.⁴⁰³

396. See Kristina Wright Bowen, *Participation and Predictability: A Comparative Analysis of Processes and Outcomes of the Form-Based Codes and Previous Conventional Zoning Codes of Miami, Florida and Denver, Colorado* (2011) (M.A. thesis, University of Florida) (on file with the George A. Smathers Libraries, University of Florida).

397. *Id.*

398. See Keith A. Ratner & Andrew R. Goetz, *The Reshaping of Land Use and Urban Form in Denver Through Transit-Oriented Development*, 30 *CITIES* 31 (2013).

399. See Bowen *supra* note 396.

400. Katherine A. Woodward, *Form over Use: Form-Based Codes and the Challenge of Existing Development*, 88 *NOTRE DAME L. REV.* 2627, 2650 (2013).

401. *Updating Boise's Zoning Code*, CITY OF BOISE, <https://www.cityofboise.org/departments/planning-and-development-services/planning-and-zoning/zoning-code-rewrite/> (last visited Sept. 10, 2021).

402. CLARION, <https://www.clarionassociates.com/> (last visited Sept. 10, 2021).

403. As in most states, Idaho's planning and zoning enabling statute, the Local Land Use Planning Act (LLUPA), is based upon the Standard State Zoning Enabling Act (SZEAA), a 1920s-era model enabling code written by the U.S. Department of Commerce to encourage zoning in accordance with the zoning code that passed constitutional muster in Euclid. Few governments in Idaho have sought to expand beyond the basic formulations for permitting that the Euclidean provisions of LLUPA provide that are, in turn, based upon the structure of the SZEAA.

Still, the growth pressure in Boise is not at the levels seen in Denver; at least not yet.⁴⁰⁴ The problem with discretionary permitting, though, is that it requires extra diligence to ensure that the mitigations for projects are adequate. It also has a tendency to encourage piecemealed development patterns because there is no priority illustrated in plans for where the local government will permit more dense development. In a perfect world, it would be these communities that still have vast tracts of open land that would have the more advanced codes in long-term anticipation of the growth that is sure to come. In practice, that is not the case.

Euclidean zoning's one true planning component, the comprehensive plan, is equally unable to meet this particular moment.⁴⁰⁵ There have been a number of efforts over the years to give the comprehensive plan heft. Professor Charles Harr sought to "constitutionalize" the comprehensive plan, making it into the equivalent of a constitution for land use.⁴⁰⁶ But most comprehensive plans are nothing like constitutions; instead, they are often a mush of contradictory elements and goals without any hierarchy. Even in states like California that adopted Harr's constitutionalism, the plan—called a general plan in California—can be amended four times a year, which hardly gives it anything like the long-term Five Finger Plan of Copenhagen, discussed earlier, which has been in place for over seventy years.⁴⁰⁷ In Idaho, as in most states, the comprehensive plan remains a required document, though zoning codes and other land use controls are not required to be consistent with the plan.⁴⁰⁸ The result is that the plan takes a long time to produce, and then has little role in how actual development plays out except to the extent that it guides future, individual decisions on land use permits by those who participated in the plan's production or otherwise have come to understand the plan with some depth. The latter tend to be few and far between. For all the funds expended on such plans, they almost never can be reduced to some kind of vision that can be provided to the public—the "Five Finger Plan,"⁴⁰⁹ "Keep Tahoe Blue,"⁴¹⁰ and so forth—that take land use planning from the pages of the plan to embodied politics and actionable decision-making. For the next generation of land use planning to emerge, there must be some kind of planning that can rise to, and guide, political choices in the Treasure Valley.

404. See, e.g., *Housing Unit Percentage Change: 2018 to 2019 in Historical Context*, U.S. CENSUS (May 21, 2020), <https://www.census.gov/library/visualizations/2020/demo/map-housing-unit-change.html> (evaluating growth in housing stock over past decade).

405. See *Standard State Zoning Enabling Act and Standard City Planning Enabling Act*, AM. PLAN. ASS'N, <https://www.planning.org/growingsmart/enablingacts/> (last visited Sept. 10, 2021).

406. Charles M. Haar, *The Master Plan: An Impermanent Constitution*, 20 LAW & CONTEMP. PROBS. 353 (1955).

407. See *supra* notes 319–22 and accompanying text.

408. IDAHO CODE ANN. § 67-6508 (West 2021).

409. See *supra* notes 319–22 and accompanying text.

410. *About Us*, KEEP TAHOE BLUE, <https://www.keeptahoeblue.org/about-us> (last visited Nov. 19, 2021).

At a foundational level, land use planning is about the provision of usually public infrastructure for private development. Since the late nineteenth century, this has largely been the province of cities.⁴¹¹ That infrastructure has mostly been funded through general obligation bonds secured by property taxes. The viability of that funding mechanism began to come undone after World War II for several reasons. Among them was the increasing spatial distance of development, which meant that infrastructure simply was more expensive and served fewer people.⁴¹² It became harder to justify why those living in an urban core should subsidize infrastructure that cost a lot and served just a few.⁴¹³ Developers, for their part, were largely not interested in helping to make the issues at stake especially clear.⁴¹⁴ The automobile and federal highway system opened up cheap greenfield land for suburban and exurban development.⁴¹⁵ Few developers were able to pay for the infrastructure, and so the development of greenfields could go on so long as the private developers could get the public governments to pay the infrastructure costs.⁴¹⁶ That lasted a good while, until the system began to unravel with the property tax revolts of the Seventies. Beginning in California with Prop 13,⁴¹⁷ many Western states saw their citizens require assessors to limit property valuations for taxation purposes far below market value.⁴¹⁸ That artificial lowering of property values for taxation purposes, however, did not change the fact that many Western communities were seeing rapid growth and, as a result, rapid escalation in home prices and costs to provide the infrastructure services that residents came to expect.⁴¹⁹

411. See STANDARD STATE ZONING ENABLING ACT AND STANDARD CITY PLANNING ENABLING ACT, AM. PLAN. ASS'N, <https://www.planning.org/growingsmart/enablingacts/> (last visited Sept. 10, 2021).

412. See, e.g., Jonathan Rosenbloom, *Funding Adaptation*, 47 J. MARSHALL L. REV. 657, 670 (2013).

413. Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385, 451 (1977). These debates still go on today. See debate over community infrastructure districts in Boise's Harris Ranch.

414. *Id.*

415. KENNETH T. JACKSON, *CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES* (1987).

416. *Id.*

417. *Understanding Proposition 13*, OFF. OF THE ASSESSOR, CNTY. OF SANTA CLARA, <https://www.sccassessor.org/index.php/faq/understanding-proposition-13> (last visited Sept. 10, 2021).

418. ISAAC WILLIAM MARTIN, *THE PERMANENT TAX REVOLT: HOW THE PROPERTY TAX TRANSFORMED AMERICAN POLITICS 4-7* (2008). Martin describes the tax revolts of the 1970s as a rebellion against the local property tax. *Id.*; see also Marika Cabral & Caroline Hoxby, *The Hated Property Tax: Salience, Tax Rates, and Tax Revolts* 24 (Nat'l Bureau of Econ. Rsch., Working Paper No. 18514, 2012).

419. Edward Sullivan & A. Dan Tarlock, *The Western Urban Landscape and Climate Change*, 49 ENV'T. L. 931, 943 (2019) ("Most western cities have on the whole welcomed explosive growth on the theory that benefits outweigh the costs. Las Vegas, Phoenix, and Salt Lake City adapted by accepting growth and encouraging low-density sprawl, leaving it to the next generation to deal with the consequences.").

As local governments could no longer rely on property taxes to pay for infrastructure, and thus future growth, those local governments had to turn to increasingly elaborate funding mechanisms to keep growth going. Almost all of these new tools for financing development focused on shifting costs to the developer.⁴²⁰ The tools go by different names and have different purposes, but they all are based upon the same general idea: development must pay its own way.⁴²¹ These new tools were usually referred to as impact fees, exactions, or any of a variety of an alphabet soup of fees. Developers, obviously, did not like this.⁴²² Under the general theory, the new fees were cost neutral to the developer because they could pass along the costs of development fees to the future landowner.⁴²³ That made some sense, and that happened to some degree.⁴²⁴ But the fees—which were usually owed at the time the building permit was issued or, in some more lenient circumstances, when the building permit was finalized—caused significant economic instability for developers who had to take on extra debt in construction loans to cover the fees.⁴²⁵ On this theory, developers had to charge more for homes beyond just the extra fee to cover the carrying costs of the loan.⁴²⁶

Whatever theory of impact fees is accurate, there can be little doubt that funding infrastructure is far too complicated, and far too deeply constitutionalized through the *Nollan / Dolan / Koontz* analyses.⁴²⁷ While those cases are a necessary back-stop to prevent local governments from overreaching in their requests from developers, the cases of overreach distort the mundane necessities that these fees usually seek to provide, which are things like schools, police, fire, open space, and parks.⁴²⁸ These are obviously all part of a new community, and they obviously cost money. Someone has to pay. If local governments cannot use property taxes to pay the bills, someone else has to or development cannot go on. States have responded, like Idaho, by permitting certain types of bonding through local improvement districts and community infrastructure districts, which are funded through assessment paid over decades by the new property owners.⁴²⁹ Another approach

420. Ronald H. Rosenberg, *The Changing Culture of American Land Use Regulation: Paying for Growth with Impact Fees*, 59 SMU L. REV. 177, 182 (2006).

421. Zenia Kotval & John Mullin, *Fiscal Impact Analysis: Methods, Cases, and Intellectual Debate* 19 (2006) (Lincoln Inst. of Land Pol’y, Working Paper), <https://www.lincolninst.edu/sites/default/files/pubfiles/kotval-wp06zk2.pdf>.

422. Arthur C. Nelson, *The Myths and Realities*, in EXACTIONS, IMPACT FEES AND DEDICATIONS § IV (1995) (discussing common myths of impact fees in competitive and non-competitive markets).

423. *Id.*

424. *Id.*

425. *Id.*

426. *Id.*

427. *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595 (2013).

428. *Nollan*, 483 U.S. 825; *Dolan*, 512 U.S. 374; *Koontz*, 570 U.S. 595.

429. IDAHO CODE ANN. § 43-2508 (West 2021) (providing local improvement districts); IDAHO CODE ANN. § 50-3120 (West 2021) (providing community infrastructure districts).

is to require a new subdivision or planned development to take on the costs of infrastructure maintenance through a mandatory homeowner's association.⁴³⁰ This has consequences, however, when risk is allocated to a small pool—for example, a broken sewer pipe repair spread across a city hardly affects anyone's bill but spread across just fifty homeowners it can be burdensome. Here is a chance for Idaho's developers to lead the way in working with local governments and the state government to find a solution that will permit ongoing growth to occur.

Finally, the region's cities need better tools, and more state support for contract-based development tools, such as development agreements used in other Western states.⁴³¹ Idaho does currently permit development agreements to occur along with rezones, but that provision is inadequate to address broader legal constraints.⁴³² Development agreements can be useful tools that permit developers and local governments to provide for multi-decade growth decisions, which provide stability for developers and certainty for local governments as to how a project will be built out. Idaho has seen the use of some development agreements, primarily for large industrial food manufacturing facilities in Twin Falls for Chobani, Amy's Kitchen, and several other producers.⁴³³ Those sorts of broad-scale agreements have become common in many other Western states, such as California, Arizona,

430. For example:

The development of a master planned community entails the design of an overall master community based on project infrastructure, design and marketing themes, and, of critical importance, the establishment of a system of governance for the master community. A developer can conceivably set up a large master planned project that had no central system of governance; each separate subdivision tract can stand on its own and be responsible for the infrastructure facilities within its borders. Each of these separate developments can have its own set of project documents containing provisions for use restrictions and for operations of any common areas or common facilities within the separate project. However, in most instances in which a master planned project is conceived, there are some essential elements of the master plan that establishes a community-based infrastructure to be used by the entire community that cannot be easily isolated to only one, or a few, of the separate subdivisions.

See, e.g., JOHN PAUL HANNA & DAVID VAN ATTA, CALIFORNIA COMMON INTEREST DEVELOPMENTS: LAW AND PRACTICE § 10:15 (2021 ed.).

431. Selmi, *supra* note 250, at 593–94 (discussing development agreements).

432. IDAHO CODE ANN. § 67-6511A (West 2021).

433. *Twin Falls Urban Renewal Agency Gets National Award for Chobani Financing*, TIMES-NEWS (Aug. 15, 2013), https://magicvalley.com/news/local/twin-falls-urban-renewal-agency-gets-national-award-for-chobani/article_243f1b3d-fcf5-520b-b623-4f5d6568203d.html.

Nevada, and Colorado.⁴³⁴ Doing so, however, requires a more robust development agreement statute that would begin by providing a back-stop against “sweetheart” deals that could lead to abuse of the process at the behest of private individuals. Such a statute would also provide a template for how to negotiate a good development agreement, and perhaps most importantly, enable such long-term decision-making thus freeing it from some of the legal doctrines—such as the requirement that local governments not bind the hands of future officials—that can call such agreements into jeopardy.⁴³⁵

ii. Affordability

For several decades, the American approach to affordable housing has been remarkably stable. Aging federal housing projects remain, but no more are being built.⁴³⁶ Federal tax credits incentivize the creation of new affordable units by private developers, but there are fewer of them to go around than there is need.⁴³⁷ Section 8 vouchers remain, which permit low income individuals to rent on the private market, but again, there is not enough to go around.⁴³⁸ But as affordable housing has come to affect even the middle class in many urban centers, another playbook on affordable housing has developed. Cities are increasingly trying things like community housing land trusts⁴³⁹ and embracing once esoteric approaches to incentivize affordable housing production. For instance, the city of Boise tried a particularly novel approach—simply giving money to a developer who promised to provide rentals at a modest level of affordability.⁴⁴⁰ Once the building was built, the developer proceeded to turn the units into a collection of short-term rentals, and it is unclear if the city has any recourse.⁴⁴¹

The heart of the local government playbook on affordability is the inclusionary zoning ordinance, which requires market-rate developers to make a percentage of

434. Selmi, *supra* note 250, at 591 (“Local governments and developers now often negotiate and then enter formal contracts that establish the terms governing individual projects.”).

435. *Id.*

436. MAGGIE MCCARTY ET AL., CONG. RSCH. SERV., RL34591, OVERVIEW OF FEDERAL HOUSING ASSISTANCE PROGRAMS AND POLICY 11 (2019) (“There are roughly 1 million public housing units under contract with the federal government, making public housing the second-largest direct housing assistance program. The 1998 Public Housing Reform Act (P.L. 105-276) prohibited PHAs from increasing the total number of public housing units in their inventories”).

437. *Id.*

438. *Id.*

439. Margaret Carmel, *Feasibility Study Gives Positive Outlook for a Housing Land Trust in Boise*, IDAHO PRESS (Dec. 20, 2019), https://www.idahopress.com/news/local/feasibility-study-gives-positive-outlook-for-a-housing-land-trust-in-boise/article_1e2324cd-1e17-57f0-be87-d26f533a2187.html.

440. Kate Talerico, *McLean Wants Boise Developers to Build Less-Costly Housing. Why Her Incentives May Fail*, IDAHO STATESMAN (Sept. 8, 2020), <https://www.idahostatesman.com/news/business/article245453820.html>.

441. *Id.*

multi-family units affordable to a particular rate of the area median income (e.g., 60% or 80%).⁴⁴² Inclusionary zoning ordinances are complicated, however, and almost certain to attract litigation, such as the one in San Jose, California, for which a coalition of developers sought a grant of certiorari to the U.S. Supreme Court after losing at the California Supreme Court.⁴⁴³

In Idaho, it is unclear whether local governments have the power to engage in inclusionary zoning ordinances. A recent lawsuit raised an obscure claim—that a Ketchum, Idaho inclusionary zoning ordinance would be an “illegal tax” under Idaho law—before it was dropped.⁴⁴⁴ The issue remains undecided at the appellate level, though two Idaho district courts invalidated prior efforts at inclusionary zoning.⁴⁴⁵ Even if that Idaho provision were to lose, any serious effort at a regulatory approach like inclusionary zoning would almost certainly draw the ire of the State’s Legislature, which would then officially preempt such approaches.

That leaves Idaho’s communities in an extraordinary position of having no obvious plan to address affordability at a time when the Boise region just had the highest appreciation in property values of any metropolitan region in the country within the last decade. The city of Boise is slated to try a density bonus for affordable housing, but any review of that tool in national use shows it will have some modest effect but is unlikely to meaningfully address the region’s affordability problem.⁴⁴⁶

It is clear that the Treasure Valley’s affordability problem is both a housing production problem and a result of the “greater California” effect.⁴⁴⁷ Both are pernicious and will require new thinking to address. Oregon, Idaho’s neighbor, may have provided one of the best templates for the housing production issue, though, with its new statewide regulations that will require duplexes in most of the state’s single-family districts, as well as triplexes and fourplexes in some more urban areas.⁴⁴⁸ With established cities in Oregon, across the country, and in the Treasure Valley having over half of their land mass in single-family districts already, it is clear that

442. *See, e.g.*, Cal. Bldg. Indus. Ass’n v. City of San Jose, 351 P.3d 974, 979 (Cal. 2015) (discussing history of inclusionary housing), *cert denied*, 577 U.S. 1179 (2016).

443. *Id.*

444. Peter Jensen, *Boise Councilman Scot Ludwig, Also a Developer, Sues Ketchum Over ‘Illegal Tax’*, IDAHO STATESMEN (Feb. 3, 2017), <https://www.idahostatesman.com/news/local/article130565829.html>.

445. Schaefer v. City of Sun Valley, No. CV-06-882, 2007 Idaho Dist. LEXIS 30, at *1 (Idaho 5th Dist. July 3, 2007); Mountain Cent. Bd. of Realtors, Inc. v. City of McCall, No. CV 2006-490-C, 2008 Ida. Dist. LEXIS 35, at *3 (Idaho 4th Dist. Feb.19, 2008).

446. Talerico, *supra* note 440.

447. Dougherty, *supra* note 21.

448. Laurel Wamsley, *Oregon Legislature Votes to Essentially Ban Single-Family Zoning*, NPR (July 1, 2019), <https://www.npr.org/2019/07/01/737798440/oregon-legislature-votes-to-essentially-ban-single-family-zoning>.

something has to change in those areas for there to be any meaningful change in housing production and density without endless sprawl.

Other approaches that have received less attention focus on training developers on how to build affordable units and still make a profit; providing easy, and low-cost capital for those working on affordable housing projects; and creating templates of high-quality affordable units that are open-sourced for developers and permitted as-of-right by local governments.⁴⁴⁹ Such supply-side options, which seek to build a cadre of affordable housing developers to build specifically within the region's contexts and to standards that the region seeks and incentivized by expedited processing and approvals, have received little attention thus far.⁴⁵⁰ In a place like the Treasure Valley, where regulation will be a hard sell for a long time, such coordinated efforts to build the developer ranks could prove a useful way to proceed.

Novel financing mechanisms could also be contemplated. Increasingly, state governments—even Idaho—are offering bridge financing to assist affordable housing developers with otherwise expensive financing necessary at the point when a project finished construction until a permanent loan is obtained or the project units are sold.⁴⁵¹ For instance, the local government could guarantee a profit on development of an affordable unit. If the project sells for more than the agreed upon profit margin, the excess profit goes back into the preferential funding mechanism to fund future developments. If the profit is lower than the guaranteed margin, the developer would obtain a subsidy to equal the guarantee. This is similar to what California did with its energy utilities several decades ago to sever the relationship between energy production and profitability.⁴⁵² A similar approach could be tried with developers: a guaranteed profit ensures a good living without having to build large homes at every turn.

Addressing the problem of great California is perhaps the hardest. There are simply people moving into the region with significant equity from homes in California that are now able to buy homes in prestigious local markets at rates equal to what they sold their California homes for.⁴⁵³ That is not easily rectified because

449. See, e.g., *CHASE Neighborhoods Pattern Book with Design and Development Guidelines*, HUD EXCHANGE (Feb. 2014), <https://web.archive.org/web/20210915172540/https://www.hudexchange.info/resource/4377/chase-neighborhoods-pattern-book-with-design-and-development-guidelines/>.

450. *Id.*

451. Sally Krutzig, *Little Wants Businesses to Build Affordable Housing, Provide Child Care. Here's How*, IDAHO STATEMAN (Sept. 28, 2021), <https://www.idahostatesman.com/news/politics-government/state-politics/article254570607.html> (noting that governor is “considering” offering bridge financing to affordable housing developers).

452. *Decoupling Policies*, CTR. FOR CLIMATE & ENERGY SOLS., <https://web.archive.org/web/20210831214025/https://www.c2es.org/document/decoupling-policies/> (Mar. 2019).

453. Dougherty, *supra* note 21.

price no longer is related simply to wages and supply and demand. It is now related to a migration of capital to which those native to the region have no access.

iii. Transportation

Probably the best-known proposal for public transportation in the Treasure Valley region was for a downtown, fixed-rail trolley-style connector adamantly pursued—to no avail—by Boise's previous four-term mayor, David Bieter.⁴⁵⁴ Mayor Bieter's proposal was not without merit; his goal was to incentivize development with fixed-stop investment. Whatever the merits of that proposal, the fact that it is the region's only significant proposal for public investment in transportation beyond bigger roads and highway-based suburban development makes the problem for the valley clear. Boise struggles in all the usual ways with suburban and exurban development: the pattern does not make traditional bus service financially feasible; there is not significant planning between transportation stops and destinations needed by those who use the services; and the "last mile" problem—getting from the stop to home, continues to be a significant dilemma.⁴⁵⁵ All of those issues are important; however, this section seeks to focus on some of the less-discussed issues in the Treasure Valley.

Among the most important problems the Treasure Valley faces in transportation is an imbalance in jobs and housing. The city of Boise, on the eastern edge of the valley, holds a disproportionate number of the jobs while housing has tended to trend west. While it behooves the city of Boise to maintain its dominance in jobs for its fiscal health, the region's growth cannot all commute to the city of Boise as the region grows west. There is only one federal highway through the region—I-84—and there is no obvious other east-west route that could offer a similar level of service. State Street, which has long been the region's northern primary roadway, will almost certainly be broadened to service commuter traffic from Meridian and Eagle to Boise.⁴⁵⁶ That said, the traffic on almost all of the highways goes one way at rush hour: to Boise in the morning, and out of Boise in the afternoon. Regions that have planned effectively for growth have made the most of existing infrastructure by ensuring that the job commute can go both

454. Kate Talerico, *Bieter Has Wanted Streetcar for over a Decade. The Project Could Soon Take a Step Forward*, IDAHO STATESMAN (Aug. 12, 2019), <https://www.idahostatesman.com/news/local/traffic/article233799167.html>.

455. Skip Descant, *Transit Partnerships Take on First/Last-Mile Problem*, GOV'T TECH. (June 2020), <https://www.govtech.com/transportation/Transit-Partnerships-Take-on-First-Last-Mile-Problem.html>.

456. Kate Talerico, *More Buses. Lots More Apartments. State Street's Future May Finally be Coming into View*, IDAHO STATESMAN (Jan. 26, 2020), <https://www.idahostatesman.com/news/local/community/boise/article239291173.html>.

ways.⁴⁵⁷ This has been an express planning goal of larger cities, such as Copenhagen, that have ensured job opportunities all along the transit corridor.⁴⁵⁸ A bi-modal growth pattern for jobs has consistently shown to be one of the best ways to encourage public transportation planning.⁴⁵⁹

That said, there is no way the region will see an effort to grow jobs across the region if it means that any one city—Boise or otherwise—faces fiscal problems as a result. To solve transportation, as a result, there needs to be a way to think about the costs and benefits of regional job growth. That could mean a new type of special district that pools the spoils of regional job share growth, which could incentivize communities like Boise to encourage job growth outside its boundaries.

Even if such a special district is not created, this example makes clear that transportation planning is not simply about moving people around, or even the size of the roads. It is a governance issue tied to the deployment of uses across a region. It implicates the financial future of local governments in unexpected ways. For that reason, transportation needs to be seen as central to the future of the region, but transportation's future is dependent upon a meaningful deployment of uses across the region that permits the maximization of infrastructure. New approaches to that transportation planning can only begin when these broader implications of movement across boundaries is a necessity of individuals that is not always a shared priority of location-bound local governments.

iv. Environment

Idaho, and many red states, are not likely to require any type of meaningful environmental review, such as under the California Environmental Quality Act, any time soon.⁴⁶⁰ In part, that is a political issue: while Idaho values the beauty of its environment, the majority here do not value “environmentalists.”⁴⁶¹ It is also partly an infrastructural issue: Idaho simply does not have the resources in its planning

457. *E.g.*, Robert Cervero, *Public Transport and Sustainable Urbanism: Global Lessons* (Nov. 2006) (unpublished), https://escholarship.org/content/qt4fp6x44f/qt4fp6x44f_noSplash_e54103209a50d6f28c82c41cbb06de1f.pdf?t=lc4zd0.

458. *Id.*

459. *Id.*

460. *CEQA: The California Environmental Quality Act*, GOVERNOR'S OFF. OF RSCH. & PLAN., <https://opr.ca.gov/ceqa> (last visited June 2, 2022).

461. See Rocky Barker, *Boise State Survey Returns, Shedding Light on Idahoans' Opinions on Environment, Other Issues*, IDAHO STATESMAN (Feb. 19, 2016), <https://www.idahostatesman.com/news/local/news-columns-blogs/letters-from-the-west/article61146697.html#storylink=cpy>. One of the more provocative declarations of this may be a road sign near Lowman, Idaho, where a large wildfire caused significant damage, which states, “Environmentalists...You Own This! Log It, Graze It, or Burn It!” See also MATTHEW MAY ET AL., BOISE STATE UNIV., SEVENTH ANNUAL IDAHO PUBLIC SURVEY 10 (2022).

process to conduct the kind of elaborate, multiple alternatives analysis that California local governments conduct on even modest projects.⁴⁶²

Still, the future of the region's viability relies upon several key environmental constraints. Perhaps most importantly for the region's growth, it needs to maintain access to open space and the broad expanses of Western terrain that make the place unique and attractive. Idahoans are an active set, and the ability to access such resources quickly is something Idahoans have come to expect. When the regional populations were small, that easy access occurred without any real thought. As the region grows, such access will only be maintained with planning.

Here, again, the Copenhagen model is useful to contemplate. The growth of that city expressly sought to maintain access to open space in between corridors of development that radiated out from the city center.⁴⁶³ In doing so, the region ensured that everyone had access to open space nearby. The Treasure Valley's development is still nascent enough that it could effectively plan significant meaningful open spaces throughout the region that would provide ongoing access to a Western lifestyle while also permitting growth to occur. The region's Ridge to Rivers trail system is already an extraordinary resource connecting the foothills in the north of the region to the Boise River that flows down the region's spine.⁴⁶⁴ That said, much of that infrastructure is primarily in Boise and would need to be replicated by other jurisdictions as appropriate to the contours of landscapes in other parts of the valley.

v. Planning & Legal Culture

For those who live in states with large populations, the state of Idaho's legal statutes and planning culture can be a shock. The state's statutes are often poorly worded with significant ambiguities in the key terms. There is almost never legislative history and, where there is, it is often not helpful. Municipal codes are routinely boilerplate, copied from local government to local government, with few fundamental changes.⁴⁶⁵ Comprehensive plans in Idaho are often decades old;

462. As but one example, Idaho cut funding for its statewide Bureau of State Planning and Community Affairs many years ago, which makes it one of just a few states that has no statewide planning office offering assistance to local governments. See IDAHO LAND USE ANALYSIS STEERING COMMITTEE, IDAHO LAND USE ANALYSIS 5 (2010), https://www.idahosmartgrowth.org/app/uploads/2014/04/idaho_land_use_analysis-final_summary.pdf.

463. Danish Nature Agency, *supra* note 319.

464. See RIDGE TO RIVERS, <https://www.ridgetorivers.org/> (last visited June 2, 2022).

465. For instance, many Idaho counties have an almost identical code enforcement section routinely located in code section 1-4. For example, compare ADA CNTY., IDAHO, CODE § 1-4 (2021), with TWIN FALLS CNTY., IDAHO, CODE § 1-4 (2021).

planning codes are often, also, boilerplate.⁴⁶⁶ The place has been held together, in part, by a congenial culture and the fact that the problems faced thus far have not been that complex. While much of the state can go on in this state of haphazard, “limited,” and confusing governmental structure, the Treasure Valley cannot. Something has to give, and, even if it is conservative in nature, there has to be some collective effort to plan for the future something more than chock-a-block subdivisions and endless congestion.

That will require professionalizing the planning culture, to begin. Idaho has very few planners who have passed the AICP exam, the profession’s only effort at credentialing.⁴⁶⁷ It also needs a master’s program for such planners since the only one offered in the region, at Boise State University, was shuttered several years ago.⁴⁶⁸ The profession also needs to be paid better. There is no reason that planners who are charged with the future development of the region should be paid less than police and fire department officials.⁴⁶⁹ Planning needs to be a profession, and it should be able to attract those with vision and a desire for public service to its ranks.

Local governments should also, simultaneously, work to build the skills of real estate and construction professionals in the region. Much of the pushback on regulation is the concern among those in the real estate and construction fields that their livelihoods will be at stake.⁴⁷⁰ The Treasure Valley communities need to help train local real estate and construction professionals in the kinds of development processes that have long-term benefits for the region. That may mean training plumbers on how to install just-in-time water heaters, or training rooftop solar installers, or gardeners in xeriscaping for the region’s climate. Such investments in the local real estate and construction community pay off in less opposition to

466. See, e.g., Chase Biefeldt, *City Planners Working on Big Changes to Boise's Zoning Code*, KTVB7, <https://www.ktvb.com/article/news/local/growing-idaho/boise-city-planners-rewriting-code-for-years-to-come/277-4c18fec4-92db-4444-9842-11c6f2270849> (June 4, 2021, 6:13 PM) (“It has been over 55 years since Boise's zoning code was overhauled.”).

467. In February 2022, ninety-seven Idaho planners were listed as AICP members in the American Planning Association’s membership directory (including the author); see also AICP, AM. PLAN. ASS’N, <https://planning.org/aicp/> (last visited June 2, 2022) (“The American Institute of Certified Planners provides the only nationwide, independent verification of planners’ qualifications.”).

468. *Community and Regional Planning Concluded Operations*, BOISE STATE UNIV., <https://www.boisestate.edu/sps/planning3/> (last visited June 2, 2022).

469. For instance, in 2021, the Boise police chief’s base pay was \$180,003, the fire chief’s base pay was \$173,014, and the planning director’s base pay was \$152,006. See <https://www.idahostatesman.com/news/local/community/boise/article251037254.html>. Similar pay discrepancies exist for other staff members.

470. As one example that led to significant litigation, the real estate trade groups lead a series of lawsuits that challenged inclusive housing requirements. *Schaefer v. City of Sun Valley*, No. CV-06-882, 2007 Ida. Dist. LEXIS 30 (Idaho 5th Dist. July 3, 2007); *Mountain Cent. Bd. of Realtors, Inc. v. City of McCall*, No. CV 2006-490-C, 2008 Ida. Dist. LEXIS 35 (Idaho 4th Dist. Feb.19, 2008).

change and a more skilled workforce that should be able to attract higher wages for more skilled labor.

The legal profession also needs to be educated about planning beyond simply takings law. Few lawyers leave law school knowing anything about local government law except that some government regulations are a taking. Training lawyers to see everything as a taking is problematic because, in truth, almost nothing is a taking and it forestalls negotiation about meaningful project development that could yield a far better result for the project sponsor and the community at large. That means exposing law students early on to the administrative processes of land use planning, but also the rich texture and experience of land use practice.

Similarly, Idaho's case law exhibits a results-oriented approach that seeks to decide individual cases but ignores other norms about how land use practice is supposed to work. There is perhaps no better example than a case where a project sponsor wanted a height exception for an agricultural facility.⁴⁷¹ The project sponsor filed for a conditional use permit, and was denied with the board telling him to file for a variance.⁴⁷² Instead, a lawsuit ensued, with the Idaho Supreme Court upholding the board's decision.⁴⁷³ However, the Idaho Legislature decided to change the statute to permit a conditional use permit for height, which goes against over a century of planning practice across the country.⁴⁷⁴ Idaho needs to stop making such results-oriented decisions based on individual cases if it is ever going to meaningfully plan for the future of a region with over a million persons.

IV. CONCLUDING REMARKS

Several years ago, an organization calling itself "Vanishing Boise" started operating on the Internet and social media.⁴⁷⁵ Before long, the group had obtained a popular following opposing projects that would alter the character of the region. The city's fourth-term mayor, David Bieter, largely sought to ignore the group,

471. *Burns Holdings, LLC v. Teton Cnty. Bd. of Comm'rs*, 272 P.3d 412, 413, 152 Idaho 440, 441 (2012) ("This case illustrates the time and expense that can be expended due to the confusion between a variance and a conditional use permit.").

472. *Id.* at 442.

473. *Id.* at 447.

474. See GARY G. ALLEN ET AL, *LAND USE HANDBOOK: THE LAW OF PLANNING, ZONING, AND PROPERTY RIGHTS IN IDAHO* 68 (2022), <https://www.givenspursley.com/publications> ("The Legislature responded [to the Idaho Supreme Court's *Burns Holdings* decision] in the same year by amending LLUPA to expressly provide that conditional use permits may contain conditions granting exceptions or waivers of standards. Idaho Code § 67-6512(f)."); see also Jacob Green, *When Conditions Go Bad: An Examination of the Problems Inherent in the Conditional Use Permitting System*, 2014 B.Y.U. L. REV. 1185, 1185 (2014).

475. Vanishing Boise (@vanishingboise), FACEBOOK, <https://www.facebook.com/vanishingboise/> (last visited June 2, 2022).

perhaps considering it a small-scale operation. But the group began to gain steam, and power, which ultimately led to public confrontations between the mayor and the group's leader.⁴⁷⁶ It opposed a baseball stadium the mayor wanted to build, showing up in a rowdy neighborhood meeting that the project's attorney, a veteran of the region's land use battles, said was unlike anything he'd ever seen.⁴⁷⁷ The mayor wanted to hire a world-famous architect to design a new library, but the plan would require moving a modest wooden house that housed a literary society.⁴⁷⁸ Again, the mayor's instinct was to push ahead without seeking to placate the group that opposed the project because it would tear down the historic house. The group, however, began a campaign to change the city code to require a vote on any major project that would require the city to take on significant debt.⁴⁷⁹ The measure passed.⁴⁸⁰ In part because of these missteps, the previously popular mayor lost an election for a fifth term to a city council member who ran against him to the political left, something remarkable in a largely conservative area.⁴⁸¹

The lessons here should not be lost on the region as a whole. If there is not a concerted effort to address growth in a way that is acceptable to the community, there will likely be a backlash that seeks to prohibit the kinds of infrastructural choices that could bring long-term success to the region.

Boise's story is compelling not because it is unusual, but because it evinces all the usual components that face fast-growth cities. This kind of growth has happened so often before since World War II that it should not even be news. But time and again, communities have failed to learn the lessons of other cities that have gone before them. They have failed to work together across boundary lines to build a collective future for the region. They have been hamstrung by state politicians that do not like the tenor of the growth because it doesn't fit with their preferred rural values. And they have failed to invest in the human infrastructure—the planners and the lawyers—that can create the tools of governance to make the

476. David Staats, *Citizens Came to Testify on an Urban-Renewal District. Then Mayor Bieter Got Annoyed*, IDAHO STATESMAN (Aug. 6, 2019), <https://www.idahostatesman.com/news/business/article222984780.html#storylink=cpy>.

477. Sven Berg, *Angry Residents Shout Down Boise Stadium at Neighborhood Meeting*, IDAHO STATESMAN (April 17, 2018), <https://www.idahostatesman.com/news/local/community/boise/article209198719.html>.

478. *World-Renowned Firm Safdie Architects to Lead Boise Main Library Design Team*, CITY OF BOISE (Feb. 14, 2018), <https://www.cityofboise.org/news/mayor/2018/february/world-renowned-firm-safdie-architects-to-lead-boise-main-library-design-team/>.

479. *Boise, Idaho, Proposition 1, Voter Approval Requirement for Library Development Initiative (November 2019)*, BALLOTOPEDIA, [https://ballotpedia.org/Boise,_Idaho,_Proposition_1,_Voter_Approval_Requirement_for_Library_Development_Initiative_\(November_2019\)](https://ballotpedia.org/Boise,_Idaho,_Proposition_1,_Voter_Approval_Requirement_for_Library_Development_Initiative_(November_2019)) (last visited June 2, 2022).

480. *Id.*

481. Hayley Harding, *How Little-Known Lauren McLean Beat Boise's Mighty Mayor Bieter: The Inside Story*, IDAHO STATESMAN (Dec. 7, 2019), <https://www.idahostatesman.com/news/local/community/boise/article238052034.html>.

most of growth. It will be Boise's decision whether to learn lessons from the past, but it can no longer be said that such cities have no predecessors to learn from. There are so many places that have failed in all of these ways, and the undesirable result is well known.

What matters now is a willingness to build coalitions in the region that place vision for the future above all else. If that can't happen in Boise, it is worth thinking about under what conditions we could ever expect a mid-sized city undergoing tremendous growth to think meaningfully about its growth and change direction before it ruins itself. Boise may be one of the country's best litmus tests for whether twenty-first century cities can glean the mistakes of land use planning's last one hundred years, or if the known mistakes of the past remain doomed to repeat themselves in Boise's western suburbs, and in other fast-growth cities around the country.

Still, Boise's leaders must be offered some grace. Despite knowing that growth will come, despite knowing all the options that have failed before, there is no obvious solution to growth that any American city has found. These problems of rapid urbanism at the industrial scale challenge the first generation of community leadership tools built to address them. That is all the more reason to embrace a spirit of ingenuity than ever before.