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Curbing the Anticompetitive Impact of Commercial Land Use Regulation: An Administrative Approach

W.C. Bunting

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CURBING THE ANTICOMPETITIVE IMPACT OF COMMERCIAL LAND USE REGULATION: AN ADMINISTRATIVE APPROACH

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ABSTRACT

This Article explores how the anticompetitive impact of a zoning ordinance is assessed under the antitrust laws and substantive due process and concludes that neither is likely to satisfactorily curb the anticompetitive impact of commercial land use regulation. The Article highlights the distinction between a local government's zoning power and its more general police power. For rational basis review to act as a meaningful check on zoning power, as distinguished from more general police powers, this Article contends that such review must require a local government to produce evidence of a causal link between the zoning action and the stated government interest. Rejecting antitrust law as the proper doctrinal vehicle through which to curb the anticompetitive impact of commercial zoning restrictions, this Article proposes a three-part administrative procedure, grounded in notions of due process and the legitimate exercise of a locality's zoning power, to reduce the frequency with which local governments impose socially inefficient restrictions on commercial land use. Finally, the Article introduces the concept of an economic impact statement.

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INTRODUCTION

RESTRICTIONS on land use can impact economic competition by constraining or altering the supply of key real estate inputs in the provision of goods and services. Zoning restrictions and other land use regulations often impose zoning restrictions and other land use regulations to satisfy public objectives other than competition. Residents, for example, often want commercial businesses to be located outside of residential areas. Likewise, a locality can prevent market entry by a potential competitor on the grounds that the entrant, while increasing economic competition, will generate various social costs such as traffic congestion or environmental pollution. Indeed, in *City of Columbia v. Omni Outdoor Advertising*,¹ the United States Supreme Court stated that “the very purpose of zoning regulation is to displace unfettered business freedom in a manner that regularly has the effect of preventing normal acts of competition, particularly on the part of new entrants.”² Assessing the overall impact of land use restrictions requires a difficult balancing of the anticompetitive harm against the social benefits of accomplishing other public policy objectives. This Article explores this complex balancing in the specific context of commercial land use regulation.

Part I begins by describing what this Article views as the key challenge in the regulation of commercial land use, which serves as the principal focus of this paper. Specifically, this Part contends that regulators of commercial land use must perform a complex balancing of social costs and benefits to determine if certain restrictions on commercial land use, on net, increase social welfare, weighing the potential anticompetitive effects of restrictive zoning against the negative externalities that are eliminated by such legislative action. As theoretical background, Section A presents two simple models of zoning. The first model justifies zoning as a mechanism to reduce negative externalities created by land use conflicts.³ The second model views restrictive zoning as a means by which incumbent businesses can maintain or enlarge monopoly power in a local geographic market.⁴ To better understand this balancing of social costs and benefits, Section B also provides two distinct hypotheticals as stylized examples of the corresponding social benefits and costs, respectively.

Part II explores how the anticompetitive impact of a zoning ordinance is assessed under current law. Two avenues of attack are generally available to challenge the validity of a zoning ordinance. The first avenue of attack is antitrust laws. Under this approach, the challenger argues that the zoning restriction harms economic competition in violation of federal

1. 499 U.S. 365 (1991).

2. *Id.* at 373.

3. For more information on the first model of zoning, refer to discussion of the Chicago School of Political Economy in Section II.B.2.a.

4. For more information on the second model of zoning, refer to discussion of the Virginia School of Political Economy in Section II.B.2.b.

or state antitrust laws. The second avenue of attack is substantive due process. Under this approach, the challenger argues that the zoning restriction is not rationally related to a legitimate government interest. Neither attack is likely to succeed, however. In general, antitrust law exempts local governments from antitrust liability if the governing body exercises its legislative powers to enact a regulation with anticompetitive impact, meaning that a zoning ordinance cannot be challenged under antitrust law. Likewise, although courts have recognized that a locality's zoning power should not be used to regulate economic competition among private businesses, judicial scrutiny of the potential anticompetitive impact of a zoning action under rational basis review is weak and can be easily circumvented by local governments.

Part II further highlights the distinction between a local government's zoning power and its more general police power. For the rationally related requirement to serve as a meaningful check on *zoning power*, as distinguished from a local government's more general *police powers*, this Article contends that such review must require a local government to provide evidence of a causal link between the zoning action and the stated government interest. This differs from standard rational basis review of more general police power actions, which can be based upon "rational speculation unsupported by evidence or empirical data."⁵ As discussed in Part III, local governments should be compelled to produce some type of concrete empirical or statistical evidence to support the existence of a causal link between the zoning restriction and the stated government interest for the zoning action to represent a valid exercise of zoning power under rational basis review. Given the omnipresent specter of anticompetitive impact, a local government cannot merely posit a plausible causal link, blithely stating, without additional evidentiary support, that the zoning restriction will promote a legitimate public interest. Local governments must do more.

Part III further contends that the current legal safeguards, including antitrust law and rational basis review as presently applied, are insufficient to safeguard local communities against the anticompetitive effects of commercial land use regulation. Rejecting antitrust law as the proper doctrinal vehicle through which to curb the anticompetitive impact of commercial zoning restrictions, Section III.B.2 suggests a three-part administrative procedure, grounded in notions of due process and the legitimate exercise of zoning power, to reduce the frequency with which local governments impose socially inefficient restrictions on commercial land use. This Section introduces the concept of an economic impact statement in connection with the anticompetitive impact of commercial land use regulation. As part of the three-part procedure, a business owner who challenges the validity of a zoning ordinance that prohibits or restricts commercial land use can make out a *prima facie* case of anticompetitive impact by submitting to the governing body an "economic impact state-

5. Fed. Commc'ns Comm'n v. Beach Commc'ns, 508 U.S. 307, 315 (1993).

ment” that establishes the extent to which the proposed zoning action acts as a barrier to entry. Importantly, to establish a prima facie case of anticompetitive impact, the challenger need not prove an “antitrust injury” under the proposed framework. Instead, the business owner need only submit an economic impact statement that displays where the business can locate in the jurisdiction given the proposed zoning ordinance. Lastly, this Article briefly concludes.

I. PROBLEM OF COMMERCIAL LAND USE

This Part describes the key challenge in the regulation of commercial land use that serves as the principal focus of this paper. Specifically, this Part contends that regulators of commercial land use must perform a complex balancing of social costs and benefits to determine if a restriction on commercial land use increases social welfare, on net, weighing the potential anticompetitive effects of the restrictive zoning action against the negative externalities that are eliminated by such legislative action.

A. Theoretical Background

As theoretical background, this Section describes two models of zoning. The first model explains zoning as a mechanism to decrease negative externalities generated by land use conflicts.⁶ The second model sees restrictive zoning as a means by which incumbent private businesses can maintain or expand monopoly power in a specific geographic market.

1. Zoning as Externality Control Mechanism

Zoning is often conceived as a collective property right that protects the value of properties and enhances the efficiency of resource allocation in metropolitan areas.⁷ Under this view, zoning functions as a top-down regulatory mechanism to reduce expected conflicts related to land use including, for example, nuisance litigation. Both legislatures and courts have consistently articulated, in express terms, the close link between zoning and nuisance, justifying zoning as a mechanism that spatially orders land uses to minimize potential instances of nuisance.⁸ As the United States Supreme Court noted in *Euclid v. Ambler Realty*,⁹ “a nuisance may be merely a right thing in the wrong place,—like a pig in the parlor instead

6. See e.g., Robert B. Fiske, *Real Property: The Effect of Zoning Ordinances on the Law of Nuisance*, 54 MICH. L. REV. 266 (1955).

7. See, e.g., William A. Fischel, *An Economic History of Zoning and a Cure for its Exclusionary Effects*, 41 URB. STUD. 317 (2004); Bruce W. Hamilton, *Zoning and Property Taxation in a System of Local Government*, 12 URB. STUD. 205 (1975); Wallace E. Oates, *The Effects of Property Taxes and Local Public Spending on Property Values: An Empirical Study of Tax Capitalization and the Tiebout Hypothesis*, 77 J. POL. ECON. 957 (1969). See generally WILLIAM A. FISCHEL, *THE ECONOMICS OF ZONING LAWS: A PROPERTY RIGHTS APPROACH TO AMERICAN LAND USE CONTROLS* (1985).

8. See generally Fiske, *supra* note 6.

9. 272 U.S. 365 (1926).

of the barnyard.”¹⁰ Because zoning normally shields any activity that is properly conducted at a place authorized for that activity from a private nuisance claim, zoning allows localities to minimize the transaction costs that would otherwise arise in the private resolution of land use conflicts (e.g., litigation costs).¹¹

Many zoning restrictions, however, seek to regulate land use conflicts that extend beyond nuisance law.¹² Local governments, for example, often implement zoning restrictions that impose a building density limit in an express effort to reduce traffic congestion in the local community. In general, nuisance law does not hold a driver of an automobile liable for the potential negative externalities incurred by other residents because of increased traffic congestion: driving does not represent the type of behavior in which the law identifies a “wrongdoer” who is engaged in harmful conduct towards others.¹³ Likewise, a majority of states permit zoning based purely upon aesthetic factors.¹⁴ In this way, zoning can be regarded as a form of regulation designed to restrict not just wrongful conduct that would otherwise constitute private nuisance, but a much larger set of land use conflicts involving negative externalities more broadly defined than under the common law of nuisance.¹⁵

2. *Anticompetitive Effects of Zoning*

Alternatively, zoning can be viewed as a tool employed by incumbent businesses to maintain or enlarge monopoly power in a local geographic market.¹⁶ In many industries, competition takes place at a very narrow

10. *Id.* at 388.

11. *See, e.g.*, Neil K. Komesar, *Housing, Zoning, and the Public Interest*, in *PUBLIC INTEREST LAW: AN ECONOMIC AND INSTITUTIONAL ANALYSIS* 218, 219–21 (Burton A. Weisbrod et al. eds., 1978).

12. *See* Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 *U. CHI. L. REV.* 681, 719–60 (1973).

13. *See, e.g.*, Ralph Slovenko, *Desocialization by Automobile*, 54 *WAYNE L. REV.* 1767, 1788–89 (2008). In fact, this type of behavior aligns well with Coase’s view of externalities as having a “reciprocal nature,” meaning that a wrongdoer and victim cannot be categorically identified. *See* R.H. Coase, *The Problem of Social Cost*, 3 *J.L. & ECON.*, Oct. 1960, at 1, 2; *see also* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 *HARV. L. REV.* 1089 (1972).

14. *See, e.g.*, Georgette C. Poindexter, *Light, Air, or Manhattanization?: Communal Aesthetics in Zoning Central City Real Estate Development*, 78 *B.U. L. REV.* 445, 483–88 (1998) (discussing the legitimacy of aesthetic zoning in the absence of recognition for aesthetic nuisance); Kenneth Regan, *You Can’t Build that Here: The Constitutionality of Aesthetic Zoning and Architectural Review*, 58 *FORDHAM L. REV.* 1013 (1990); *see also* Mark Bobrowski, *Scenic Landscape Protection Under the Police Power*, 22 *B.C. ENVTL. AFF. L. REV.* 697, 744 (1995) (arguing that visual resource protection’s importance “makes it a [public] purpose that may stand alone as an exercise of the police power”).

15. *See, e.g.*, Amnon Lehavi, *Zoning and Market Externalities*, 44 *FORDHAM URB. L.J.* 361, 372 (2017).

16. *See, e.g.*, J. Fred Giertz, *A Note of Zoning and Monopoly*, 8 *GROWTH & CHANGE* 50, 50 (1977).

geographic scale.¹⁷ To maximize profit in these narrowly defined geographic markets, incumbent firms can take steps to prevent entry of a competitor. Several municipalities in the United States, for example, have placed restrictions on the entry of “formula” businesses characterized by a “standardized array of services or merchandise, trademark, logo, service mark, symbol, décor, architecture, layout, uniform, or similar standardized feature,” and generally are designed to include such national retailers as Wal-Mart, McDonalds, or Starbucks.¹⁸

Typically, these land use restrictions are justified as a means by which to preserve an appropriate balance of small-, medium-, and large-scale businesses in the jurisdiction.¹⁹ As discussed in Section II.B, to justify such a zoning restriction on commercial land use, a local government ordinarily must show how the restriction promotes the public interest and establish that the restriction is not merely a pretext for preserving the status quo in the service of politically powerful local economic interests.²⁰ Although restrictions on the entry of “formula businesses” have generally withstood judicial scrutiny, a few courts have questioned the legitimacy of this type of land use regulation if comparable restrictions have not been levied upon other large businesses that do not have standardized features, suggesting that the true motive for such restrictions is a targeted policy against specific retailers, and not a general, broad-based policy on the preservation of small businesses or the viability of a central business district.²¹ As some scholars have convincingly argued, strictly anticompetitive purpose can be all too easily concealed in the guise of a more general social welfare analysis, in which anticompetitive harm is weighed against otherwise legitimate government interests that are, in fact, entirely pretextual.²²

Empirically, a small, but important, literature generally supports the claim that land use restrictions, such as those imposed on large retailers like Wal-Mart, can have significant anticompetitive impact.²³ Land use

17. See, e.g., Richard A. Posner & William M. Landes, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937, 963 (1981).

18. *Island Silver & Spice, Inc. v. Islamorada*, 542 F.3d 844, 845 (11th Cir. 2008) (quoting ISLAMORADA, FLA., ORDINANCE 02-02 §§ 6.4.3–4(a–b) (2002)).

19. See generally Patricia E. Salkin, *Municipal Regulation of Formula Businesses: Creating and Protecting Communities*, 58 CASE W. RES. L. REV. 1251 (2008).

20. See *infra* Section II.B.

21. See, e.g., *Island Silver & Spice*, 542 F.3d at 847–49 (reasoning that the goal of preserving Islamorada’s “small town” features does not stand if other large non-standardized retailers are allowed and holding that the special limits on formula retail violate the Dormant Commerce Clause’s protection of interstate commerce).

22. See, e.g., Richard A. Epstein, *On Wal-Mart: Doing Good by Doing Nothing*, 39 CONN. L. REV. 1287, 1293–94 (2007) (arguing that labor unions have used municipal zoning regulations to prevent the entry of Wal-Mart into local labor markets).

23. See, e.g., Panle Jia, *What Happens When Wal-Mart Comes to Town: An Empirical Analysis of the Discount Retailing Industry*, 76 ECONOMETRICA 1263, 1291–1306 (2008) (investigating effect of Wal-Mart and Kmart’s entry on small discount retailers using a fully structural approach, and finding that Wal-Mart’s expansion from the

regulations intended to protect city centers, for example, can potentially incentivize owners to open stores that are smaller than what both consumers and sellers would optimally prefer. In a study of the British supermarket industry, for example, the authors show that size and location regulations, set forth in the government's Planning Policy Guidance, imposed suboptimal store characteristics on both consumers and firms in requiring these groups to focus on small rather than more valued middle-sized stores.²⁴ A more recent study shows that independent retailers were harmed by certain land use measures taken to prevent market entry by large stores. These legislatively-created barriers to entry incentivized large retail chains to invest in smaller, more centrally located stores that competed more directly with independent retailers and, ultimately, accelerated the decline of the very retailers whom the legislation was designed to protect.²⁵ A few empirical studies have examined land use regulations that require firms to invest additional time or effort to obtain permission to enter a market and have confirmed that such restrictions, in serving as a barrier to entry, can have a significant anticompetitive impact.²⁶ For example, using microdata on midsized chain hotels in Texas, one empirical study demonstrated that land use regulation served to decrease the probability of market entry, with consumers incurring the cost of zoning indirectly in the form of higher prices charged by incumbent firms that benefited from greater market power.²⁷

late 1980s to the late 1990s explains about fifty percent of net negative change in number of small discount retailers); *see also* Daniel Shoag & Stan Veuger, *Shops and the City: Evidence on Local Externalities and Local Government Policy from Big-Box Bankruptcies*, 100 REV. ECON. & STAT. 440, 444–45 (2018) (finding that directly competing retailers are economically harmed by the presence of a big-box store while the overall pecuniary effects of large retailers are positive); David Merriam et al., *The Impact of an Urban WalMart Store on Area Businesses: The Chicago Case*, 26 ECON. DEV. Q. 321 (2012); *cf.* John C. Haltiwanger et al., *Mom-and-Pop Meet Big-Box: Complements or Substitutes?*, 67 J. URB. ECON. 116 (2010) (showing that impact of big-box entry on other retailers is characterized by considerable heterogeneity where negative employment effects can be found only for stores that operate in immediate geographic area and same detailed industry of new big-box). *See generally* P. Ford, *Excessive Competition in the Retail Trades. Changes in the Numbers of Shops, 1901-1931*, 45 ECON. J. 501 (1935).

24. *See* Howard Smith, *Store Characteristics in Retail Oligopoly*, 37 RAND J. ECON. 416, 428–29 (2006); *see also* Rachel Griffith & Heike Harmgart, *Supermarkets Competition in England and Planning Regulation*, 22 INT. REV. RETAIL, DISTRIBUTION & CONSUMER RES., Feb. 2012, at 1, 12–14 (finding that planning regulation has a statistically significant impact on number of firms operating in region, although the effects are halved once observable differences across local authorities in population density, employment, and distance from town centers are taken into account).

25. *See* Raffaella Sadun, *Does Planning Regulation Protect Independent Retailers?*, 97 REV. ECON. & STAT. 983, 994–97 (2015).

26. *See supra* note 19 and accompanying text.

27. *See* Junichi Suzuki, *Land Use Regulation as a Barrier to Entry: Evidence from the Texas Lodging Industry*, 54 INT'L ECON. REV. 495, 509–14 (2013); *cf.* David B. Ridley et al., *Retail Zoning and Competition* (Jan. 14, 2011) (working paper) (presenting empirical results supporting hypothesis that tighter commercial zoning leads to

B. *Problem to be Solved*

In practice, both models of zoning are likely correct in that zoning can be simultaneously a mechanism to reduce negative externalities created by land use conflicts and a means by which incumbent businesses can maintain or enlarge monopoly power in a local geographic market. The challenge for land use policy is how best to balance these corresponding social costs and benefits to determine if a local land use regulation, on net, increases social welfare.

1. *Two Hypotheticals*

To better understand this complex balancing of social costs and benefits, this Subsection provides two distinct hypotheticals as stylized examples of the corresponding social benefits and costs, respectively.

a. Reducing Negative Externalities Through Land Use Regulation

Consider a small town located a few miles from a busy interstate highway. The local government must decide whether to allow a national fast-food chain-style restaurant to open within its jurisdiction. Most people in town strongly oppose the opening of this type of restaurant, concerned that the local community will incur several distinct social harms, including increased traffic congestion, environmental pollution (including noise and litter), and blight, as well as a rise in low-level crime rates. Many in the community are also concerned that young people will frequent this restaurant and develop bad eating habits that will negatively contribute to the long-run health and well-being of the community. At first blush, the overall lack of local demand for this type of business might suggest that this restaurant is unlikely to survive in the long-run and that normal competitive free market forces can be safely relied upon to prevent entry by this potential market participant (provided the business owner correctly anticipates the lack of future demand). In other words, government intervention in the form of restrictive zoning is not necessary in this local market because natural free market forces, in the form of a lack of consumer demand, ensure the socially efficient outcome—in this case, the restaurant not opening.

Suppose, however, that the patrons of this chain-style restaurant are primarily motorists traveling along the nearby interstate, in addition to a small minority of local town residents, and that the revenues generated by these customers is enough to render the restaurant profitable in the long-run despite the absence of strong local consumer demand. Even though the restaurant imposes substantial social harm on the local community and is not wanted by most of its members, the restaurant is still able to operate profitably due to its proximity to the interstate, which guarantees

fewer rivals, but that, overall, a firm faces more price competition because of spatial proximity forced by zoning).

a steady revenue stream from customers who do not bear directly the social costs generated by the restaurant. In this way, private market forces cannot be relied upon to prevent a business from opening that makes the community worse off: the business creates social harms that it does not internalize, and consumer demand by those who do not incur these external costs is sufficiently large to allow the restaurant to earn a profit.

Characterized in this manner, the problem addressed by commercial land use regulation is one of negative externalities: neither the restaurant nor its customers internalize the negative external costs created by the business. Zoning represents a solution to this externality problem, preventing socially suboptimal development when market forces are not sufficient to deter market entry.²⁸ Rather than making the restaurant internalize the external costs imposed on the local community, the town uses zoning to prevent the restaurant from opening in the first instance on the assumption that such market entry, if permitted, will leave the local community, taken as a whole, worse off.

b. Reducing Local Competition Through Land Use Regulation

Consider again this same small town located a few miles from a busy interstate that must decide whether to allow a national fast-food chain-style restaurant to open. Suppose that most people in the town are now strongly in favor of permitting the restaurant to open. Dining options in town are severely limited, especially affordable lower-priced options, and this restaurant, will benefit consumers by expanding the set of available choices. Less saliently, market entry will also benefit consumers in constraining the pricing power of incumbent restaurants, especially those that offer similar lower-priced fare such as the local diner and pizza parlor. If one of these restaurants raises its prices toward monopoly levels, then its customers will gradually migrate to its competitors in the local market, including the market entrant. In the usual manner, greater market competition, therefore, serves as a check upon the potential exercise of monopoly power, discouraging existing firms from charging supra-competitive prices.²⁹ Importantly, because of these price effects, the net social impact of greater economic competition is positive: increased competition in this local market makes the community, taken as a whole, better off.

In response to this competitive threat, assume that the owner of the local diner, correctly anticipating that greater competition will negatively impact the profitability of the business, lobbies local government officials to prevent this potential competitor from entering the local market. Specifically, to protect his private economic self-interests, the owner of the diner successfully persuades the local zoning board to reject the entrant's

28. *See generally* FISCHER, *supra* note 7.

29. *See generally* Timothy F. Bresnahan & Peter C. Reiss, *Entry in Monopoly Markets*, 57 REV. ECON. STUD. 531 (1990).

application for a zoning permit. In support of the diner's petition to disallow the opening of the fast-food restaurant, the zoning board, however, does not cite to the protection of specific local business interests as the rationale for its decision. Instead, the zoning board ties its decision to other legitimate governmental interests, including the reduction of environmental pollution, traffic congestion, and low-level crime rates. Of course, these stated rationales are entirely pretextual in this hypothetical: the decision to disallow market entry is *not* made to minimize external social harm. Rather, the decision is the direct result of pressure applied by an adversely impacted party with whom members of the board may have a personal relationship. Unlike those seeking to open the national chain-store location, the owner of the diner is a longtime resident of the town, and members of the board are people whom the owner can be expected to have known for many years. For this reason, among others, the zoning board is disinclined to disrupt the status quo and rule against a known insider in favor of an unknown outsider with no real ties to the local community.³⁰

Characterized in this manner, the problem posed by commercial land use regulation is one of public choice: a small number of adversely impacted special interest groups use a political process to prevent market entry by a potential competitor that threatens existing revenue streams. Zoning is a mechanism that allows incumbent businesses to maintain or enlarge monopoly power in a local geographic market. Specifically, incumbents lobby the government to implement specific land use regulations that are solely intended to act as a barrier to market entry, benefiting existing businesses at the expense of the local community. In both hypotheticals, the zoning board makes the decision not to permit a national, chain-style fast-food restaurant to open and cites to the same legitimate government interests in support of its decision to prevent market entry. On its face, the board's decision to deny the zoning permit appears an innocuous exercise of its zoning power: the decision to prevent market entry is rationally related to the government's legitimate interests in controlling pollution, traffic congestion, and local crime, as well as more general considerations related to aesthetics and the long-run health of the local community.³¹ The social welfare implications of each decision, however, are entirely different. In one case, zoning is used to prevent negative externalities; in the other, zoning is used to construct a barrier to entry. Accordingly, the challenge for land use policy is how best to distinguish these two distinct scenarios and allow zoning actions to proceed only in the first scenario, not the second, given that the observed justifications for both zoning actions will appear largely the same if assessed *ex post*.

30. See *infra* note 44.

31. See *infra* Section II.B.2.

2. *Two Opposing Views of Local Government*

One possible response to the challenge suggested above is to contend that local land use authorities can be safely relied upon to distinguish between efficient and inefficient zoning and will generally only restrict commercial land use if the restriction, on net, increases social welfare. That is to say, the extent to which the regulation of commercial land use poses a problem, ultimately, depends upon one's underlying view of local government. This Subsection briefly describes two competing views of local governmental decision-making: (1) decisions made by local government tend towards *efficiency*, and (2) decisions made by local government tend towards *inefficiency*.

a. Chicago School of Political Economy

Under the first model of local government, sometimes referred to as the Chicago School, local land use authorities maximize the joint welfare of residents and predatory special interest groups who seek to extort wealth from residents through local land use regulation.³² Regulators of local land use, such as zoning boards or planning commissions, redistribute income between these two groups such that the marginal costs of enacting regulations that harm residents equals the marginal gain of enacting regulations that benefit special interests.³³ This tradeoff between marginal costs and marginal benefits may not be linear, however; land use regulations enacted in response to interest group pressure may create deadweight losses. In an influential article, Gary Becker argued that these deadweight losses can serve as a constraint on predation.³⁴ Leveraging a well-known insight that deadweight losses are proportional to the square of the tax, Becker argued that a linear increase in takings by a predatory special interest results in a non-linear increase in deadweight losses and that these increasing losses, in turn, provoke the victims of inefficient government policies to invest equivalent sums in resisting attempts to appropriate their wealth.³⁵ If the benefits of special interest groups—which increase linearly—are increasingly offset by the harm to the public—which increases non-linearly (or parabolically), then government decision-making will tend toward efficiency because legislative action is increasingly

32. See, e.g., Samuel Peltzman, *Towards a More General Theory of Regulation*, 19 J.L. & ECON. 211, 231–39 (1976); see also George Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971) (contending that groups whose interests were concentrated would be better able to influence government than groups whose interests were diffuse and thus the main beneficiaries of regulation are likely not consumers but regulated firms).

33. See Peltzman, *supra* note 32, at 231.

34. See Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q.J. ECON. 371, 374 (1983); see also Gary Becker, *Comment*, 19 J.L. & ECON. 245 (1976).

35. See *supra* note 34.

influenced by the preferences of the general public, and not by the particularized demands of special interest groups.³⁶

b. Virginia School of Political Economy

Under the second model of local government, sometimes referred to as the Virginia School, local land use authorities implement inefficient outcomes as a result of the influence of special interest groups who seek to provide some type of private benefit to government officials (e.g., greater job security, personal sense of importance, future wealth as a lobbyist) in exchange for government favors that run contrary to the public good.³⁷ The costs of these inefficient policies are presumed to be diffuse and relatively small at the individual level.³⁸ The anticompetitive harm of restrictive land use regulations, for example, is borne by all consumers and is unlikely to be large at an individual level. Underlying this view of local government is the assumption that the public is rationally ignorant of the lobbying efforts of special interests,³⁹ where the greater the ignorance, the more easily can special interests obtain private benefits to the detriment of the public more generally.⁴⁰ Consumers may not know or be generally aware, for example, that local firms are charging supra-competitive prices. Moreover, even if the public did understand and could properly evaluate the anticompetitive effect of certain zoning restrictions, collective action on the part of the public to defend such diffuse interests is unlikely, especially given the relatively small magnitude of the effect at the individual level: the cost to the individual of defeating any one specific government give-away is large, while the benefit to the individual is relatively small.⁴¹

On the other hand, the benefits of inefficient government regulation are presumed to be concentrated and relatively large at the individual level. The benefits of commercial land use regulation, for instance, are enjoyed by a small number of incumbent businesses with a strong incentive to promote anticompetitive policies through lobbying or other forms of rent-seeking behavior.⁴² The potential harm caused by market entry to

36. See generally FILIP PALDA, *A BETTER KIND OF VIOLENCE: THE CHICAGO SCHOOL OF POLITICAL ECONOMY, PUBLIC CHOICE, AND THE QUEST FOR AN ULTIMATE THEORY OF POWER* (2015).

37. See, e.g., GORDON TULLOCK, *THE ECONOMICS OF SPECIAL PRIVILEGE AND RENT SEEKING* (1989); see also MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* (1965).

38. See, e.g., William C. Mitchell & Michael C. Munger, *Economic Models of Interest Groups: An Introductory Survey*, 35 AM. J. POL. SCI. 512 (1991); see also Anne O. Krueger, *The Political Economy of the Rent-Seeking Society*, 64 AM. ECON. REV. 291 (1974).

39. See, e.g., David Austen-Smith, *Interest Groups, Campaign Contributions, and Probabilistic Voting*, 54 PUB. CHOICE 123, 126–27 (1987).

40. See *id.*

41. See, e.g., Mitchell & Munger, *supra* note 38.

42. See, e.g., Thomas W. Hazlett, *Physical Scarcity, Rent Seeking, and the First Amendment*, 97 COLUM. L. REV. 905, 912 (1997) (discussing rent-seeking associated with licensing regime for broadcasting). See generally Edward P. Lazear & Sherwin

incumbent firms is immediate and obvious, and the financial consequences are significant. Greater competition can be expected to result in lower revenue, and, in turn, lower profits—and, in some cases, may lead to the termination of the business. For a relatively small investment, incumbent firms can secure government favors potentially worth much more and, in fact, may risk forsaking these benefits to existing market competitors if such favors are not actively pursued.⁴³ In this way, the incentive for concentrated groups to act rationally in their private short-run self-interest, coupled with the intrinsic lack of organization of large groups, can produce land use regulations that benefit special interest groups at the expense of the public more broadly.⁴⁴

This Article regards this second view of local government as largely correct with respect to the regulation of commercial land use. In certain cases, land use authorities may fail to correctly assess whether specific restrictions on commercial land use increase social welfare, implementing restrictive zoning regulations in which the anticompetitive harm is not fully offset by the corresponding social benefits. In view of this posited government failure, the discussion to follow examines how the potential anticompetitive impact of a restrictive zoning action is currently evaluated

Rosen, *Rank-Order Tournaments as Optimum Labor Contracts*, 89 J. POL. ECON. 841 (1981).

43. See, e.g., SUSAN ROSE-ACKERMAN, *CORRUPTION: A STUDY IN POLITICAL ECONOMY* 20 (1978).

44. See, e.g., Jagdish N. Bhagwati, *Directly Unproductive, Profit-Seeking (DUP) Activities*, 90 J. POL. ECON. 988 (1982). The influence of special interest groups can be further strengthened by local government's behavioral preference for the status quo; specifically, regulators of land use may be characterized by a status quo bias, defined as a preference for the current situation, that pushes them to rule in favor of incumbent businesses to the detriment of potential market entrants. Status quo bias has been attributed to a combination of behavioral factors including mere exposure and loss aversion. As an explanation for the status quo bias, mere exposure posits that existing states (i.e., the status quo) are encountered more frequently than non-existent states (i.e., changes to the status quo) and existing states will, therefore, generally be perceived as truer and be evaluated more preferably than non-existent states. Under this theory, status quo bias increases with repeated exposure over time. See, e.g., Robert F. Bornstein, *Exposure and Affect: Overview and Meta-Analysis of Research, 1968-1987*, 106 PSYCHOL. BULL. 265 (1989). As an explanation for the status quo bias, loss aversion posits that people weigh the potential losses of switching from the status quo more heavily than the potential gains: the current baseline (or status quo) is taken as a reference point, and any change from that baseline is perceived as a loss: even though choosing the status quo may entail forfeiting certain positive consequences, when these consequences are represented as forfeited "gains," they are given less weight psychologically than the "losses" that would be incurred if the status quo were changed. See, e.g., Nick Bostrom & Toby Ord, *The Reversal Test: Eliminating Status Quo Bias in Applied Ethics*, 116 ETHICS 656 (2006). This tendency to overemphasize the avoidance of losses favors retaining the status quo, resulting in a *status quo bias* in which change is avoided, and decision-makers tend to stick with what has been done in the past. See, e.g., William Samuelson & Richard Zeckhauser, *Status Quo Bias in Decision Making*, 1 J. RISK & UNCERTAINTY 7 (1988) (explaining how departures from the status quo occur only if the benefits of the change outweigh the risks by a sufficiently large amount).

and explores whether land use policy may be usefully modified to produce a more optimal weighing of the expected social costs and benefits of restrictive zoning.

II. CURRENT REGULATORY APPROACHES

Part II explores how the anticompetitive impact of a zoning ordinance is assessed under current law. Two avenues of attack are generally available to challenge the validity of a zoning ordinance. The first avenue of attack is antitrust laws. Under this approach, the challenger argues that the zoning restriction harms economic competition in violation of federal or state antitrust laws.⁴⁵ The second avenue of attack is substantive due process. Under this approach, the challenger argues that the zoning restriction is not rationally related to a legitimate government interest. Neither attack is likely to succeed, however. In general, antitrust law exempts a local government from antitrust liability if the governing body exercises its legislative powers to enact a regulation with anticompetitive impact, meaning that a zoning ordinance cannot be challenged under antitrust laws.⁴⁶ Likewise, although courts have recognized that zoning should not be used to regulate economic competition among private businesses, judicial scrutiny of the potential anticompetitive impact of a zoning action under rational basis review is weak and can be easily circumvented by local governments.⁴⁷ Rather than engage in the complicated balancing of social costs and benefits necessary to determine if a zoning action, on net, increases social welfare, courts have been willing to assess anticompetitive impact generally only when this balancing is relatively straightforward and have been otherwise content to rely upon the legislature to regulate commercial land use in a socially efficient manner.⁴⁸ Whether this reliance is sound, of course, depends, in large part, upon the extent to which the regulation of commercial land use by local government tends toward efficiency.

A. *Antitrust Attack*

This Section examines how the anticompetitive impact of a restrictive zoning action is presently evaluated under the federal antitrust laws.

45. See e.g., *City of Columbia v. Omni Outdoor Advert.*, 499 U.S. 365, 367 (1991) (referring to allegations that a zoning ordinance provided an unfair competitive advantage to an advertising company that controlled more than ninety-five percent of the local market and enjoyed close relations with city officials).

46. See *infra* Section II.A.

47. See *infra* Section II.B.2.

48. For an illustration of this tendency in antitrust-zoning jurisprudence, see Section II.B.2.a.

1. *Immunity Flows from States*

Whether a local government is liable for a violation of the federal antitrust laws depends, in large part, upon whether a local government qualifies for immunity under the state action doctrine. Originating in the 1943 Supreme Court case *Parker v. Brown*,⁴⁹ the state action doctrine insulates state actors from federal antitrust claims.⁵⁰ The doctrine respects the sovereign immunity afforded to the states under a federal system in which the states, and not Congress, are entitled to regulate matters within their geographic boundaries unless Congress has plainly indicated a contrary result.⁵¹ Unlike state governments, local governments are not themselves sovereign entities.⁵² Accordingly, local governments “do not receive all the federal deference of the States that create them[,]” and are only immune to the extent that they act with authority from the state.⁵³ Specifically, a local government’s immunity from antitrust liability is conditioned on authorization from the state to displace competition. Although the Supreme Court initially appeared to suggest that a high level of state oversight was required for antitrust immunity to attach,⁵⁴ the Court has, over time, generally set a low bar as to what constitutes sufficient authorization,⁵⁵ expressly articulating this standard in *City of Columbia v. Omni Outdoor Advertising*,⁵⁶ which clarifies how the state action doctrine applies to local governments.⁵⁷

a. State Action Doctrine Applicable to Municipalities

In *Omni*, the Supreme Court significantly strengthened the antitrust immunity afforded local governments in land use cases with its broad in-

49. 317 U.S. 341 (1943).

50. *See id.* at 352.

51. *See, e.g.,* S. Motor Carriers Rate Conference v. United States, 471 U.S. 48, 56–57 (1985).

52. *See* *City of Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 412 (1978) (first citing *Edelman v. Jordan*, 415 U.S. 651, 667 n.12 (1974); then citing *Lincoln County v. Luning*, 133 U.S. 529 (1890)) (“Cities are not themselves sovereign[.]”).

53. *Id.*

54. *See, e.g.,* *Goldfarb v. Va. State Bar*, 421 U.S. 773, 791 (1975) (suggesting that the state must compel and, in fact, supervise a municipality’s conduct); *City of Lafayette*, 435 U.S. at 410 (holding that immunity is limited to instances where a municipality acts according to a “clearly articulated and affirmatively expressed” state policy to displace competition); *cf. Cmty Commc’n Co. v. City of Boulder*, 455 U.S. 40, 55 (1982) (refusing to find a “clear articulation and affirmative expression” where the “State’s position is one of mere *neutrality* respecting the municipal actions challenged as anticompetitive”).

55. *See, e.g., City of Lafayette*, 435 U.S. at 415 (holding that the state need not supervise, mandate, or even explicitly authorize local government’s anticompetitive behavior so long as the state “contemplated the kind of action complained of” (quoting *City of Lafayette v. La. Power & Light Co.*, 532 F.2d 431, 434 (1976))).

56. 499 U.S. 365 (1991).

57. *See id.* at 379–80; *see also* *Fed. Trade Comm’n v. Ticor Title*, 504 U.S. 621 (1992) (clarifying how state action doctrine applies to private parties).

terpretation of the state action doctrine. *First*, the Court held that the proper focus of the state action analysis is limited to whether the state, in fact, authorized the challenged conduct by the local government: determining if a local government exceeds the limits of that authority is not relevant to the analysis.⁵⁸ *Second*, the Court eliminated the co-conspirator exception to state action immunity.⁵⁹

Omni involved a challenge to a zoning ordinance that restricted the size, location, and spacing of billboards.⁶⁰ *Omni Outdoor Advertising* alleged that the zoning ordinance provided an unfair competitive advantage to the Columbia Outdoor Advertising (“COA”) company, which controlled more than ninety-five percent of the local market and enjoyed close relations with city officials.⁶¹ *Omni* alleged that COA had conspired with city officials to prevent business competitors from entering the market.⁶² On the question of the state action doctrine, the Court held that the City of Columbia was entitled to immunity from antitrust liability. The state had expressly granted the city statutory authority “to regulate the size, location, and spacing of billboards.”⁶³ The Court rejected the contention that this requirement can be met only if the delegating statute explicitly permits the displacement of competition, holding that it is enough if suppression of competition is the “foreseeable result” of what the statute authorizes.⁶⁴ Because the purpose of zoning regulation is to displace unfettered business freedom in a manner that regularly has the effect of preventing normal acts of economic competition, especially with respect to market entry, the Court concluded that the foreseeability condition was “amply met” in the present case.⁶⁵

This interpretation of the state action doctrine implies broad immunity for local governments to enact zoning regulations with significant anticompetitive impact. The authority of local governments to regulate commercial land use is expressly delegated to local governments by state governments through state zoning enabling statutes.⁶⁶ If it is “foreseeable” that an exercise of such zoning power would displace competition,

58. *See Omni*, 499 U.S. at 372.

59. *See id.* at 374.

60. *Id.* at 368.

61. *Id.* at 367 (“The mayor and other members of the city council were personal friends of COA’s majority owner, and the company and its officers occasionally contributed funds and free billboard space to their campaigns.”).

62. *Id.* at 369 (“According to respondent . . . these beneficences were part of a longstanding secret anticompetitive agreement whereby the City and COA would each use their [sic] respective power and resources to protect . . . COA’s monopoly position, in return for which City Council members received advantages made possible by COA’s monopoly.” (alterations in original) (internal quotation marks omitted)).

63. *Id.* at 370–71.

64. *Id.* at 373 (citing *Hallie v. Eau Claire*, 471 U.S. 34, 41 (1985)).

65. *Id.*

66. *See infra* Section II.B.1.

as the Supreme Court acknowledged in *Omni* in holding that zoning is inherently anticompetitive,⁶⁷ then the state, in delegating such power to local governments under the enabling legislation, has clearly articulated a policy authorizing anticompetitive conduct that serves to shield the exercise of zoning power by local governments from antitrust attack. In other words, any common form of zoning that limits market entry is entitled to state action immunity.

b. Local Government Antitrust Act of 1984

Congress enacted the Local Government Antitrust Act of 1984⁶⁸ that barred antitrust damages against official state actors.⁶⁹ The Act codified the judicially-created state action doctrine, immunizing from monetary liability “any official action directed by a local government, or official or employee thereof acting in an official capacity.”⁷⁰ The legislative history indicates that Congress intended the state action doctrine to apply, by analogy, to the conduct of a local government in directing the actions of non-governmental parties, as if the local government were a state.⁷¹ A local government’s activities, therefore, need not be authorized by the state for immunity to apply. Accordingly, local governments are more likely to qualify for antitrust immunity under the Act than under the state action doctrine itself.⁷²

This provision for injunctive relief, however, has not, in practice, significantly expanded local governments’ liability for anticompetitive conduct in connection with the regulation of commercial land use.⁷³ In many cases, state action immunity bars suit altogether, foreclosing the possibility of any remedy under the Act.⁷⁴ Moreover, when courts have acknowl-

67. See *Omni*, 499 U.S. at 373 (“The very purpose of zoning regulation is to displace unfettered business freedom in a manner that regularly has the effect of preventing normal acts of competition, particularly on the part of new entrants.”).

68. 15 U.S.C. §§ 34–36 (1994).

69. See, e.g., S. REP. NO. 98–593, at 3 (1984) (stating that legislation was necessary to “allow local governments to go about their daily functions without the paralyzing fear of antitrust lawsuits”).

70. 15 U.S.C. § 34.

71. See H.R. REP. NO. 98–1158, at 3 (Conf. Rep.), reprinted in 1984 U.S.C.C.A.N. 4602, 4626–27.

72. See E. Thomas Sullivan, *Antitrust Regulation of Land Use: Federalism’s Triumph over Competition, The Last Fifty Years*, 3 WASH. U. J.L. & POL’Y 473, 509 (2000). Unlike the absolute immunity provided under the state action doctrine, immunity under the Act is only from monetary damages: a plaintiff may still request injunctive relief. See 15 U.S.C. § 36(a). Importantly, in recognizing the possibility of injunctive relief, Congress confirmed, for the first time, that local governments come within the jurisdiction of federal antitrust laws. See *id.* § 34.

73. See Sullivan, *supra* note 72, at 510.

74. State action immunity trumps the protection afforded by the Act. If there is overlap, then the state action doctrine precludes both damage and injunctive suits. See, e.g., *Am. Int’l Sec. Specialists, Inc. v. Roberts*, 161 F.3d 1, 3 n.1 (4th Cir. 1998) (concluding that appellees were entitled to immunity under state action, which rendered it unnecessary to consider whether they might also be immune

edged the possibility of injunctive relief, the formidable defenses available to government defendants, coupled with the burden of properly stating a claim for equitable relief, have typically proven an insurmountable obstacle to antitrust plaintiffs seeking an equitable remedy.⁷⁵ The legislative history indicates that Congress sought to “readjust the litigation advantages and disadvantages more equitably for local government defendants”⁷⁶ in requiring that plaintiff’s burden in bringing a claim for injunctive relief be treated the same as in other equitable actions.⁷⁷ In a suit for equitable relief, the remedial focus is on prevention of future injury, and not compensation for prior injury.⁷⁸ The prospective nature of equitable remedies imposes a substantial burden on the plaintiff at the outset of the litigation, because “[l]ogically, ‘a prospective remedy will provide no relief for an injury that is, and likely will remain, entirely in the past.’”⁷⁹

2. *Co-Conspirator Exception*

Private parties often play an important role in the regulation of local land use. As such, private parties may be implicated when such regulations yield anticompetitive outcomes including the exclusion of a business competitor. In *Omni*, the Supreme Court expressly rejected a co-conspirator exception to the *Noerr-Pennington* doctrine under which private parties may be subject to antitrust liability for attempts to influence government officials if such parties could be characterized as conspiring with local government officials to stifle economic competition in a local market.⁸⁰

a. *Noerr-Pennington* Doctrine

The *Noerr-Pennington* doctrine immunizes private parties from antitrust liability for attempts to influence the passage or enforcement of laws or regulations,⁸¹ even if such political actions are purely motivated by an

under the Local Government Antitrust Act); *Martin v. Memorial Hosp.*, 86 F.3d 1391, 1398–1400 (5th Cir. 1996) (holding that appellants were immune under the state action doctrine and reversing the lower court’s conclusion that injunctive relief, attorney’s fees, and court costs were available under the Act).

75. See Sullivan, *supra* note 72, at 487.

76. H.R. REP. NO. 98–965, at 18–19 (1984).

77. See S. REP. NO. 98–593, at 6 (1984); H.R. REP. NO. 98–965, at 18–19.

78. See FED. R. CIV. P. 65.

79. *Church v. City of Huntsville*, 30 F.3d 1332, 1337 (11th Cir. 1994) (quoting *Am. Postal Workers Union v. Frank*, 968 F.2d 1373, 1376 (1st Cir. 1992)).

80. See *City of Columbia v. Omni Outdoor Advert.*, 499 U.S. 365, 382 (1991).

81. See *United Mine Workers v. Pennington*, 381 U.S. 657, 670 (1965) (“Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition.”); *E. R.R. Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127, 136 (1961) (finding that antitrust laws are directed only to private trade restraints, not conduct undertaken because of valid government action); see also *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508 (1972) (expanding upon the *Noerr-Pennington* doctrine).

anticompetitive purpose.⁸² The doctrine is premised on the notion that the activities of those who petition local governments for changes to certain laws or regulations constitute protected free speech under the First Amendment,⁸³ and upon a recognition that the antitrust laws, “tailored as they are for the business world, are not at all appropriate for application in the political arena.”⁸⁴ Prior to *Omni*, several lower courts had recognized an exception to the *Noerr-Pennington* doctrine, refusing to grant immunity if local government officials had *conspired* with private parties to stifle market competition.⁸⁵ Conspiratorial activity between a local government and members of its constituency was deemed to lie outside the scope of constitutionally-protected free speech.⁸⁶ Specifically, these courts located a basis for this co-conspirator exception in *Parker* which appeared to suggest that immunity would not attach if a state or local government participated in a private agreement to restrain trade.⁸⁷

In *Omni*, the Supreme Court expressly rejected this analysis, holding that *Parker* “simply clar[ified] that [state action] immunity does not necessarily obtain where the State acts not in a regulatory capacity but as a commercial participant in a given market.”⁸⁸ In the Court’s view, a conspiracy exception would, in effect, nullify state action immunity because good government necessarily requires agreements between public officials and members of their constituency.⁸⁹ Drawing a parallel to the state action doctrine, the Court reasoned that both the state action and *Noerr-Pennington* doctrines “are complementary expressions of the principle that the antitrust laws regulate business, not politics[,]” and concluded that it would be logically incongruous to bar the conspiracy exception from one

82. See *Pennington*, 381 U.S. at 670 (“*Noerr* shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose.”).

83. See *Noerr*, 365 U.S. at 138 (Because “[t]he right of petition is one of the freedoms protected by the Bill of Rights . . . we cannot, of course, lightly impute to Congress an intent to invade these freedoms”). See generally E. Thomas Sullivan, *First Amendment Defenses in Antitrust Litigation*, 46 MO. L. REV. 517, 538–39 (1981).

84. *Noerr*, 365 U.S. at 141.

85. See, e.g., *Omni Outdoor Advert. v. Columbia Outdoor Advert.*, 891 F.2d 1127 (4th Cir. 1989); *Westborough Mall v. City of Cape Girardeau*, 693 F.2d 733 (8th Cir. 1982); *Whitworth v. Perkins*, 559 F.2d 378 (5th Cir. 1977).

86. See, e.g., *Whitworth*, 559 F.2d 378 (5th Cir. 1977).

87. See *Parker v. Brown*, 317 U.S. 341, 351–52 (“[W]e have no question of the state or its municipality becoming a participant in a private agreement or combination by others for restraint of trade The state in adopting and enforcing the prorate program made no contract or agreement and entered into no conspiracy in restraint of trade or to establish monopoly but, as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit.” (first citing *Union Pac. R.R. v. United States*, 313 U.S. 450 (1941); then citing *Olsen v. Smith*, 195 U.S. 332, 344–45 (1904))).

88. *City of Columbia v. Omni Outdoor Advert.*, 499 U.S. 365, 374–75 (1991).

89. See *id.* at 375 (stating that a conspiracy exception would make “all anticompetitive regulation . . . vulnerable to a ‘conspiracy’ charge”).

but not the other.⁹⁰ Moreover, even if unlawful conduct is a factor in such an exchange, the Court believed that other laws, like the Hobbs Act, for example, are better suited to regulate such private conduct.⁹¹

b. Sham Exception

Several exceptions do exist to the *Noerr-Pennington* doctrine, including the “sham” exception, which holds that using the petitioning process simply as an anticompetitive weapon without legitimately seeking a positive outcome to the petitioning destroys immunity.⁹² In *Omni*, the Supreme Court further strengthened the immunity available to local governments in holding that this sham exception did not apply to “improper or even unlawful” lobbying efforts to obtain zoning restrictions when “the regulatory process is being invoked genuinely[.]”⁹³ The Court explained that “the purpose of delaying a competitor’s entry into the market does not render lobbying activity a ‘sham,’ unless . . . the delay is sought to be achieved only by the lobbying process itself, and not by the governmental action that the lobbying seeks.”⁹⁴ A sham proceeding is defined not by anticompetitive purpose, but, rather, by the absence of any purpose to obtain government action.⁹⁵ Thus, initiating an administrative proceeding that, if successful, will harm a business competitor falls within the scope of the *Noerr-Pennington* doctrine, whereas initiating a similar proceeding with no expectation of success solely to prevent market entry by a business competitor falls squarely within the sham exception.⁹⁶

90. *Id.* at 383. In effect, a conspiracy exception would bar First Amendment protection whenever a private party was successful in petitioning a local government to a particular outcome. *See id.* at 375.

91. *See id.* at 378–79 (suggesting the Hobbs Act as one example of a law better suited to deal with illegal petitioning activity).

92. *See id.* at 374–75; *see also* *E. R.R. Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127, 144 (1961) (holding that activity constituting “a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor” is not protected under the *Noerr-Pennington* doctrine).

93. *Omni*, 499 U.S. at 381–82.

94. *Id.* at 381.

95. *See id.*

96. *See, e.g.,* *Miracle Mile Assocs. v. City of Rochester*, 617 F.2d 18, 21 (2d Cir. 1980) (“[A]ccess-barring is the cornerstone to the sham exception.” (quoting *Wilmorite, Inc. v. Eagen Real Estate Inc.*, 454 F. Supp 1124, 1134–35 (N.D.N.Y. 1977))). Two years after *Omni*, in *Professional Real Estate Investors v. Columbia Pictures Industries*, the Supreme Court addressed the issue of “intent” for purposes of the sham exception, rejecting a purely subjective definition of a sham lawsuit. *Prof'l Real Estate Inv'rs v. Columbia Pictures Indus.*, 508 U.S. 49 (1993). Under the first prong of its two-part test to determine the existence of sham litigation, a lawsuit fits within the sham exception only if the suit is “objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits.” *Id.* at 60. If the challenged litigation satisfies the first prong, then the Court proceeds to the second prong under which it must determine whether the litigant’s subjective motivation in filing the lawsuit was “an attempt to interfere directly with the business relationships of a competitor . . . through the use [of] the governmen-

B. *Due Process Attack*

This Section examines how the potential anticompetitive impact of a restrictive zoning action is currently evaluated under the Due Process Clause.⁹⁷

1. *Zoning Power*

This Subsection provides a general overview of zoning law and delegated authority and explores the difference between a zoning ordinance and a general police ordinance.

a. *Zoning Law and Authority*

“Zoning is the deprivation, for the public good, of certain uses by owners of property to which their property might otherwise be put”⁹⁸ A zoning ordinance is a legislative document drafted and enacted by a local government and is generally enforced by a specialized board or planning commission.⁹⁹ Through zoning ordinances, local governments set forth classifications of permitted or prohibited land uses, typically dividing the locality into separate districts within which only certain prescribed land uses are allowed.¹⁰⁰ Land use restrictions vary across localities according to the different legislative decisions that each local legislative body makes when drafting or amending its zoning laws or regulations.¹⁰¹ Although zoning decisions are made with respect to specific neighborhoods and the property owners located within, zoning decisions are considered legislative in nature, impacting the community at large, and require a holistic analysis of aesthetic, environmental, and economic considerations.¹⁰²

The legal basis for all land use regulation is the police power.¹⁰³ The police power is the inherent authority of a *state* government to impose restrictions on private rights in the interests of public health, safety, morals, and general welfare.¹⁰⁴ To achieve these public benefits, the state retains the power to constrain (within federal and state constitutional lim-

ital process—as opposed to the outcome of that process[.]” *Id.* at 60–61 (citation omitted) (internal quotations omitted). If so, then the proceeding is deemed a sham, and the litigant’s activities are not entitled to immunity from antitrust liability under the *Noerr-Pennington* doctrine. *See id.*

97. U.S. CONST. amend. XIV, § 1 (“[N]or shall any State deprive any person of life, liberty, or property, without due process of law”).

98. *Gilbert v. Stockton Port Dist.*, 60 P.2d 847, 850 (Cal. 1936).

99. *See, e.g.*, CAL. GOV’T CODE § 65850 (West 2000).

100. *See, e.g.*, John R. Nolon, *Historical Overview of the American Land Use System: A Diagnostic Approach to Evaluating Governmental Land Use Control*, 23 PACE ENVTL. L. REV. 821, 831–33 (2006).

101. *See, e.g.*, *W.R. Grace & Co.-Conn. v. Cambridge City Council*, 779 N.E.2d 141, 149–50 (Mass. App. Ct. 2002).

102. *See, e.g.*, *Metro. Baptist Church v. D.C. Dep’t of Consumer & Regulatory Affairs*, 718 A.2d 119, 125 (D.C. 1998).

103. *See Berman v. Parker*, 348 U.S. 26, 31–32 (1954).

104. *See, e.g.*, *Mugler v. Kansas*, 123 U.S. 623, 661 (1887).

its) private and economic interests, including private property rights. The police power is an inherent authority of state governments; importantly, local governments do not have an inherent authority to regulate land use. Instead, this authority is *delegated* to local governments by state governments through state zoning enabling statutes,¹⁰⁵ or home-rule provisions contained in the state constitution.¹⁰⁶ Accordingly, for a zoning ordinance to be valid, the enactment of the ordinance must represent a legitimate exercise of the zoning power expressly delegated to a local government by the state.¹⁰⁷

Courts have held that a zoning action represents a valid exercise of its delegated zoning power if such action bears a rational relationship to a legitimate government interest¹⁰⁸ and is not otherwise arbitrary, capricious, or entirely lacking in evidentiary support.¹⁰⁹ This statement of what is commonly referred to as “rational basis review” suggests the following two-step test. The first step is to identify a legitimate government interest that justifies the zoning ordinance—not all government interests are legitimate.¹¹⁰ Having successfully identified a legitimate government interest, the second step is to consider whether the zoning ordinance is rationally related to the stated government interest and does not constitute arbitrary

105. *See, e.g.*, MICH. COMP. LAWS ANN. § 125.3201 (West 2016).

106. *See, e.g.*, GA. CONST. art. IX, § 2, ¶ IV; *see also* CAL. CONST. art. XI, § 7 (“A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws.”). Zoning and land use regulation based upon delegated police power is distinct from the government’s taking of private property through its inherent power of eminent domain—when government restrict private property rights under the authority of the zoning power, a private property owner is not typically entitled to just compensation. *See, e.g.*, William B. Stoebuck, *Police Power, Takings, and Due Process*, 37 WASH. & LEE L. REV. 1057, 1059–61 (1980) (discussing how police power is “very different” from eminent domain).

107. *See* *Euclid v. Amber Realty*, 272 U.S. 365, 389–90, 395 (1926) (holding that the exercise of the zoning power is constitutionally valid, unless such provisions “are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare” (first citing *Thomas Cusack Co. v. City of Chicago*, 242 U.S. 526, 530–31 (1917); then citing *Jacobson v. Massachusetts*, 197 U.S. 11, 30–31 (1905))).

108. *See* *Associated Home Builders, Inc. v. City of Livermore*, 557 P.2d 473 (Cal. 1976).

109. *See, e.g.*, *Hernandez v. City of Hanford*, 159 P.3d 33, 44 (Cal. 2007) (stating that “zoning ordinances, when reasonable in object and not arbitrary in operation, constitute a justifiable exercise of police power” (quoting *Lockard v. City of Los Angeles*, 202 P.2d 38, 42 (Cal. 1949))); *see also* *Town of Normal v. Seven Kegs*, 599 N.E.2d 1384, 1387 (Ill. App. Ct. 1992) (stating that local government action must bear “a rational relationship to a legitimate governmental purpose and is neither arbitrary nor discriminatory” (citing *Kidd v. Indus. Comm’n*, 426 N.E.2d 822, 824 (Ill. 1981))).

110. *See* *Berman v. Parker*, 348 U.S. 26, 33 (1954) (“The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.” (citation omitted)).

or capricious action by the local government.¹¹¹ In exercising their zoning power, local governments are given broad discretion in determining what actions are reasonable to protect the public health, safety, morals, and general welfare of the local community.¹¹² In general, local governments are permitted, within constitutional limits, to use zoning power to regulate or restrict private property including land uses, population densities, the height of buildings, and the location of a building on a lot (i.e., setbacks).¹¹³

b. Zoning Power Versus Police Power

There are important differences between a zoning ordinance and a general police ordinance adopted under the general police power authority delegated to a local government by the state.¹¹⁴ Specifically, a local government's zoning power can be viewed as a "subset of the police power,"¹¹⁵ under which the government's power to act is subject to relatively greater restrictions. Distinguishing a zoning ordinance from a non-zoning police ordinance "is not necessarily a simple task."¹¹⁶ In general, a zoning ordinance regulates the use of land, whereas a police ordinance regulates an "activity" performed upon that land.¹¹⁷

Unlike a police ordinance, the administrative process to enact a zoning ordinance includes, in recognition of the central role that private property rights play in a free-market capitalist system, a number of procedural requirements, such as public hearings, notices, appeals, and non-conforming uses.¹¹⁸ Further, the master plan itself, upon which most

111. See *infra* Section II.B.2.b.

112. See, e.g., *Carlin v. City of Palm Springs*, 92 Cal. Rptr. 535, 539 (Cal. Ct. App. 1971). See generally Jeffrey D. Jackson, *Putting Rationality Back into the Rational Basis Test: Saving Substantive Due Process and Redeeming the Promise of the Ninth Amendment*, 45 U. RICH. L. REV. 491 (2011).

113. See *Euclid v. Amber Realty*, 272 U.S. 365, 388–89 (1926).

114. See Brian W. Ohm, *Some Modern Day Musings on the Police Power*, 47 URB. LAW. 625, 648–56 (2015).

115. *Zwiefelhofer v. Town of Cooks Valley*, 809 N.W.2d 362, 370 (Wis. 2012).

116. *Id.*

117. See *id.* (identifying six common characteristics of a traditional zoning ordinance, including that a zoning ordinance traditionally controls where an activity takes place spatially rather than how such activity must be conducted). The Tennessee Supreme Court has adopted a test under which a court must first assess the non-zoning ordinance to determine if the ordinance is so closely related to the zoning ordinance that it is "tantamount to zoning;" only after a court has determined that the non-zoning ordinance is tantamount to zoning does the court determine if the ordinance substantially impacts the use of the property. See *SNPCO, Inc. v. City of Jefferson City*, 363 S.W.3d 467, 478 (Tenn. 2012) (holding that ordinance banning the sale or fireworks within a city is not a zoning ordinance). Courts have recognized that "use of land" and "activities" of persons or business entities are neither absolute nor mutually exclusive as legal categorizations. See, e.g., *Belanger v. Chesterfield Twp.*, 293 N.W.2d 622, 623 (Mich. Ct. App. 1980).

118. See ELLEN FRANKEL PAUL, *PROPERTY RIGHTS AND EMINENT DOMAIN* 185–224 (1987).

zoning ordinances are typically based, must be adopted pursuant to the procedures set forth in the state enabling legislation which also generally include public involvement, hearings, notices, and appeals.¹¹⁹ Given these greater procedural burdens, a local government should, in theory, prefer to employ its relatively less restricted police powers to enact a general police ordinance with anticompetitive purpose. Rather than attempt to “zone” a given business out of the jurisdiction, a local government can simply use its general police powers to enact a ban prohibiting the unwanted business activity.¹²⁰ Despite the formal procedural requirement, a local government may, nevertheless, prefer to employ its zoning power, rather than its more general police powers, to achieve an anticompetitive purpose for reasons related to (1) transparency, (2) electoral accountability, and (3) non-retroactive application of the law.

i. Transparency

Compared to a general police ordinance, the anticompetitive impact of a zoning ordinance tends to be relatively more difficult for the voting public to assess insofar as the exact properties impacted by the zoning restriction are often unclear and change dynamically over time. Consider, for example, zoning restrictions on medical marijuana dispensaries in Philadelphia, Pennsylvania. In 2016, Pennsylvania voted to legalize medical marijuana. The legislation prohibited medical marijuana dispensaries from locating “within 500 feet of residential areas, churches, hotels, convention centers, playgrounds, pools, parks, recreation centers, libraries, and other places.”¹²¹ The net effect of this type of zoning restriction is not immediately clear on its face and requires a fair measure of technical analysis to determine the areas of permitted land use.

Moreover, as these listed structures enter or exit the market, the areas of prohibited land use change and must be recalculated accordingly, further complicating the analysis required to assess the expected impact of the zoning action. Indeed, as evidence of just how difficult it can be to

119. See, e.g., MICH. COMP. LAWS §§ 125.3801–85 (2008).

120. In general, a complete ban is properly characterized as an exercise of the local government’s general police power, and not as a zoning action and, therefore, will be free of the accompanying procedural requirements. See, e.g., *SNPCO*, 363 S.W.3d at 478 (holding that ordinance banning the sale of fireworks within the city is not a zoning ordinance).

121. Tricia L. Nadolny & Sam Wood, *Before Launch of Medical Marijuana, City Council to Weigh Where Dispensaries Can Open*, PHILA. INQUIRER (Oct. 20, 2016), https://www.inquirer.com/philly/news/20161021_Before_launch_of_medical_marijuana_City_Council_to_weigh_where_dispensaries_can_open.html [<https://perma.cc/AKN6-G2LA>]. In addition, many municipalities have enacted zoning provisions to prevent “green zones,” which forbid any cannabis dispensary from opening within a set distance (often 1,000 feet) from another dispensary. See, e.g., Dan Adams, *Here’s Where Marijuana Businesses Can Set Up Shop in Boston Under New Zoning Rules*, BOS. GLOBE (Apr. 11, 2018) <https://www.bostonglobe.com/business/2018/04/11/boston-approves-zoning-for-recreational-marijuana-businesses/iOdsPhiqViSaaEqnrEIy9L/story.html> [<https://perma.cc/73XM-8TWM>].

assess the true impact of land use regulation, a growing industry of private, for-profit companies has developed solely to help cannabis dispensaries navigate land use obstacles. As part of its services, these companies provide detailed maps that display where a dispensary can legally locate in a given jurisdiction under existing land use regulations.¹²² A local government may be able to exploit this lack of transparency to shield the anticompetitive impact of commercial land use regulations from voters who cannot properly identify or assess the true extent to which a lack of consumer choice is the result of natural free market forces or the product of restrictive land use regulations enacted with deliberate anticompetitive purpose.¹²³

Not only can local governments use zoning to obscure the true impact of a government action from voters, but they can also use this relative lack of transparency to evade the preemptive effect of state law. In *White Mountain Health Center v. Maricopa County*,¹²⁴ for instance, the Maricopa County ordinance at issue allowed medical cannabis cultivation and other medical cannabis operations in a single industrial zone.¹²⁵ This ordinance, however, imposed the additional zoning restriction—the “poison pill provision”—that no land use within that zone can be in conflict with federal, state, or local law.¹²⁶ Because cannabis cultivation and possession is a violation of federal law, the zoning ordinance thus operated as an effective ban on all cannabis-related operations in the county.¹²⁷ The Arizona Appellate Court characterized the issue in the case as whether a local government can ban medical cannabis operations under the guise of “reasonable zoning.”¹²⁸ Although the Arizona Medical Marijuana Act (“AMMA”) expressly permitted local regulation of medical cannabis operations through zoning ordinances, the effective ban imposed by the county was found to “nullify the basis for AMMA, [which was] to permit use of marijuana for medical purposes consistent with the AMMA”¹²⁹

122. See, e.g., Cannabis Real Estate Consultants, *Custom Cannabis Regulation & Property Maps*, CREC (Mar. 1, 2021), <https://cannabisrealestateconsultants.com/custom-regulation-maps/> [<https://perma.cc/5HCG-8K7P>].

123. Additionally, a zoning action sends an intrinsically mixed signal to the electorate insofar as an activity is deemed lawful by the local government on the one hand, but the locations where such activity can take place are subsequently restricted through zoning on the other hand—in some cases to such an extent that the activity is, in effect, banned in the jurisdiction. Having voted to make an activity lawful (e.g., the use of medical marijuana), the electorate may very well reasonably believe that they are now free to engage in that activity and may not fully understand the extent to which this activity is, in fact, restricted by a complex set of zoning and planning processes about which they know little and in which they are relatively uninvolved.

124. 386 P.3d 416 (Ariz. Ct. App. 2016).

125. *Id.* at 420.

126. *Id.*

127. *Id.* at 435.

128. *Id.*

129. *Id.*

The appellate court concluded that the poison pill provision in the county's ordinance violated state law and was, therefore, invalid.¹³⁰

ii. Electoral Accountability

Most localities require some form of governmental decision on a case-by-case basis in connection with the placement of certain land uses, delegating to nonelected administrative bodies the discretion to make important zoning decisions in individual cases, including, most notably, variances and special use permits.¹³¹ Governed by standards in the zoning ordinance itself, an administrative body is granted the discretion to determine if certain land uses fit within specific exceptions to the zoning ordinance or should receive a zoning variance and be allowed to use property in a manner not otherwise permitted under the current zoning ordinance.¹³² These individual administrative determinations can have significant anticompetitive impact insofar as such determinations prevent market entry by potential competitors. Compared to legislative bodies, however, administrative decision-making of this kind is not constrained by the same measure of electoral accountability.

Under one view of the administrative state, this loss of accountability to the electorate is compensated by the institutional expertise of members of the administrative body that allows for better, more fully informed decisions. The basic concept that an administrative agency acts as an expert, providing neutral, technical expertise to resolve complex specialized socio-political challenges, is often viewed as one of the cornerstones of the administrative process in the United States.¹³³ In the case of land use regulation, however, the lack of electoral accountability may not be offset by the usual professional expertise typically associated with administrative decision-making. Most members of administrative bodies connected to the regulation of land use—planning commissions or boards of appeals—do not necessarily possess a comparative expertise in land use planning, let alone antitrust law.¹³⁴ Although some members of these bodies will certainly have substantial expertise in land use matters, unlike other administrative bodies, members are not specifically chosen because they possess special knowledge or training in land use planning (or antitrust law specifically).¹³⁵ As a result, these administrative bodies often have no greater

130. *Id.* at 437.

131. *See, e.g.*, Jerry L. Anderson et al., *A Study of American Zoning Board Composition and Public Attitudes Toward Zoning Issues*, 40 *URB. LAW.* 689, 696 (2008).

132. *See, e.g.*, Daniel R. Mandelker, *Delegation of Power and Function in Zoning Administration*, 1963 *WASH. U. L.Q.* 60 (1963).

133. *See, e.g.*, David B. Spence & Frank Cross, *A Public Choice Case for the Administrative State*, 89 *GEO L.J.* 97, 135-37 (2000) (“[T]here is little that could be done to provide Congress with the engineering expertise of OSHA or EPA.”).

134. *See AMERICAN SOCIETY OF PLANNING OFFICIALS, AMENDING THE ZONING ORDINANCE* (Oct. 1958).

135. *See id.*

competence than elected representatives to assess the net social welfare impact of commercial land use regulation.¹³⁶ Accordingly, when land use decisions are made by these administrative bodies, the loss of direct accountability to the electorate can come with no significant improvement in decision-making quality: business owners relinquish the ability to push back directly against a zoning action with anticompetitive impact through the political process without receiving the benefit of more expert decision-making in exchange.¹³⁷

iii. Non-Retroactive Application of Zoning Laws

Finally, unlike a police ordinance, a zoning ordinance tends to be forward looking, regulating future uses of land or property rather than existing ones and typically do not apply retroactively to current land users.¹³⁸ Existing land uses must be allowed to continue and are called “nonconforming” uses, buildings, or parcels.¹³⁹ Zoning ordinances allow certain property owners whose land use was legal prior to the adoption of a zoning ordinance to maintain that land use despite nonconformance with recently adopted zoning regulations, a practice motivated by important constitutional considerations.¹⁴⁰ Police ordinances, however, are generally applied retroactively and tend to cover all market participants with equal force, including incumbent businesses. If a local government, for example, has prohibited an activity under its general police powers, then all existing businesses can be forced to comply with the regulation, not just market entrants.¹⁴¹ Compared to land use, the same level of protection is generally not afforded business activity, because a business owner can generally alter an existing activity at lower cost than an existing land use. A business activity, for instance, might be curtailed at no cost to

136. *See id.*

137. Although this Article is concerned with land use regulation that is legislative in nature insofar as the government action impacts entire jurisdiction, zoning actions that are site-specific may be better characterized as quasi-judicial and thus receive more stringent standard of review. *See, e.g., Samuel Toevs Creason, Land Use and the Lost Promise of Cooper: What Happened to the Judicial in Quasi-Judicial Proceedings*, 44 IDAHO L. REV. 735, 745–55 (2008).

138. *See Zwiefelhofer v. Town of Cooks Valley*, 809 N.W.2d 362, 377 (Wis. 2012) (acknowledging that the Town’s ordinance “grandfathers” existing mines and stating there is no rule, however, that prohibits a non-zoning police power ordinance from exempting preexisting uses).

139. *See, e.g., Rhod-A-Zalea v. Snohomish Cty.*, 959 P.2d 1024, 1027 (Wash. 1998) (“[N]onconforming uses are allowed to continue based on the belief that it would be unfair and perhaps unconstitutional to require an immediate cessation of a nonconforming use.” (citing *State ex rel. Miller v. Cain*, 242 P.2d 505, 506 (Wash. 1952))).

140. *See County of Columbia v. Bylewski*, 288 N.W.2d 129, 138 (Wis. 1980) (describing the protection granted to preexisting, “non-conforming” uses); *see also* 4 EDWARD H. ZIEGLER, JR., RATHKOPF’S THE LAW OF ZONING AND PLANNING, § 72:2 (2011) (describing the “doctrine of vested nonconforming uses”).

141. *See, e.g., SNPCO, Inc. v. City of Jefferson City*, 363 S.W.3d 467, 478–79 (Tenn. 2012).

the business owner (other than perhaps lost inventory), whereas compliance with a new zoning ordinance may require the property owner to invest considerable resources in making costly physical alterations to land or an existing structure.¹⁴²

While the forward-looking nature of zoning protects existing interests in private property, the non-retroactive application of zoning law can also serve as a barrier to entry, shielding incumbent businesses from zoning regulations that increase business expenses or reduce business revenue. Indeed, the non-retroactive nature of zoning is arguably the principal source of anticompetitive impact in *Omni*. In that case, after the respondent entered the billboard market, the city of Columbia passed a new ordinance restricting the size, location, and spacing of billboards.¹⁴³ Importantly, these restrictions, particularly those on spacing, provided Columbia Outdoor Advertising (“COA”), which already had its billboards in place,¹⁴⁴ with a competitive advantage, because these restrictions did not apply *retroactively* to COA and applied only, in a forward-looking manner, to those who had yet to enter the local market, including *Omni*.¹⁴⁵ Had the zoning restrictions applied equally to incumbents and potential market entrants alike, the zoning ordinance would not have had the same level of anticompetitive impact. By not applying retroactively to incumbent business, restrictive zoning ordinances, almost by definition, impose differential costs on market competitors that can serve as barriers to entry, reducing competition in the local market to the detriment of local consumers. A local government, by contrast, may not be able to draw such distinctions under its general police powers, potentially running afoul of the Equal Protection Clause were it to treat similarly situated business differently in this manner.¹⁴⁶ For this reason, among the others highlighted above, a local government may prefer to exercise its zoning power rather than its more general police power to favor incumbent businesses at the expense of potential market entrants.

While commentators have argued that the exercise of legislative authority by local governments should not receive immunity from antitrust

142. See David A. Dana, *Natural Preservation and the Race to Develop*, 143 U. PA. L. REV. 655, 685 (1995) (“The costs of undoing an existing development, moreover, are typically much greater than the costs of preventing development.”); cf. Lior Jacob Strahilevitz, *The Right to Destroy*, 114 YALE L.J. 781, 796 (2005) (“Concern about wasting valuable resources is, by far, the most commonly voiced justification for restricting an owner’s ability to destroy her property.”). See generally Osborne M. Reynolds, Jr., *Self-Induced Hardship in Zoning Variances: Does a Purchaser Have No One but Himself to Blame?*, 20 URB. LAW. 1 (1988).

143. See *City of Columbia v. Omni Outdoor Advert.*, 499 U.S. 365, 368 (1991).

144. *Id.*

145. *Id.*

146. See, e.g., *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) (stating that the Equal Protection Clause “is essentially a direction that all persons similarly situated should be treated alike”).

liability in all cases,¹⁴⁷ the principal claim advanced here is relatively more limited in scope: a *zoning* ordinance should not receive the same level of deference with respect to possible anticompetitive impact as a general police ordinance.¹⁴⁸ Not only can a local government more easily frustrate competition in a local market through the exercise of its zoning power (as opposed to its more general police power), but unlike a general police ordinance, a zoning ordinance will, in almost all cases, have some non-trivial anticompetitive impact, especially in the case of commercial land use regulation.

2. *Judicial Checks on Anticompetitive Impact of Zoning*

Like the protection of private property rights, well-functioning local markets are critical to the success of a capitalist, free market economy. Yet, measured against private property rights, the same procedural safeguards do not exist, in comparable force, to protect economic competition from the anticompetitive impact of commercial zoning regulations. Although courts, as a general matter, do recognize that zoning should not be used to regulate economic competition among private businesses, judicial scrutiny of the potential anticompetitive impact of commercial land use regulation tends to be weak and can be easily circumvented by local governments. Arguably, the relatively lax judicial review of zoning actions reveals an understandable reluctance on the part of the judiciary to engage in a complex weighing of the potential anticompetitive effects of a restrictive zoning action against the negative externalities that are eliminated by such legislative action.

a. Legitimate State Interest

The case of *Hernandez v. City of Hanford*¹⁴⁹ illustrates well how courts tend to assess the anticompetitive impact of a zoning action under rational basis review.¹⁵⁰ In this case, the California Supreme Court concluded that because all zoning has some impact on economic competition, anticompetitive impact alone cannot invalidate a zoning ordinance, stating, in partic-

147. See Timothy J. Muris, Chairman, Remarks at the Fordham Annual Conference on International Antitrust Law & Policy (Oct. 24, 2003), in *STATE INTERVENTION/STATE ACTION—A U.S. PERSPECTIVE*, at 1, 5 (“Attempting to protect competition by focusing solely on private restraints is like trying to stop the flow of water at a fork in a stream by blocking only one of the channels. Unless you block both channels, you are not likely to even slow, much less stop, the flow. Eventually, all the water will flow toward the unblocked channel.”).

148. While beyond the scope of this Article, many of the same arguments made with respect to a locality’s exercise of its zoning power apply to licensing which is a central police power function of local government. See Ohm, *supra* note 114, at 631 (discussing local government licensing of the sale of alcoholic beverages).

149. 159 P.3d 33 (Cal. 2007).

150. See *id.* at 42. See generally Skye L. Daley, *The Gray Zone in the Power of Local Municipalities: Where Zoning Authority Clashes with State Law*, 5 J. BUS. ENTREPRENEURSHIP & L. 215, 220 n.30 (2012).

ular, that “[a] zoning ordinance which serves some established purpose of zoning is not necessarily invalid simply because it has the additional effect of limiting competition.”¹⁵¹ In the court’s view, a zoning action should be upheld even if the regulation of economic competition reasonably can be viewed as a direct and intended effect of a challenged zoning action, *so long as* the “primary purpose” of the zoning action is to achieve a valid public purpose, and not to advance an impermissible anticompetitive purpose.¹⁵² The California Supreme Court provided the following as illustrative examples of impermissible anticompetitive purposes: “securing a financial advantage or monopoly position for the benefit of a favored business or individual or imposing a disadvantage on an unpopular business or individual.”¹⁵³

In support of this judicial approach, the court cited to several appellate cases including, among others, *Van Sicklen v. Browne*.¹⁵⁴ In this case, the petitioner-landowner applied for a conditional use permit to construct an automobile service station in the Highway Service (“HS”) District.¹⁵⁵ The city denied the landowner’s application on the grounds, *inter alia*, that a proliferation of service stations already existed in the area and that there was, therefore, no demonstrated need for an additional station at that location at that time.¹⁵⁶ On appeal, the landowner claimed that the city had denied the conditional use permit “for economic rather than planning considerations resulting in an invalid attempt to regulate competition through zoning laws.”¹⁵⁷ The California Court of Appeals upheld the city’s denial of the use permit, stating that “[i]ntensity of land use is a well-recognized and valid city concern and relates to both health and safety factors and to proper zoning practices” and “encompasses within its purview the degree of saturation in a particular area of land devoted to automobile service stations.”¹⁵⁸

Similarly, in *Ensign Bickford Realty Corp. v. City Council*,¹⁵⁹ the city council denied plaintiff’s request for permission to build a neighborhood shopping center on the grounds that the city had recently zoned property in a nearby area to permit construction of a neighborhood shopping center and that the city did not believe that the surrounding residential

151. *Hernandez*, 159 P.3d at 41 (quoting 1 ANDERSON’S AMERICAN LAW OF ZONING § 7.28, p. 807 (4th ed. 1996) (“The simple division of the community into districts has an inherent and profound effect on the real estate market, because some land is withdrawn from the commercial market and placed in the residential market” (quoting 1 ANDERSON’S AMERICAN LAW OF ZONING § 7.28, p. 807))).

152. *Id.*

153. *Id.* at 42.

154. 92 Cal. Rptr. 786 (Cal. Ct. App. 1971).

155. *See id.* at 787–89.

156. *See id.* at 787–88.

157. *Id.* at 789.

158. *Id.* at 790.

159. 137 Cal. Rptr. 304 (Cal. Ct. App. 1977).

population could financially support two competing shopping centers.¹⁶⁰ Although the city's denial of plaintiff's rezoning request had the direct and intended effect of regulating competition among private businesses, California Court of Appeals nevertheless upheld the validity of the city's action on appeal. The court concluded that the "primary purpose" of the city's regulation of competition was not to further or disadvantage a private business, but, rather, to serve the city's legitimate public interest in carefully planning or controlling the pace or location of economic growth within the city.¹⁶¹

Finally, in *Wal-Mart Stores v. City of Turlock*,¹⁶² the city of Turlock enacted a zoning ordinance that prohibited the development of so-called discount superstores anywhere in the city.¹⁶³ In explaining the rationale underlying the restriction on discount superstores, the ordinance set forth a series of findings, including that "the establishment of discount superstores [in the city] is likely to negatively impact the vitality and economic viability of the city's neighborhood commercial centers by drawing sales away from traditional supermarkets located in these centers" and that "smaller stores within a neighborhood center rely upon the foot traffic generated by the grocery store for their existence and in neighborhood centers where the grocery store closes, vacancy rates typically increase and deterioration takes place in the remaining center[.]"¹⁶⁴ Wal-Mart filed an action challenging the validity of the ordinance on several grounds, including that the ordinance exceeded the city's police powers because the ordinance was "designed to suppress economic competition and is not reasonably related to the public welfare[.]"¹⁶⁵ Rejecting this contention, the California Court of Appeals held that although a zoning ordinance may not legitimately be used to control economic competition, a zoning ordinance may be used to further the city's legitimate public interest in avoiding the decay that *might* result from economic competition.¹⁶⁶

In *Hernandez*, the California Supreme Court, as a matter of first impression, addressed the question of whether a municipality may enact a zoning ordinance that regulates economic competition by placing limits on potentially competing commercial activities or developments in other parts of the municipality.¹⁶⁷ Even if the regulation of economic competition can reasonably be viewed as a direct and intended effect of a zoning ordinance, the court held that so long as the *primary purpose* of the ordinance is not the impermissible anticompetitive goal of protecting or dis-

160. *Id.* at 306–07.

161. *See id.* at 310–11.

162. 41 Cal. Rptr. 3d 420 (Cal. Ct. App. 2006).

163. *Id.* at 421. Discount superstores were defined as large discount stores with a "full-service grocery department" (which included Wal-Mart). *Id.* at 425.

164. *Id.*

165. *Id.* at 438.

166. *Id.* at 439–41.

167. *See Hernandez v. City of Hanford*, 159 P.3d 33, 44 (Cal. 2007).

advantaging a favored or disfavored business or individual, but, rather, is the advancement of a legitimate government interest, such as the preservation of a downtown business district for the benefit of the local community as a whole, the ordinance reasonably relates to the general welfare of the municipality and, therefore, constitutes a legitimate exercise of the municipality's police power.¹⁶⁸ In assessing the validity of a zoning ordinance intended, at least in part, to regulate economic competition, a court must determine if the "primary purpose" of the enacted ordinance—meaning its principal and ultimate objective—is to promote a legitimate public purpose, and not to advance an impermissible anticompetitive purpose, such as the exclusion of an unpopular company from the community.¹⁶⁹ Even though the zoning ordinance in question was expressly intended to insulate incumbent retail furniture stores in the downtown commercial district from competition with other furniture stores located elsewhere in the jurisdiction, the California Supreme Court concluded that the zoning action served multiple purposes including, importantly, a desire to protect and preserve, as distinct from any given individual retail furniture store itself, the general "economic viability" of the city's downtown commercial district.¹⁷⁰

In assessing the soundness of this judicial approach, it is initially unclear why anticompetitive effect is a concern *only if* the principal and ultimate objective of the enacted ordinance is to promote an impermissible private anticompetitive purpose. Under this approach, a zoning ordinance passes judicial muster no matter the magnitude of the anticompetitive impact so long as the primary purpose of the legislation is to achieve a valid non-anticompetitive purpose: if the locality can establish that the primary purpose of the zoning ordinance is to advance some other legitimate government interest, such as preserving the economic viability of a downtown business district, then the locality now has unfettered authority to use zoning to regulate economic competition among private businesses.¹⁷¹

In theory, the judicial inquiry is better focused upon the magnitude of the anticompetitive effect, and not upon the extent to which this effect is the "principal and ultimate objective" for the government action.¹⁷² Assuming an ordinance promotes more than one purpose how should a court identify which of the several competing purposes is primary? While

168. *See id.*; *see also* Sprenger, *Grubb & Assocs. v. City of Hailey*, 903 P.2d 741 (Idaho 1995) (responding to claim that rezoning action was an invalid exercise of police powers to protect downtown merchants from retail competition and holding that preserving aesthetic values and economic viability of a community downtown business core is an appropriate exercise of police power and does not constitute "protection from competition" because city has not disallowed market entry, only required that new businesses locate in or around the downtown business core).

169. *See Hernandez*, 159 P.3d at 44–45.

170. *Id.* at 35.

171. *See id.*; *see also Wal-Mart*, 41 Cal. Rptr. 3d at 425.

172. *Hernandez*, 159 P.3d at 44.

any anticompetitive effect standing alone is surely too broad given that, as the *Hernandez* court itself correctly noted, almost all zoning has some material impact upon economic competition.¹⁷³ Primary purpose, on the other hand, is surely too narrow given the relative ease with which a local government can manufacture an alternate primary purpose for a zoning ordinance whose true primary purpose is, in fact, anticompetitive.¹⁷⁴ As discussed in Part I, a more sensible test would attempt to balance the private anticompetitive effect of a zoning ordinance against other socially beneficial non-anticompetitive objectives.

Although lax judicial scrutiny of restrictive zoning actions may reveal a recognition on the part of the judiciary that land use regulation is better left in the hands of legislatures, the lack of substantive judicial review too easily allows a local government to use its zoning power to substitute its own judgment of expected consumer demand for that of the market itself. In *Van Sicklen*, for example, the city denied plaintiff a conditional use permit to construct an automobile service station because the city believed that there was no demonstrated need for an additional station at that location at that time.¹⁷⁵ Arguably, this assessment is better made by natural free market forces rather than by local government.

Similarly, in *Ensign*, the city council denied plaintiff's request for permission to build a neighborhood shopping center, because the city did not believe that the surrounding residential population could financially support two competing shopping centers.¹⁷⁶ Again, the market, and not local government, would appear better able to determine if the residential population can, in fact, support two shopping centers. In both *Wal-Mart* and *Hernandez*, local governments used their zoning powers to enact ordinances that served to insulate existing businesses from increased economic competition based on the belief that market entry would result in business failure, and, in turn, urban or suburban decay,¹⁷⁷ or would otherwise threaten the economic viability of a particular commercial district.¹⁷⁸ Whether the local government's justification for the zoning action focuses on market demand directly or on the consequences of a lack of market demand indirectly, the gist of the zoning action is the same: in all of these cases, local government has used zoning to implement or to maintain a particular market structure that it believes is socially efficient in lieu of

173. See *id.* at 41 (recognizing that any zoning ordinance will bear *some* relation to local economic competition, no matter how slight).

174. See Jacob Gersen & Adrian Vermeule, *Thin Rationality Review*, 114 MICH. L. REV. 1355, 1398 (2016) (discussing the possibility of a local government contriving a permissible primary purpose to disguise a true, anticompetitive purpose).

175. See *Van Sicklen v. Browne*, 92 Cal. Rptr. 786, 789 (Cal. Ct. App. 1971).

176. See *Ensign Bickford Realty Corp. v. City Council*, 137 Cal. Rptr. 304, 306–07 (Cal. Ct. App. 1977).

177. See *Wal-Mart Stores v. City of Turlock*, 41 Cal. Rptr.3d 420, 425 (2006).

178. See *Hernandez*, 159 P.3d at 35.

what would have otherwise obtained, organically, as a natural byproduct of market supply and demand.

Forecasting market demand for specific consumer products or services is not a proper objective of commercial land use regulation. As discussed in Part II.B, zoning law is best understood as a mechanism to reduce expected conflicts related to land use.¹⁷⁹ If a local government genuinely believes that a particular business is likely to generate externalities that would negatively impact other property owners, such as traffic congestion, then zoning represents a proper response to that legitimate public concern. In assessing such potential negative externalities, however, that may be created by market entry, the government's operating baseline assumption must be that the market entrant will be financially successful. A local government should not take it upon itself to forecast a lack of market demand and speculate as to the social costs created by this expected business failure. The best gauge of market demand is the market itself. Entrepreneurs intend for their business ventures to succeed and very often personally invest or borrow substantial amounts of money to finance the new business.¹⁸⁰ Before assuming this personal risk, an entrepreneur can expect to spend a considerable amount of time and effort developing a keen understanding of the local market, and, specifically, whether sufficient consumer demand exists to operate the business profitably.¹⁸¹ The owner will open the business only if the owner rationally believes that the market demand is there to support the business. Local government, by contrast, is not as invested, less informed, and more susceptible to the distorting influence of special interest groups who may stand to benefit financially if the market entrant should fail.¹⁸² While a failed business can, of course, create various forms of social costs,¹⁸³ these speculative harms do not justify government interference in free markets. In the end, the market, and not local government, must determine market demand for the business. Government interference is warranted only in-

179. See *supra* Section I.B.1.

180. See, e.g., William B. Gartner et al., *Financing the Emerging Firm*, 39 *SMALL BUS. ECON.* 745, 753 (2012) (outlining various financing techniques used by entrepreneurs at the outset of a new business venture); see also Howard E. Van Auken, *Obstacles to Business Start-up*, 4 *J. DEV. ENTREPRENEURSHIP* 175 (1999) (presenting survey results indicating that risk tolerance is an important common obstacle presenting new business owners). See generally S. M. Ravi Kanbur, *Entrepreneurial Risk Taking, Inequality, and Public Policy: An Application of Inequality Decomposition Analysis to the General Equilibrium Effects of Progressive Taxation*, 90 *J. POL. ECON.* 1 (1982) (explaining the calculated nature of entrepreneurial risk-taking).

181. See, e.g., *Market Research and Competitive Analysis*, U.S. *SMALL BUS. ADMIN.* (Mar. 1, 2021, 5:30 PM), <https://www.sba.gov/business-guide/plan-your-business/market-research-competitive-analysis> [<https://perma.cc/F6X4-L9WC>].

182. See *supra* Section I.A.2.

183. See W.C. Bunting, *How the Law Can Better Protect Small Business Owners Against Location Risk in the Brick-and-Mortar Retail Sector*, *AM. BUS. L.J.* (forthcoming 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3554435 [<https://perma.cc/LJC9-KS6C>].

sofar as a *successful* business does not internalize the external costs that it creates as a going concern.

Even if courts were generally less willing to allow a local government to substitute its own prognostications of expected market demand for that of potential private market entrants, agreeing that such determinations are better left to the free market itself, the practical effect of this shift in judicial approach is unlikely to provide a sufficient check on the anticompetitive impact of commercial land use regulation. To prevent market entry, rather than cite to market structure, a local government can simply claim that the purpose of the restrictive zoning is to prevent some type of social disorder that detrimentally impacts the quality of life in the local community, such as increased criminal activity, loitering, vagrancy, increased traffic, noise, odor, litter, environmental pollution, or more nebulous public concerns relating to aesthetic considerations—all of which are legitimate government interests.¹⁸⁴ Eliminating considerations of expected market demand as legitimate government interests merely compels a local government purely motivated by an anticompetitive purpose to provide some other pretextual rationale for its decision to deny market entry.¹⁸⁵ Accordingly, to prevent the anticompetitive impact of zoning, the challenge for land use policy is to identify and disallow those zoning actions where the legitimate state interest purportedly advanced by the zoning action is largely pretextual: the key to surmounting this challenge lies in the second prong of the rational basis test.

b. Rational Relationship

To satisfy rational basis review, state action must bear a “rational relationship” to the legitimate government interest.¹⁸⁶ To determine if a rational relationship exists, a court may assume “the existence of any necessary state of fact which [the court] can reasonably conceive in determining if a rational relationship exists between the challenged law and a legitimate government interest.”¹⁸⁷ The Supreme Court has defined this type of judicial review broadly, stating that an ordinance must be upheld so long as “there is any reasonably conceivable state of facts that could

184. See, e.g., Kern Cty., Cal., Cannabis Land Use Ordinance 2017-320 (Oct. 24, 2017). See generally D. Don Welch, *Legitimate Government Purposes and State Enforcement of Morality*, 1993 U. ILL. L. REV. 67 (1993) (contextualizing a local government’s duty to prevent social disorder amid the legitimate governmental interests that may motivate zoning ordinances).

185. See, e.g., Gersen & Vermeule, *supra* note 174, at 1398 (discussing how it is possible for a government agency to articulate a plausible pretext for an otherwise bad (however defined) reason for its decision). See generally Thomas J. Miles & Cass R. Sunstein, *The Real World of Arbitrariness Review*, 75 U. CHI. L. REV. 761 (2008).

186. E.g., *Romer v. Evans*, 517 U.S. 620, 635 (1996) (enunciating the legal standard inherent to rational basis review).

187. *Amunrud v. Bd. of Appeals*, 143 P.3d 571, 578 (Wash. 2006) (citing *Helmer v. Doe*, 509 U.S. 312, 320 (1993)).

provide a rational basis for the classification[.]”¹⁸⁸ and that “those attacking the rationality of the legislative classification have the burden ‘to negate every conceivable basis which might support it[.]’”¹⁸⁹ Rational basis review is not a genuine effort to determine the legislature’s actual reasons for enacting a statute, nor to inquire into whether a statute does, in fact, further a legitimate government interest.¹⁹⁰ Although this standard sets a high bar for a challenger to meet, a court must still be assured that a legislative decision was reached in a fair manner.¹⁹¹

Because the regulation of economic competition among private businesses cannot be a legitimate government interest, a local government seeking to enact a zoning action motivated by anticompetitive purpose must claim some other public interest as a pretext for the exercise of its zoning power. Given this, the key inquiry under rational basis review of commercial land use regulation is not whether the zoning action promotes a legitimate public interest, but, rather, whether the zoning action is rationally related to the government’s stated interest. For the rationally related requirement to act as a meaningful check on *zoning power*, as distinguished from the local government’s more general *police powers*, this Article contends that a local government must be required to produce evidence of a causal link between a zoning action and the stated government interest. This differs from standard rational basis review of more general police power actions that can “be based on rational speculation unsupported by evidence or empirical data.”¹⁹² In other words, in the narrower context of a zoning action, the claim set forth here is that the question of whether a zoning action is rationally related to a legitimate government interest can be rephrased as follows: does there exist a *causal link* between the zoning action and the stated government interest?

Accepting this as a plausible standard of review for a locality’s exercise of zoning power, the question is what type of empirical evidence a local government must adduce to establish proof of a causal link.¹⁹³ Given the

188. *Fed. Commc’ns Comm’n v. Beach Commc’ns*, 508 U.S. 307, 313 (1993).

189. *Id.* at 314–15 (quoting *Lehnhausen v. Lake Shore Auto Parts*, 410 U.S. 356, 364 (1973)).

190. *See Jackson*, *supra* note 112, at 493.

191. *See United States v. Salerno*, 481 U.S. 739, 746 (1987) (justifying heightened burden by emphasizing the court’s need to ensure fair and transparent legislative decision-making).

192. *Beach Commc’ns*, 508 U.S. at 315; *see also Golan v. Holder*, 565 U.S. 302, 326 (2012) (“Congress rationally *could have* concluded that adherence to Berne ‘promotes the diffusion of knowledge[.]’” (emphasis added) (quoting Brief for Petitioners at 4, *Golan v. Holder*, 565 U.S. 302)). *See generally* DEBORAH HELLMAN, *WHEN IS DISCRIMINATION WRONG?* 115 (2008) (describing rationality for equal protection review as requiring mere positive correlation).

193. Under standard rational basis review, there is no requirement that a proffered rational inference be the one, in fact, held by the legislature enacting the provision. *See, e.g., U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980) (“It is, of course, constitutionally irrelevant whether this reasoning in fact underlies the legislative decision”); *see also* Thomas B. Nachbar, *The Rationality of Rational*

omnipresent specter of anticompetitive impact, a local government cannot merely posit a plausible causal link, blithely stating, without additional evidentiary support, that a zoning restriction will promote a legitimate public interest. Local governments must do more. Unlike more general police powers, Part III argues that a local government should be compelled to produce some verifiable empirical evidence to support the existence of a causal link between the zoning restriction and the stated government interest for the zoning action to represent a valid exercise of zoning power under rational basis review.

III. PROPOSED REGULATORY APPROACH

In highlighting the anticompetitive impact of commercial land use regulation, this Article contends that current legal safeguards, including the antitrust laws and rational basis review as presently applied, are insufficient to protect local communities against the anticompetitive effects of commercial land use regulation. This Article rejects antitrust law as the proper doctrinal vehicle through which to curb the anticompetitive impact of commercial zoning restrictions and instead suggests a three-part administrative procedure, grounded in notions of due process and a locality's legitimate exercise of zoning power, to reduce the frequency with which local governments impose socially inefficient restrictions on commercial land use.

A. *Antitrust Approach*

To start, this Section reviews the arguments for and against immunity from antitrust liability as set forth by the majority and the dissent in *Omni* and presents a slightly different argument, based upon the proper scope of antitrust law, for why the exercise of zoning power by local governments should be immune from antitrust liability.

1. *Majority Opinion*

Omni is a peculiar case in that Justice Scalia, who may be viewed as having generally sought to curb government regulation of private business,¹⁹⁴ authors a majority opinion that, in granting local governments immunity from federal antitrust liability, expands the capacity of local governments to regulate free market competition. In arguing that antitrust liability compromises the ability of state governments to “regulate their

Basis Review, 102 VA. L. REV. 1627, 1650–52 (2016) (discussing how rational basis test particular understanding of rationality divorced from actual legislative reasoning).

194. *See, e.g.*, *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228 (2013) (finding that prohibitively high cost of arbitration was not sufficient reason to invalidate class action waiver because waiver did not ultimately restrict a party's right to pursue remedies via an arbitral forum); *see also AT&T Mobility v. Concepcion*, 563 U.S. 333 (2011) (holding that Federal Arbitration Act preempted California's attempt to invalidate arbitration agreements).

domestic commerce[.]” Justice Scalia echoes the Chicago school of political economy, describing local governments as generally capable of regulating commercial land use in a socially optimal manner.¹⁹⁵ Consistent with a belief in the general efficiency of the political process, Justice Scalia describes the influence of special interest groups in government decision-making as not necessarily disfavored, but, rather, as an “inevitable and desirable” part of a political process that can normally be relied upon to yield efficient public policy outcomes.¹⁹⁶ Because government officials will often comply with the urgings of special interest groups, Justice Scalia rejects extending a broadly defined conspiracy exception to *Noerr* immunity, suggesting that this would render most, if not all, zoning regulation vulnerable to a conspiracy charge.¹⁹⁷ Further, Justice Scalia contends that conspiracy cannot be sensibly limited to governmental acts “‘not in the public interest.’”¹⁹⁸ Many, if not all, government actions, including land use regulation, can be described as benefiting the private economic interests of specific groups at the expense of the public more broadly.¹⁹⁹ Allowing government action, such as the city of Columbia’s decision to regulate “billboard jungles,” to be made subject to this type of ex post facto judicial assessment of “the public interest” would only compromise what Justice Scalia views as the otherwise broadly efficient regulation of domestic commerce by local governments.²⁰⁰

2. *Dissenting Opinion*

The dissent in *Omni* presents a vastly different view of local government. Echoing the Virginia school of political economy, Justice Stevens contends that local government cannot be safely relied upon to resist the distorting influence of special interest groups who seek some type of private benefit at the expense of the public interest, with the facts in *Omni* itself serving as a compelling example of how special interest groups can push local government officials to act contrary to the public interest.²⁰¹

195. *City of Columbia v. Omni Outdoor Advert.*, 499 U.S. 365, 377 (1991) (“*Parker* was not written in ignorance of the reality that determination of ‘the public interest’ in the manifold areas of government regulation entails not merely economic and mathematical analysis but value judgment”). At the very least, local government is better suited than juries to perform this complex weighing of social costs and benefits. *See id.* (stating that antitrust immunity prevents a shift in the determination of public interest “from elected officials to judges and juries”).

196. *Id.* at 375.

197. *Id.*

198. *Id.* at 376.

199. *Id.* at 377 (“The California marketing scheme at issue in *Parker* itself, for example, can readily be viewed as the result of a ‘conspiracy’ to put the ‘private’ interest of the State’s raisin growers above the ‘public’ interest of the State’s consumers.”).

200. *Id.*

201. *Id.* at 386 (Stevens, J., dissenting) (“After a 3-week trial, a jury found that, despite the city fathers’ denials, there was an agreement motivated by past favors in the form of political advertising, by friendship, and by the expectation of a benefi-

Specifically, the dissent argues that the majority has erroneously transformed a private anticompetitive agreement between local political officials and an incumbent business into a lawful exercise of public decision-making.²⁰² Even without the corrupting influence of special interest groups, the dissent contends that local governments, unlike state governments, are “more apt to promote narrow parochial interests ‘without regard to extraterritorial impact and regional efficiency.’”²⁰³ In the dissent’s view, regulation of domestic commerce by local governments, which are principally influenced by special interest groups or other parochial concerns, can have significant anticompetitive effects that undermine Congress’ comprehensive national policy to protect economic competition.²⁰⁴

In response to this posited government failure, the dissent offers the federal antitrust laws as a check on the capacity of local government to enter into private anticompetitive agreements, exhibiting far more optimism than the majority in the capacity of courts to invalidate legislative action motivated by anticompetitive purpose. The dissent insists that juries are perfectly “capable of recognizing the difference between independent municipal action and action taken for the sole purpose of carrying out anticompetitive agreement for the private party.”²⁰⁵ As a counter to a political process that tends towards inefficiency, juries can be safely relied upon to strike down, as a violation of the federal antitrust laws, any zoning action that is the product of an agreement solely intended to elevate private interests over the general public interest.²⁰⁶ While expressly acknowledging the inherent difficulty of proving whether an agreement truly motivated a specific course of conduct, the dissent does not believe that this concern alone should deter a court from exempting those illegal agreements that are proven by convincing evidence.²⁰⁷ In its view, such problems of proof are better addressed through heightened evidentiary standards, and not, as the majority contends, through judicial expansion of exemptions from the Sherman Act.²⁰⁸

cial future relationship—and not by a concern for the public interest more generally.”).

202. *Id.* at 397.

203. *Id.* at 389 (quoting *Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 404 (1978)); see also *THE FEDERALIST* NO. 10 (James Madison) (describing the greater tendency of smaller societies to promote oppressive and narrow interests above the common good).

204. *Omni*, 499 U.S. at 389–90 (Stevens, J., dissenting).

205. *Id.* at 395–96; see also *In re Japanese Elec. Prods. Antitrust Litig.*, 631 F.2d 1069, 1079 (3d Cir. 1980) (“The law presumes that a jury will find facts and reach a verdict by rational means. It does not contemplate scientific precision but does contemplate a resolution of each issue on the basis of a fair and reasonable assessment of the evidence and a fair and reasonable application of the relevant legal rules.”).

206. See *Omni*, 499 U.S. at 396 (Stevens, J., dissenting).

207. *Id.* at 396–97.

208. *Id.* at 397.

3. *Alternative View*

Notwithstanding whether juries can, in fact, identify legislative action solely intended to advance specific private interests over the general public interest, the majority is surely correct to assert that this scenario represents a “polar extreme[.]”²⁰⁹ As Justice Scalia puts it: “[i]ndependent municipal action’ is unobjectionable, ‘action taken for the *sole* purpose of carrying out an anticompetitive agreement for the private party’ is unlawful, and everything else (that is, the known world between the two poles) is unaddressed.”²¹⁰ Recall that Section II.B made a similar point in connection with the primary purpose test that courts have relied upon to assess the anticompetitive impact of a zoning action under rational basis review. To the extent that legislative action promotes more than one purpose, the dissent—like proponents of the primary purpose test—commits a similar error in failing to explain how a jury can properly identify which of several competing purposes is, in fact, *primary*.²¹¹ Moreover, the emphasis on purpose, rather than on net social impact, is similarly misplaced. The real challenge facing zoning is not simply to identify and strike down zoning actions with an anticompetitive impact, but, rather, to prevent zoning actions where the anticompetitive harm exceeds the social benefits of greater land use regulation.

Framed in this way, antitrust laws cannot, contrary to what the dissent asserts, solve this key challenge. The cost-benefit analysis required to identify efficient zoning sits beyond the scope of the antitrust laws insofar as anticompetitive harm, which, of course, lies within the proper domain of the antitrust laws, must be weighed against social benefits that are not related to economic competition and which do not properly lie within the domain of antitrust law. Under this view of *Omni*, the majority is right to hold that antitrust liability should not attach, although the reasoning may be flawed. Rather than locate immunity from federal antitrust liability in principles of federalism and state sovereignty, this Article contends that such immunity follows from the observation that antitrust law is simply the wrong doctrinal vehicle through which to assess if a restriction on commercial land use is social welfare increasing. As discussed, anticompetitive impact is only one factor, among many others that are entirely unrelated to economic competition, that must be carefully considered in a much broader balancing of social costs and benefits to correctly assess the efficiency of a restrictive zoning ordinance.

Having rejected antitrust liability as the appropriate means by which to ensure efficient zoning, the majority in *Omni* is content to leave the exercise of zoning power, unchecked by the federal antitrust laws, in the

209. *Id.* at 375 n.5.

210. *Id.*

211. *See supra* Section II.B.2.

hands of local government.²¹² While this Article likewise rejects the federal antitrust laws as a valid constraint upon the exercise of a locality's zoning power, this Article does not share the majority's optimistic view of local government in which legislative decision-making tends towards efficiency. Instead, this Article agrees with the dissent that the facts in *Omni* provide a striking example of how special interests can influence local government officials to take legislative action with significant anticompetitive harm to the public.²¹³

Accordingly, neither the majority nor the dissent in *Omni* provide an entirely satisfactory approach to curbing the anticompetitive impact of commercial land use regulation. The next Subsection proposes a solution that relies neither upon a belief in the general efficiency of the political process (as does the majority in *Omni*) nor upon an unduly expansive view of the federal antitrust laws (as does the dissent in *Omni*) but, instead, places substantial weight upon the formal administrative process by which local governments enact restrictions on local land use.

B. *Administrative Approach*

This Section proposes a three-part administrative procedure as a check on the anticompetitive impact of commercial land use regulation.

1. *Statutory Right to Challenge*

For this proposed administrative procedure to work, the applicable enabling legislation must authorize challenges to the validity of a zoning ordinance based upon anticompetitive impact.²¹⁴ Under the enabling legislation, a business owner seeking to challenge the validity of a zoning on substantive grounds, could be authorized to submit a challenge, coupled perhaps with a request for a curative amendment, to the local governing body detailing the anticompetitive impact of the proposed zoning action. In response, the governing body may be instructed to refer this challenge to a planning commission that then decides whether to make a recommend approval of the challenge (and curative amendment) to the governing body. Part of this review process might include public hearings in which residents are invited to offer public comment on the proposed zon-

212. See *Omni*, 499 U.S. at 377 (establishing the majority's deference to local governments regarding zoning ordinances).

213. See *id.* at 386 (Stevens, J., dissenting).

214. See, e.g., 53 PA. STAT. AND CONS. STAT. ANN. § 10916.1 (West 2001) (authorizing a challenge to the validity of a zoning ordinance when its provisions prohibit or unduly restrict a legitimate use); see also *Hock v. Bd. of Supervisors*, 622 A.2d 431, 433 (Pa. Commw. 1993) (holding that an ordinance that prohibits a lawful use throughout the municipality or is duly restrictive is unconstitutional). See generally Jan Z. Krasnowiecki & L.B. Kregenow, *Zoning and Planning Litigation Procedures Under the Revised Pennsylvania Municipalities Planning Code*, 39 VILL. L. REV. 879 (1994).

ing action.²¹⁵ If the governing body, in consultation with the planning commission, determines that the challenge has merit, then the governing body can either accept the business owner's curative amendment, with or without revision, or adopt an alternative amendment that cures the challenged defects of the proposed land use regulation.

2. *Three-Part Test*

This Subsection describes in greater detail how a statutory right to challenge a zoning restriction based upon anticompetitive impact might operate in practice. Specifically, the following three-part administrative procedure is proposed as part of the process by which zoning restrictions on commercial land use are enacted by local governments.

- *First*, a business owner must make out a prima facie case of anticompetitive impact, submitting to the governing body an "economic impact statement" that establishes the extent to which the proposed zoning action acts as a barrier to entry.
- *Second*, if the business owner succeeds in making out a prima facie case of anticompetitive impact, then the governing body now bears the burden of proof to show that the challenged zoning action is rationally related to a legitimate government interest. If the governing body cannot do so, then a challenger's claim of anticompetitive impact must prevail.
- *Third*, if the governing body has satisfied its burden of proof at step two, then the burden of proof shifts back to the business owner to establish that the zoning action is not rationally related to a legitimate government interest. If the business owner cannot do so, then the challenge to the zoning action fails.

Each step in this proposed three-step procedure is examined in greater detail below.

a. *Prima Facie Case*

Although the enactment of a zoning ordinance by local government is generally presumed to be a valid and constitutional exercise of its legislative authority,²¹⁶ this Article contends that a challenger should be allowed to make out a prima facie case rebutting this presumption by demonstrating that the exercise of zoning power in question completely excludes a lawful commercial land use. Indeed, even if the zoning ordinance does not completely prohibit a legitimate commercial land use on its face, a challenger should still be permitted to make out a prima facie case if the

215. See generally William H. Baker et al., *Critical Factors for Enhancing Municipal Public Hearings*, 65 PUB. ADMIN. REV. 490 (2005) (listing criteria for improving public hearings and encouraging public participation).

216. See *supra* Section II.B.2.

ordinance substantially impacts the ability of the business owner to operate in the jurisdiction. Importantly, to establish a prima facie case of anticompetitive impact, the challenger need not prove an “antitrust injury” under this proposed framework—which can be extremely costly and time-consuming.²¹⁷ Rather, the challenger need only submit an economic impact statement that displays where the business can legally locate in the jurisdiction given the proposed zoning ordinance. The purpose of the impact statement is not to estimate a price effect or establish some other type of anticompetitive harm, but simply to illustrate the extent to which the zoning action restricts where the business can locate spatially within the jurisdiction.

Voters are in the best position to trade off the expected social costs and benefits of a proposed zoning action of commercial land use. To perform this calculus properly, however, voters must be fully informed and correctly understand the true impact of the zoning action. Voters do not necessarily need to know the approximate price effect of a zoning restriction.²¹⁸ But, at a minimum, the electorate appreciate the extent to which the zoning action, in restricting where businesses can locate, reduces consumer choice. The contention is that providing voters with even only a general sense of the geographic impact of a zoning action will, in many cases, sufficiently incentivize voters, who do not know the exact impact on market prices, to push back against restrictive zoning when the anticompetitive impact of a proposed zoning exceeds the corresponding social benefits. That is, the core objective of the economic impact statement is purely to bring greater transparency to an administrative process that can often appear inscrutable to those unfamiliar with the legalities of commercial land use regulation in order to magnify public resistance to the distorting influence of certain special interest groups.²¹⁹

Unlike proof of antitrust injury that often requires a considerable expenditure of time and money,²²⁰ the economic impact statement produced as part of the challenger’s prima facie case can consist of nothing more than a map that visually displays the areas in which the challenger is permitted to locate under the proposed zoning restrictions. The map might show, for instance, that the proposed ordinance completely excludes market entry by the challenger in which case the challenger can be

217. See, e.g., Jonathan M. Jacobsen, *Tackling the Time and Cost of Antitrust Litigation*, 32 ANTITRUST 3, 3 (2017) (“Antitrust cases can take forever and cost a fortune.”). See generally Ronald W. Davis, *Standing on Shaky Ground: The Strangely Elusive Doctrine of Antitrust Injury*, 70 ANTITRUST L.J. 697 (2003) (delineating the paradoxical nature of establishing a justiciable claim for antitrust injury).

218. See generally Jonathan B. Baker & Daniel L. Rubinfeld, *Empirical Methods in Antitrust Litigation: Review and Critique*, 1 AM. L. & ECON. REV. 386 (1999).

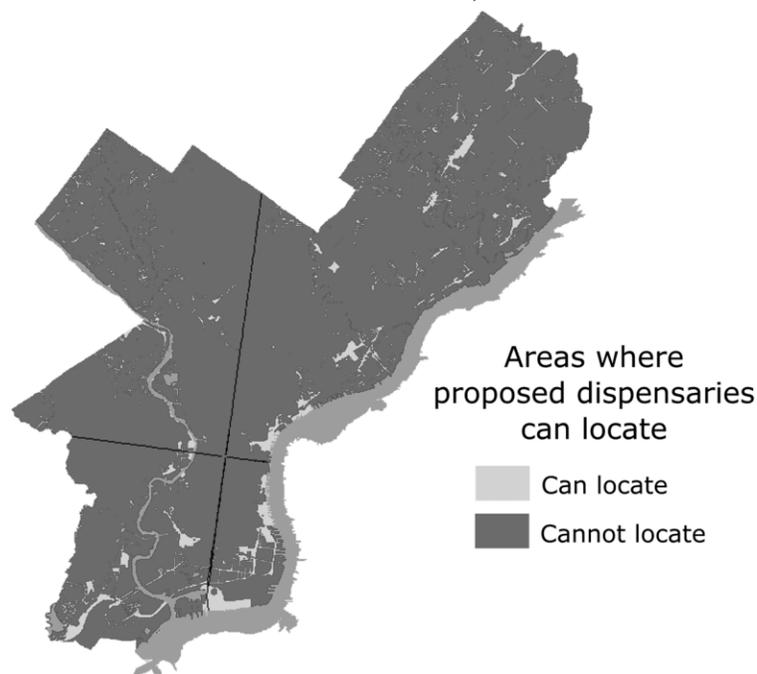
219. See Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, *supra* note 34, at 374.

220. See Jacobsen, *supra* note 217, at 3.

deemed to have made out a prima facie case of anticompetitive impact.²²¹ A more difficult question arises, however, where a business, while not excluded completely from the local market, is significantly restricted in where it may operate under the proposed zoning ordinance. Consider medical marijuana dispensaries in Philadelphia.

The figure below shows where in Philadelphia a medical marijuana dispensary would be permitted to locate under certain proposed city zoning restrictions.²²²

FIGURE 1. PROPOSED MEDICAL MARIJUANA DISPENSARY ZONING RESTRICTIONS IN PHILADELPHIA, PENNSYLVANIA



221. In the case of an express ban, an economic impact statement would be unnecessary because the ban itself constitutes prima facie evidence of antitrust injury. See, e.g., Krista-Ann M. Staley & Jenn L. Malik, *The Whereabouts of Weed: Zoning Implications of the Medical Marijuana Act*, LEGAL INTELLIGENCER (Feb. 19, 2019), <https://www.law.com/thelegalintelligencer/2019/02/14/the-whereabouts-of-weed-zoning-implications-of-the-medical-marijuana-act/> [https://perma.cc/T3PL-HNVC] (discussing how outright ban on cannabis dispensaries is likely illegal in Pennsylvania under the local zoning enabling legislation that authorizes a challenge to validity of zoning ordinance when its provisions prohibit or unduly restrict a legitimate use); see also *Hock v. Bd. of Supervisors*, 622 A.2d 431, 433 (Pa. Commw. 1993) (holding that an ordinance that prohibits a lawful use throughout municipality, or is duly restrictive, is unconstitutional).

222. See Ken Steif, *Mapping Philly's Proposed Marijuana Dispensary Zoning Restrictions*, URB. SPATIAL, <http://urbanspatialanalysis.com/mapping-phillys-proposed-marijuana-dispensary-zoning-restrictions/> [https://perma.cc/LV9S-EC75] (last visited Sept. 5, 2021).

The land area where proposed dispensaries can locate is quite small and, in many cases, corresponds to areas where a commercial business may not particularly wish to locate, such as along a remote industrial waterfront.²²³ This spatial analysis raises the following question: if the area in which a business is permitted to locate represents a relatively small—but non-zero—percentage of the total land area in the jurisdiction, can this still constitute prima facie evidence of anticompetitive impact? In this particular case, the answer may be yes. In general, the answer is likely to depend upon whether the calculated percentage lies below some predetermined threshold, with the value of that threshold varying across jurisdictions.

b. Burden-Shifting

If the business owner succeeds in making out a prima facie case of anticompetitive impact, then the burden of proof shifts to the local government to establish that the zoning action is, in fact, rationally related to a legitimate government interest. As noted in Section II.B.2, the key question here is the extent to which a legislative body must rely upon empirical evidence of a causal impact to establish a rational relationship to a legitimate government interest.²²⁴ At a minimum, to rebut the presumption of anticompetitive injury, the governing body cannot be allowed to simply identify some obviously legitimate government interest, such as the reduction of traffic congestion, and state, in a conclusory manner without additional supporting evidence, that the zoning action is expected to promote this stated interest, especially if credible empirical evidence to the contrary is likely to be produced by the challenger in the third step of this proposed three-step procedure.²²⁵ A proper justification of a zoning ordinance cannot simply be that the restriction is reasonable and necessary to promote the public health, safety, morals, or general welfare of the community and is consistent with the general plan.²²⁶ To allow this as a reasonable justification for a zoning action is to allow a local government to engage in an exercise of circular logic in which the government, in effect, justifies an ordinance as rationally related to the objectives of zoning power by simply stating, tautologically, that the ordinance is rationally related to the objectives of zoning power.²²⁷ What objectives of zoning

223. *See id.*

224. *See supra* Section II.B.2.

225. *See, e.g.,* Sedona Grand, L.L.C. v. City of Sedona, 270 P.3d 864, 870 (Ariz. Ct. App. 2012) (stating that city must provide evidence beyond mere “legislative assertion” to carry its burden of demonstrating that the land use law is exempt pursuant to the public health and safety exception).

226. *See, e.g.,* SAN DIEGO COUNTY, CAL., ZONING ORDINANCE 5281 (Oct. 18, 1978).

227. *See Sedona*, 270 P.3d at 870 (“[T]he nexus between prohibition of short-term occupancy and public health is not self-evident, and the governing body must do more than incant the language of a statutory exception to demonstrate that it is grounded in actual fact.”).

power more specifically? And more importantly, how is the ordinance expected to have an observable causal impact upon these objectives?

For the rationally related requirement to act as a meaningful check on *zoning power*, as distinguished from a local government's more general *police powers*, this Article contends that a local government, when confronted with *prima facie* evidence of anticompetitive impact, must be obligated, in consultation with a planning commission, to produce concrete, empirical evidence of a causal link between the zoning action and the stated government interest.²²⁸ In the case of a zoning action, however, the absence of such empirical evidence ought to imply that the local government has failed to rebut a presumption of anticompetitive impact. Even if empirical evidence of a causal link is not required, the governing body should, at a minimum, be obligated to explain, in writing and with specificity, how the zoning action can be expected to promote a legitimate public interest.²²⁹

This need for empirical evidence of a causal relationship is, arguably, most compelling where the local government can be viewed as treating a challenger differently than similarly situated businesses.²³⁰ If the local government, for example, cites an increase in traffic congestion as the justification for its decision not to allow a business to open in a specific location, then the government, even if a plausible causal link has been established between the challenger's business and traffic congestion, ought to be required to further explain why the challenger's negative impact on traffic congestion is likely worse than other similarly situated commercial establishments that have been permitted to operate in the same area. The local government cannot be allowed to prevent market entry at a specific location because of concerns over increased traffic congestion only to allow, say, a twenty-four-hour gas station to open in that same location, resulting in a substantial increase in local traffic congestion. Under these facts, the decision to disallow market entry by the challenger appears arbitrary and capricious and strongly suggests that the original zoning action was not related to traffic congestion at all.²³¹ If the zoning action is truly motivated by a desire to control traffic congestion, then this concern

228. Unlike standard rational basis review under which a court need not inquire into whether a statute does, in fact, further a legitimate government interest, let alone establish a causal link. *See* Fed. Commc'ns Comm'n v. Beach Commc'ns, 508 U.S. 307, 315 (1993) (holding that, under rational basis review, a statute can be based upon "rational speculation unsupported by evidence or empirical data").

229. *See, e.g.*, A.B.A., MODEL STATUTE ON LOCAL LAND USE PROCESS § 614 (2008).

230. *See* Gayle Lynn Pettinga, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L.J. 779, 780 (1987) (tracing the heightened legal standard inherent to intermediate scrutiny as opposed to the lower bar inherent to rational basis review).

231. *See, e.g.*, *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 399 (1937); *see also* Ronald J. Krotoszynski, Jr. *Fundamental Property Rights*, 85 GEO. L.J. 555, 561 (1997) (stating that judicial review of property interests under substantive due process is deferential to legislative decision-making). *See generally* James W. Ely, Jr., *The Enig-*

ought to apply equally to all similarly situated businesses, and the applicable governing body should be obligated to explain, with particularity, how the challenger differs from other businesses on the specific issue of traffic congestion or any other expected negative social impact used to justify the locality's exercise of its zoning power.

c. Pretext

If the governing body has satisfied step two of the proposed three-step procedure—meaning simply that the planning commission has produced a report—then the burden of proof shifts back to the challenger to establish that the zoning action is not rationally related to a legitimate government interest. Specifically, with the report of the planning commission in hand, the challenger is now given the opportunity to conduct its own competing empirical analysis to establish that there is, in fact, no causal link between the zoning action and the government's stated legitimate interest—or, at the very least, that the magnitude of this link has been significantly overstated by the local government—or, more specifically, its planning commission. If the stated government interest is the reduction of local traffic congestion, for example, then the challenger can examine the impact on traffic of similar businesses in other locations and present an empirical analysis that shows, contrary to the report produced by the planning commission, that its new business is similarly unlikely to have a statistically significant impact upon local traffic congestion.

Before rendering its final decision, the governing body can weigh the validity of both reports to assess if a causal link exists. Although a local government may, admittedly, hold a bias in favor of the analysis conducted by its own planning commission, that bias is not necessarily outcome determinative in any given case. Indeed, placing blame on the planning commission may provide convenient political cover for a zoning action that, upon being brought to public light, is not so popular with the electorate. Moreover, its final decision is subject to review by a court in the event of an appeal. Even though courts generally view legislative decision-making under the lens of presumed constitutionality, the substantial written record generated as a byproduct of this proposed administrative process may provide a reviewing court with a sufficiently firm evidentiary footing upon which to rule that an exercise of zoning power fails rational basis review for lack of a rational relationship between the zoning action and the local government's alleged legitimate interest.²³²

matic Place of Property Rights in Modern Constitutional Theory, in *THE BILL OF RIGHTS IN MODERN AMERICA* 108, 110 (David J. Bodenhamer & James W. Ely, Jr., eds., 2008).

232. Although this proposed framework is described as a *procedural* safeguard intended to reduce voter ignorance of the potential anticompetitive impact of commercial land use regulation, this three-part procedure also suggests a *substantive* framework for how a court should assess the validity of a locality's exercise of zoning power (as opposed to its police power) pursuant to this administrative procedure under rational basis review.

CONCLUSION

This Article explored how the anticompetitive impact of a zoning ordinance is assessed under the antitrust laws and substantive due process and concluded that neither is likely to satisfactorily curb the anticompetitive impact of commercial land use regulation. Highlighting the distinction between a local government's zoning power and its more general police power, this Article advanced the claim that for the rationally related requirement to act as a meaningful check on *zoning power*, such review must require a local government to produce evidence of a causal link between a zoning action and the stated government interest, unlike under standard rational basis review of a police power action which can be based upon "rational speculation unsupported by evidence or empirical data."²³³ Rejecting antitrust law as the proper doctrinal vehicle through which to curb the anticompetitive impact of commercial zoning restrictions, this Article proposed a three-part administrative procedure, grounded in notions of due process and the legitimate exercise of zoning power, to reduce the frequency with which local governments impose socially inefficient restrictions on commercial land use. This proposal introduced the concept of an economic impact statement that establishes the extent to which the proposed zoning action acts as a barrier to entry. Importantly, to make out a prima face case of anticompetitive impact under the proposed framework, the challenger need not prove an "antitrust injury." Instead, the challenger need only submit an economic impact statement that displays where the business can locate in the jurisdiction under the challenged zoning ordinance.

233. *Beach Commc'ns*, 508 U.S. at 315.