

SUSTAINABILITY AND LAND USE REGULATION IN CANADA: AN INSTRUMENT CHOICE PERSPECTIVE

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INTRODUCTION

The academic literature on land use regulations has tended to focus on property law implications.¹ Given the interests affected by such regulations, this emphasis is not surprising, and, indeed, one leading scholar in the field, Professor Bill Fischel, has argued that the power to zone should be

* Assistant Professor, Faculty of Law, McGill University. I thank the BLG Research Fellowship Program for funding part of the research for this paper and Adela Maciejewski Scheer for her excellent research assistance. I am also grateful for the generous questions and comments of participants at the Annual Meeting of the Canadian Association of Law Teachers (May 2009), the Annual Planning Law and Property Rights Conference (May 2011), the Vermont-McGill Sustainable Development Conference (June 2011), and the Hydro-Québec Environmental Law Working Paper Series (November 2011). Finally, I would like to thank Sara Phillips for her excellent work on the references for this paper.

1. Some have noted that, at least in the United States context, the focus has centered on the Takings Clause. Julie A. Ronin et al., *Reassessing the State and Local Government Toolkit*, 77 U. CHI. L. REV. 1, 1 (2010) (“[E]minent domain . . . has been the subject of intense scholarly scrutiny . . .”).

understood as a collectively held property right.² In this paper, I hope to redirect the analytical attention along the lines that have been suggested by contributors to a recent symposium held at the University of Chicago on the “State and Local Government Toolkit.”³ These contributors examined a range of policy instruments that state and local governments can deploy to achieve regulatory ends. In this paper, I will similarly undertake an instrument choice analysis of land use regulation, and, in keeping with the theme of this workshop, I will assess how land use instruments can be deployed to achieve sustainability ends. Before I move to the main body of the article, I will make my suggestions based on an instrument choice analysis and what I understand to be the relationship between that form of analysis and scholarship on environmental regulation.

Professor Roderick Macdonald has written a brief history of instrument choice scholarship in Western democracies and divided that history into three periods.⁴ In the first period (1977-85), scholars argued that express rules, enunciated by official organs of the state, were to be deployed to correct market failures. In the second period (1988-95), scholars expanded the scope of values to be taken into consideration beyond efficiency and widened the range of regulatory institutions beyond those of the state.⁵ Finally, according to Macdonald, in the contemporary period, scholars recognize that there is no single metric for determining what policy instrument is appropriate for a given context, and, instead, understand that a variety of perspectives, criteria, principles, values, and institutional forms can be brought to bear on any governance question.⁶

2. See William A. Fischel, *A Property Rights Approach to Municipal Zoning*, 54 LAND ECON. 64 (1978). (arguing that zoning can be understood as an incomplete property right that belongs to a community, i.e. zoning is under the control of the community, but can only be selectively leased (in the form of fiscal zoning) and cannot be alienated). Scholars have noted that environmental regulation has been similarly framed in private law terms. Professor Richard J. Lazarus has argued that natural resources law can be understood as protecting property entitlements, while pollution control law can be understood as addressing harms that are traditionally dealt with by tort law. RICHARD J. LAZARUS, *THE MAKING OF ENVIRONMENTAL LAW* 178–79 (2004).

3. Ronin et al., *supra* note 1.

4. Roderick A. Macdonald, *The Swiss Army Knife of Governance*, in *DESIGNING GOVERNMENT: FROM INSTRUMENTS TO GOVERNANCE* 203, 214–24 (Pearl Eliadis et al. eds., 2005).

5. Macdonald tracks the shift in the positions taken by Professor Michael Trebilcock to illustrate this movement from the first to the second period. *Id.* at 221. The relevant Trebilcock texts are: M.J. Trebilcock et al., *Markets for Regulation: Implications for Performance Standards and Institutional Design*, in *GOVERNMENT REGULATION: ISSUES AND ALTERNATIVES* 11, 11–28 (1978); Robert J. Howse, J. Robert S. Prichard & Michael J. Trebilcock, *Smaller or Smarter Government*, 40 U. TORONTO L.J. 498 (1990) (discussing the shift in instrument choice).

6. See Pierre Issalys, *Choosing Among Forms of Public Action*, in *DESIGNING GOVERNMENT: FROM INSTRUMENTS TO GOVERNANCE* 154, 171 (Pearl Eliadis et al. eds., 2005).

Scholarly debates in the environmental law context have resembled those in the first two eras of the instrument choice literature.⁷ Disagreements in the environmental law context have focused on the appropriate role of markets in regulating environmental problems. Proponents of market-based approaches have argued that trading mechanisms are an efficient means of reducing harmful emissions.⁸ In contrast, proponents of state regulation have tended to argue for forms of administrative agency regulation that involve agencies monitoring industry activity, issuing prescriptive rules, and enforcing compliance.⁹

Recent scholarly work by administrative law scholars on environmental regulation has departed from this debate between market and prescriptive or command and control regulation, and has come to resemble the current state of instrument choice literature. I will claim below that arguments about sustainable development in the land use context can be situated in this scholarly conversation. There are three features of the recent administrative law scholarship on environmental regulation that are relevant to the land use discussion. First, scholars recognize that a range of interests is implicated in environmental regulation. Second, scholars note that no single regulatory instrument can address the full complexity of environmental concerns. Third, scholars emphasize that public participation in regulatory regimes is necessary for them to be effective and democratically

7. See Sabel, *infra* note 12 & Freeman & Farber, *infra* note 20 (providing overviews of this debate and prescriptions for transcending the debate); DOUGLAS A. KYSAR, *REGULATING FROM NOWHERE: ENVIRONMENTAL LAW AND THE SEARCH FOR OBJECTIVITY* (2010) (providing a recent normative critique of utilitarian approaches to environmental regulation that aims to reconceive the normative underpinnings of more prescriptive policy orientations (and, in particular, the precautionary principle)). Kysar argues that in the United States' federal environmental regulation originally adopted a prescriptive approach, which relied on a conception of regulation that placed environmental, health, and safety objectives in the foreground, while introducing cost concerns only at the point of assessing the feasibility of means chosen to advance those objectives. *Id.* at 4–5. Kysar also notes that, according to critics of this feasibility approach, all regulation necessarily requires an up-front assessment of the costs and benefits of regulatory choices, instead of relegating cost considerations to the role of a side-constraint. *Id.* at 7–9. See RICHARD A. POSNER, *CATASTROPHE: RISK AND RESPONSE* 155–65 (2004) (outlining a utilitarian approach to environmental regulation that prescribes cost benefit analysis in the context of environmental regulation).

8. *Contra* Lazarus, *supra* note 2 at 183–84 (summarizing and critiquing the market-based approach). See JAMES SALZMAN & BARTON H. THOMPSON, JR., *ENVIRONMENTAL LAW AND POLICY* 100–08 (2nd ed. 2007); NANCY K. KUBASEK & GARY S. SILVERMAN, *ENVIRONMENTAL LAW* 123–25 (7th ed. 2010) (describing the trading policies in the United States).

9. See Bruce Ackerman, *Beyond the New Deal: Coal and the Clean Air Act*, 89 *YALE L.J.* 1466 (1980) (providing a classic study of U.S. environmental regulation and its relationship to the New Deal consensus about independent agency regulation).

legitimate.¹⁰ We will see below that these concerns animate scholarship on sustainable land use development and on land use regulation more generally. I shall further argue that a particular choice of land use instrument, which aimed to achieve sustainability objectives, evidences these core concerns of contemporary administrative law scholarship on environmental issues.

The paper is divided into two parts. In Part I, I will set out the background for this paper's arguments by describing two positions in the administrative law scholarship on environmental regulation that share concerns with my instrument choice approach to land use regulation. I will, moreover, argue that an instrument choice approach is applicable *in general* to questions of land use regulation and land use regulation in the sustainable development context. In Part II, I shall argue that a *particular instance* of land use regulation reveals the utility of an instrument choice approach and highlights the regulatory significance of the concerns that animate contemporary administrative law and land use scholarship on environmental issues.

I. ADMINISTRATIVE LAW AND ENVIRONMENTAL REGULATION, AND SUSTAINABLE LAND USE REGULATION: SITUATING THE DEBATE

In this part, I will situate my instrument choice approach to sustainable land use in the context of (1) positions in the administrative law scholarship concerning environmental issues and (2) contemporary scholarship on sustainable land use regulation and land use regulation more generally. Once that context is set, I will, in Part II, outline the particular instrument choice approach to land use regulation that will be taken in this paper, and I hope to demonstrate in that argument both the utility of the approach and the effectiveness of the instrument analyzed. I begin by situating my instrument choice arguments in the context of two contemporary positions in administrative law that address environmental issues, namely New Governance and Modular theories.

10. These three elements of environmental regulation are described in standard texts on environmental law. *E.g.*, Kubasek, *supra* note 8, at ch. 4; Salzman, *supra* note 8, at chs. 3, 4 (providing American examples); JAMIE BENEDICKSON, ENVIRONMENTAL LAW chs. 7, 16, 17 (3rd ed. 2009) (exploring Canadian considerations of some regulatory options).

A. New Governance and Modular Approaches to Environmental Regulation

Scholars working in the New Governance paradigm have argued that environmental regulation should avoid the atavisms of market and command and control paradigms.¹¹ These scholars argue that this end can be achieved when diverse localities gather and share information and a central authority (whether state or federal) acts as a clearing house for this information and sets best practice standards. In the New Governance regime, local communities, whose memberships are determined by the nature of the environmental concern to be addressed, monitor their surroundings and assess local regulatory efforts against the standards set and information collected by central authorities.¹² Professors Sabel, Fung, and Karkkainen argue that this emergent regulatory architecture overcomes the core problem of the market and command and control models. In both models, accurate information is a pre-requisite for effective regulation, but neither has an effective mechanism for amassing and assessing the diverse and variegated information.¹³ By contrast, in the New Governance model, local actors are delegated responsibility to report on environmental conditions to a centralized agency, which makes that information public and permits comparisons among the conditions of various localities.¹⁴

In addition, in some jurisdictions such as Massachusetts, the state provides instruction to firms to assist them in meeting their reporting requirements and in adopting strategies to reduce their emissions.¹⁵ Effective strategies thereby become part of the regulatory system's shared and public knowledge. Citizens and interest groups monitor the efforts of firms, and, in some cases, gather information themselves.¹⁶ State institutions then deploy regulatory measures, ranging from permits to funding, directives, penalties, and informational campaigns that incentivize firms to

11. See Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998) (offering a comprehensive statement of the New Governance position, which is sometimes called "Democratic Experimentalism").

12. By contrast, the market and command and control models require some centralized entity to gather the relevant information, whether for the purpose of determining the price of permits or setting precise standards. CHARLES SABEL ET AL., *BEYOND BACKYARD ENVIRONMENTALISM* (Joshua Cohen & Joel Rogers eds., 2000). For a similar critique of cost-benefit analysis in the administrative state, see HENRY S. RICHARDSON, *DEMOCRATIC AUTONOMY: PUBLIC REASONING ABOUT THE ENDS OF POLICY* 122–29 (2002) (arguing that cost benefit analysis assumes a relationship between regulatory ends and means that is at variance with the demands of practical intelligence).

13. Sabel, *supra* note 12, at 9–13.

14. *Id.* at 17–22.

15. *Id.*

16. *Id.*

satisfy the performance measures that emerge from the rolling regime of best practices.¹⁷ Proponents argue that this New Governance architecture, unlike the market and command and control models, effectively aggregates information.¹⁸ Moreover, they claim it engages citizens, firms, and state authorities in deep and collaborative deliberation about the means and ends of environmental regulation.¹⁹

Professors Freedman and Farber have argued for a modular approach to environmental regulation, which also responds to the market and prescriptive methods of environmental regulation. Freedman and Farber articulate the well-established criticisms of prescriptive regulations that impose uniform regulation on all firms in a given industrial sector: such regulation is insensitive to variations in industrial practices, is stifling local innovations, is vulnerable to informational asymmetries in which firms control the flow of information, and is burdensome and costly.²⁰ By contrast, advocates of market approaches argue for extensive recourse to emissions trading regimes.²¹ But these regimes are also subject to criticism. For example, government intervention is necessary to establish the baseline levels of entitlements in trading regimes, and this initial allocation is open to influence from interest groups, as the market does not provide a standard for determining the appropriate allocation. Trading systems suffer from additional concerns. Effective trading is made difficult by problems of incommensurability and the fact that emissions can be non-fungible. Moreover, monitoring costs may erase any gains in efficiency generated by the system.²²

Freedman and Farber argue for a modular approach which acknowledges that market mechanisms require initial government intervention and continuing government monitoring, and recognizes that prescriptive regimes need not be as inflexible or resistant to innovation as

17. *Id.*

18. *Id.*

19. *Id.*

20. Jody Freeman & Daniel Farber, *Modular Environmental Regulation*, 54 DUKE L.J. 795, 814–15 (2005) (proposing a modular approach to environmental regulation as an alternative to traditional approaches). These criticisms are also summarized in Kysar, *supra* note 7, at 5–11. *But see* STEVEN P. CROLEY, *REGULATION AND PUBLIC INTERESTS: THE POSSIBILITY OF GOOD REGULATORY GOVERNMENT* (2008) (offering a more optimistic view of a prescriptive approach's information-generating capacities that takes into consideration the deliberative benefits of "public interested administration"); *Id.* at 163–79, 258–61 (specifically analyzing the administrative process in environmental regulation).

21. Freeman, *supra* note 20, at 816.

22. *Id.* at 817–18.

critics charge.²³ The authors argue for a conception of environmental regulation that resembles the core insights of contemporary instrument choice theory: that a range of factors, in a variety of combinations, can and should be deployed in ways that are sensitive to context and that pay close attention to issues of implementation and monitoring.²⁴ Advocates of a modular approach to environmental governance argue for imaginative combinations of agencies and stakeholders working together to address governance issues.²⁵ The focus of such an approach is on generating information and facilitating deliberation for the purpose of solving long-term problems, rather than, as is often the case with administrative agency decision-making, for the purposes of justifying short-term decisions.²⁶ Finally, Freedman and Farber argue that modular structures facilitate public participation, which “not only improves the quality of decision but also helps to provide accountability.”²⁷

In this section, I have surveyed two movements in the administrative law scholarship addressing environmental concerns, and I have shown how that scholarship reflects the three central concerns identified in the Introduction. These scholars recognize that a range of interests are implicated in environmental regulation; they note that no single regulatory instrument can address the full complexity of environmental concerns, and they emphasize that public participation in regulatory regimes is necessary for them to be effective and democratically legitimate.

B. Sustainable Land Use Regulation: Defining the Debate, Choosing Regulatory Instruments

This paper’s instrument choice approach shares the emphases of New Governance and Modular approaches to the regulation of environmental issues. Like these approaches, the present paper emphasizes that sustainable land use regulation gives rise to complex issues, stresses that a range of instruments can be brought to bear on this kind of regulation, and recognizes the significance of broad stakeholder consultation. We shall see in the case study in Part II that these concerns animated the instrument choice analysis made by a particular local government. Before I turn to that

23. *Id.* at 818–19.

24. *Id.* at 822. See THE TOOLS OF GOVERNMENT: A GUIDE TO THE NEW GOVERNANCE 39 (Lester M. Salamon & Odius V. Elliott eds., 2002) (discussing the three bodies of knowledge that are critical to New Governance).

25. Freeman & Farber, *supra* note 20, at 823.

26. *Id.* at 824.

27. *Id.* at 894.

discussion, I will examine the similarities between concerns of the administrative law scholarship on environmental issues and the land use scholarship on sustainability. Let me begin by clarifying how the expression “sustainable development” is used in land use scholarship and articulating what I intend by that expression.

Land use scholars have long understood that patterns of land use development and, in particular, urban sprawl have caused significant environmental harms. The litany is familiar: sprawl increases dependence on automobiles, damages vulnerable ecological systems, leads to the abandonment of inner city infrastructure, and contributes to substantial energy consumption. As a result, the “ecological footprint” of North Americans is disproportionately large.²⁸ These circumstances have led scholars in the legal academy to consider the various regulatory instruments that are available to local governments to reduce the harms caused by land use development. It is these strategies for harm reduction that I characterize as “sustainable development.” I recognize that the term has been the subject of significant controversy. For instance, some have claimed that the term sustainable development is a mere rhetorical device that justifies a particular kind of consumption and accepts and reinforces “the prevailing form of mass market consumption.”²⁹ I do not intend to engage the claim made by these authors about the relationship between the term “sustainable development” and a Foucaultian “society of normalization.”³⁰ My goals are more modest and less speculative. I mean only to use the term in the limited way that I have specified above and I offer proposals that advance the goal of environmental harm reduction.

I am not alone in this endeavor, and the aims of land use scholarship on sustainable development resemble those of the Modular and New Governance scholarship surveyed above. In the same way those administrative law scholars, academics working in the land use context, recognize that a range of interests are implicated in sustainable development regulation, and like administrative law scholars working on environmental concerns, land use scholars note that no single regulatory instrument can address the full complexity of environmental concerns in the

28. Writing in 1997, Beatley and Manning stated that “[t]he average North American . . . require[s] about five hectares of land to support food, housing, transportation, and other consumer needs.” TIMOTHY BEATLEY & KRISTY MANNING, *THE ECOLOGY OF PLACE: PLANNING FOR ENVIRONMENT, ECONOMY AND COMMUNITY* 8 (1997).

29. Timothy W. Luke, *Neither Sustainable nor Development: Reconsidering Sustainability in Development*, 13 *SUST. DEV.* 228, 231 (2005).

30. *Id.* at 236.

land use context. Consider first the complexity of interests at play. Dernbach and Bernstein have characterized sustainable development land policies as those that “minimize sprawl and maximize sound development opportunities to conserve important lands, preserve the natural environment, protect air and water quality, promote affordable housing through compact development and urban renewal, and encourage ‘infill’ rather than rural development.”³¹ Lately, land use scholars have focused on the capacity of localities to slow climate change,³² and, more specifically, have examined closely the range of land use instruments that can be deployed to mitigate climate change. These include: revisions to building codes, adaptations to zoning ordinances that would permit the installation of solar panels and wind turbines that are otherwise excluded for aesthetic reasons, transfer of development right programs, and the inclusion in official or comprehensive plans of conservation goals.³³ Writers in Canada have argued for the use of form-based codes and performance zoning³⁴ and have advocated for regulation in a whole host of subject matters (water, transportation, sewage, solid waste, and parks and recreation) that fall under municipal powers and that would enable municipalities to pursue climate mitigation strategies.³⁵

In general, this recognition that local governments have available to them a range of regulatory responses to sustainability concerns is consistent with an emerging recognition among land use scholars that there exists a variety of means to achieving land use regulation objectives. This body of scholarship resonates with the instrument choice literature, as it expressly weighs the costs and benefits of different regulatory choices, and, moreover, it represents a movement away from land use law scholarship’s tendency to focus on the property law dimensions of land use regulation.

31. John C. Dernbach & Scott Bernstein, *Pursuing Sustainable Communities: Looking Back, Looking Forward*, 35 URB. LAW. 495, 511 (2003) (providing an overview and giving recommendations regarding sustainable development).

32. See, e.g., Patricia Salkin, *Sustainable Development, Climate Change and Land Use for Local Governments*, 11 N.Y. ZONING LAW AND PRACTICE REP. 1, 2 (2010) (discussing state level initiatives to address climate change); John Nolon, *The Land Use Stabilization Wedge Strategy: Shifting Ground to Mitigate Climate Change*, 34 WM. & MARY ENVTL. L. & POL’Y REV. 1, 8–9 (2009) (describing how local governments can mitigate climate change).

33. Salkin, *supra* note 32, at 2; Nolon, *supra* note 32, at 9.

34. Matti Lemmens, *Re-Zoning Alberta: Smart Regulation for Smart Growth*, 5 MCGILL J. SUST. DEV. LAW & POL’Y 115, 129–35 (2009) (explaining how form-based code and performance-based zoning can be incorporated into the Euclidean framework).

35. Howard M. Epstein, *Subsidiarity at Work: The Legal Context for Sustainability Initiatives at the Local Government Level: How an Environmental Agenda Could be Advanced by Canadian Municipalities*, 64 MUN. & PLAN. LAW REP. 56 (2009).

For instance, Professor Neil Komesar, writing from an institutional choice perspective, expresses this emerging understanding of land use regulation when he assesses the relative advantages of regulating a nuisance using market, judicial, or political processes.³⁶ Similarly, land use scholars have articulated the flaws of Euclidean zoning and have argued for a range of alternatives that deploy different zoning instruments, assessing the advantages of such alternatives relative to Euclidean zoning.³⁷ For example, land use law scholars writing in the New Urbanist tradition have criticized Euclidean zoning for its division of land into “single use districts with uniform requirements.”³⁸ Scholars argue that these features of Euclidean zoning are contrary to forms of urban development that are “diverse, compact, pedestrian, and celebratory of the public realm.”³⁹ In response to the perceived inadequacies of Euclidian zoning, New Urbanist proposals deploy a range of instruments that “address the relationship between building facades and the public realm, the form and the mass of buildings in relation to one another, and the scale and type of streets and blocks.”⁴⁰ New Urbanists proposals have taken two general forms. First, they have prescribed comprehensively revised zoning regulations to make them consistent with New Urbanist principles of “mixed-use, mixed-income housing, identifiable community centers, quality urban design, and

36. NEIL K. KOMESAR, *LAW'S LIMITS: THE RULE OF LAW AND THE SUPPLY AND DEMAND OF RIGHTS* 12–22 (2001).

37. See DONALD L. ELLIOTT, *A BETTER WAY TO ZONE: TEN PRINCIPLES TO CREATE MORE LIVABLE CITIES* ch. 2 (2008) (providing a recent critique of Euclidean zoning's assumptions and an articulation of design principles that should guide land use regulation). In the following, I set out in detail the New Urbanist alternative because New Urbanist principles are present in the development that is the object of the case study in Part II. It should be noted, however, that there are other alternatives to Euclidean zoning, including performance zoning and British development control. See James Marwedel, *Opting for Performance: An Alternative to Conventional Zoning for Land Use Regulation*, 13 J. OF PLAN. LITERATURE 220 (1998) (giving an overview of performance zoning's principles and objections to it); Douglas C. Baker, *Performance-Based Planning: Perspectives from the United States, Australia, and New Zealand*, 25 J. OF PLAN., EDUC. AND RES. 396 (2006) (evaluating performance zoning in various jurisdictions); Philip Booth, *Managing Land-Use Change*, 26 LAND USE POL'Y 154 (2009) (discussing British development control).

38. Brian W. Ohm & Robert J. Sitkowski, *The Influence of New Urbanism on Local Ordinances: The Twilight of Zoning*, 35 URB. LAW. 783, 784 (2003).

39. Andres Duany & Emily Talen, *Making the Good Easy: The Smart Code Alternative*, 29 FORDHAM URB. L.J. 1445, 1445 (2001–02).

40. *Definition of a Form-Based Code*, FORM-BASED CODES INST., <http://www.formbasedcodes.org/what-are-form-based-codes> (last visited Mar. 1, 2012). See Brian Ohm et al., *Changing the Rules: New Approaches to Zoning*, in *A LEGAL GUIDE TO URBAN AND SUSTAINABLE DEVELOPMENT* 94 (Daniel Slone & Doris Goldstein eds., 2008) (articulating the New Urbanist focus on the form of buildings and the relations between them, as well as on the scale of street design, rather than Euclidean separation of uses).

walkable and connected street systems.”⁴¹ Second, scholars have prescribed New Urbanist orientations for particular zoning instruments that are themselves attempts to introduce flexibility into Euclidean zoning, such as floating zones or overlay zones.⁴²

The particular development that is the object of this article’s case study falls in the second category of land use regulation, and, in the next part, I will assess this particular instance of regulatory instrument choice and consider the public law theory implications of this choice of instrument. Before I turn to a description of the City of Victoria’s deployment of a comprehensive development zone in the Docks Green project, it is worth noting a final similarity between trends in land use scholarship and those in administrative law that I identified in Part I. As we have seen above, there is a preoccupation in the contemporary administrative law scholarship on environmental issues with how regulatory systems facilitate citizen engagement in governance. This concern emerges strikingly in land use scholarship that is marked by sustainability concerns when New Urbanists argue for institutional reforms that can lead to “communities that are able to self-govern,”⁴³ and that alter a status quo in which planning processes are dominated by special interests, including developers.⁴⁴ Moreover, this

41. Jill Grant & Stephanie Bohdanow, *New Urbanism Developments in Canada: A Survey*, 1 J. OF URBANISM 109, 109 (2008) (arguing for the adoption of a Smart Code). Grant and Bohdanow note that Vancouver has adopted New Urbanist principles in its land use regulations. *Id.* at 121. Ohm and Sitkowski conduct a similar survey of American jurisdictions. Ohm & Sitkowski, *supra* note 38, at 788–89. A related regulatory form, the Smart Code, classifies zones, or “transects,” on a continuum from urban to rural and articulates form-based design principles that govern particular transects, as well as the entire region that is covered by the Code and specific lots. *See* Duany et al., *supra* note 39, at 1445 (articulating the Smart Code design principles and the concept of the transect).

42. Ohm & Sitkowski, *supra* note 38, at 790. *See* Daniel P. Selmi, *The Contract Transformation in Land Use Regulation*, 63 STAN. L. REV. 591, 601 (2011) (describing the characteristics of floating zones); Robert J. Blackwell, *Overlay Zoning, Performance Standards, and Environmental Protection After Nollan*, 16 ENVTL. AFF. 615, 616 (1989) (assessing the purposes and structure of overlay zones); Grant & Bohdanow, *supra* note 41 (examining the Canadian incorporation of New Urbanist principles into particular zoning projects such as urban infills and greenfield and brownfield redevelopments). In the Canadian context, Buholzer has argued that various legal instruments introduce a measure of flexibility into Euclidean zoning. These instruments include variances, contract zoning, bonus zoning, holding zones, architectural controls, and comprehensive development zones. WILLIAM BUHOLZER, *HALSBURY’S LAWS OF CANADA: PLANNING AND ZONING* ch. 6 (2008).

43. Dan Slone, *Strategies for Change*, in A LEGAL GUIDE TO URBAN AND SUSTAINABLE DEVELOPMENT FOR PLANNERS, DEVELOPERS AND ARCHITECTS 313, 327 (Daniel Slone & Doris Goldstein eds., 2008).

44. *Id.* In Canada, scholars have examined deliberative processes environmental impact assessments in the context of a specific resource management legislative scheme affecting land and water management in the Northwest Territories. Patricia Fitzpatrick, A. John Sinclair, & Brian Mitchell, *Environmental Impact Assessment Under the Mackenzie Valley Resource Management Act: Deliberative*

concern about citizen engagement is present in recent legal scholarship on land use regulation that assesses the capacity of emerging local government institutions to facilitate democratic deliberation.⁴⁵ This focus on citizen engagement in regulatory institutions, as well as the recognition of the complexity of land use regulation and the understanding that a range of regulatory instruments can be brought to bear on such regulation, can be seen in the City of Victoria's choice of instrument to address a specific environmental concern. It is to this instance of instrument choice that I now turn.

II. DOCKSIDE GREEN AS A CHOICE OF GOVERNING INSTRUMENT

The Dockside site in the City of Victoria was an abandoned dockyard that was owned by the Province of British Columbia and sold to the City for one dollar.⁴⁶ The site was a brownfield and had been the object of several failed attempts at remediation. In 2001, the City of Victoria brought to bear on the site the expertise of several partners. The City had entered into a memorandum of understanding with the British Columbia Building Corporation that enabled the City to cooperate with the Corporation and draw on expertise in real estate development, which the City staff lacked. The City then created a project team that brought together "planners, development economists, engineers, financial personnel from within the City as well as representation from the local community association" to develop a business case study of the site.⁴⁷ The community association was consulted at the outset, but only at key moments of decision-making, and held a veto power over the project.

Democracy in Canada's North?, 42 ENVTL. MGMT. 1 (2008) (considering "the extent to which the [MVRMA] provides an opportunity for deliberative democracy to emerge within the context of resource management in Canada's North"). Citizen participation is a concern for local government and land use law scholarship. Matthew Parlow, *Civic Republicanism, Public Choice Theory and Neighborhood Councils: A New Model for Civic Engagement*, 79 U. COLO. L. REV. 137, 152 (2008) (providing an American example); Hoi Kong, *The Deliberative City*, 28 WINDSOR Y.B. ACCESS TO JUST. 411 (2010) (providing a Canadian example).

45. See, e.g., Kong, *supra* note 44; Parlow, *supra* note 44, at 137.

46. The following draws on the case study Chris Ling, Katherine Thomas, & Jim Hamilton, *Triple Bottom Line in Practice: From Dockside to Dockside Green*, COMMUNITY RES. CONNECTIONS (Mar. 6, 2008), <http://www.crcresearch.org/case-studies/case-studies-sustainable-infrastructure/land-use-planning/triple-bottom-line-practice-f>.

47. *Id.*

A. Process, Agreement and a Comprehensive Development Zone

The City invited expressions of interest in the project and made public an evaluation grid that awarded points for achieving LEED Silver standards. Moreover, prospective bidders were informed that they would be required to include in their bids remediation strategies to address ground contaminants on the site. The City set out two possible uses for the site: a high-tech light industrial development and a mixed-use New Urbanist development. Developers who responded to the call for expressions of interest were “asked to comment upon the criteria and suggest improvements that would lead to a more sustainable project.”⁴⁸ These modifications were incorporated into the Request for Proposals and those involved in the bidding presented their development plans to an open meeting of the City council. VanCity and Windmill Development made the winning bid. VanCity is the largest credit union in Canada and has had extensive experience in social housing, and Windmill Development has significant experience with environmentally-conscious land use development projects.⁴⁹ The developer’s staff met regularly with the local community association to ensure that their concerns were met. Indeed, rather than begin with a proposed development, the developer started with a “largely blank canvas” that ensured meaningful input into design choices from the community.⁵⁰

The funding for the project came from a variety of sources. The City invested in the site to make it ready for development and set the break-even price at \$6 million. The cost to Windmill/VanCity was approximately \$600 million, \$8 million of which went to the purchase price of the land. The Federation of Canadian Municipalities made \$350,000 available to support the development of innovative sustainable infrastructure, and the City has provided a dedicated staff member to the project. The costs of this staff position are shared with Dockside Green Ltd., a corporation that is wholly owned by Windmill/VanCity.

The primary regulatory instrument that the City relied on in developing the project was a comprehensive development zone.⁵¹ In addition, the City

48. *Id.*

49. *Who We Are*, WINDMILL, <http://www.windmilldevelopments.com/about-windmill/who-we-are/> (last visited Mar. 1, 2012).

50. Ling, *supra* note 46.

51. Comprehensive Development Zoning, WEST COAST ENVIRONMENTAL LAW, <http://wcel.org/comprehensive-development-zoning> (last visited Mar. 1, 2012) (providing a description of comprehensive development zones and examples of their use); VICTORIA, B.C., BYLAW OF THE CITY OF VICTORIA, NO. 05-85 (the by-law creating the comprehensive development zone). The bylaw is

entered into a Master Development Agreement with the developer that set out specific terms under which the land would be developed, including the provision of amenities, affordable housing, construction of off-site and on-site amenities, and phased development after Council's adoption of the Rezoning Bylaw and Design Guidelines.⁵² One of the conditions precedent to the obligations of the Developer under the Agreement was Council's adoption of the bylaw creating the comprehensive development zone so as to incorporate the design guidelines into the City's Official Community Plan.⁵³ The Agreement also imposed an annual reporting obligation on the developer.⁵⁴ Finally, the City instituted a monitoring program that was made a responsibility of a staff person at the City of Victoria.⁵⁵

B. Assessing the Instrument

The Dockside Green development project evinces many of the aims of the New Governance and Modular regulatory movements, as well as the core insights of contemporary instrument choice scholarship. In this section, I consider the three elements that are shared among these bodies of scholarship and that are relevant to the case of Dockside Green. First, the development shares with these scholars the recognition that a range of interests are implicated in any instance of regulation. Second, the development shares their understanding that no single regulatory instrument can address the full complexity of regulatory issues. Third, the development and the scholars both emphasize that public participation in regulatory regimes is necessary for them to be effective and democratically legitimate.

Consider first the pragmatic recognition of the diversity of interests at stake in regulation. The case studies examined by New Governance and Modular scholars evidence the complexity of interests at stake in regulation.⁵⁶ Similarly, the City of Victoria explicitly acknowledged a

implicitly authorized by § 903(2). WILLIAM BUHOLZER, *BRITISH COLUMBIA PLANNING LAW AND PRACTICE* § 793 (2001).

52. THE CORP. OF THE CITY OF VICTORIA AND DOCKSIDE GREEN LTD., *MASTER DEVELOPMENT AGREEMENT* (2005) [hereinafter *MASTER DEVELOPMENT AGREEMENT*]. The Developer created a restrictive covenant pursuant to section 219 of the Land Title Act, R.S.B.C., ch. 250 (1996), that incorporated the terms of the Master Development Agreement (Schedule L of the Agreement). *See generally* Burnaby (City) v. Marando, 2003 B.C.L.R. 4th 100 (Can.) (examining the validity of master development agreements).

53. Master Development Agreement, *supra* note 52, at § 3.1(b).

54. *Id.* at § 10.1.

55. THE SHELTAIR GROUP, *DOCKSIDE GREEN MONITORING PROGRAM: TECHNICAL REPORT* (2007).

56. Freeman & Farber, *supra* note 20, at 845; Sabel et al., *supra* note 12, at 13–15.

similar degree of diversity in the criteria for evaluation in its call for expressions of interest and for bidding: the City raised economic concerns, as it did not want to take a loss on the sale of the lands, and it also addressed issues of affordable housing, environmental sustainability, and community design concerns.⁵⁷ I have already dealt with the first three issues, but the last is worth mentioning briefly, in light of the discussion in Part I of *New Urbanism*. The mixed-use proposal accepted by the City aims to create a sense of place and of community. It provides for a walkable environment with public paths, and links to the city's waterways and bike-paths. It also aims at more diffuse aesthetic values as it ensures sightlines for neighboring property owners and provides for the mix of uses that *New Urbanists* typically point to as necessary for creating a sense of place and of community.

Consider next the range of regulatory instruments that were involved in the Dockside Green project. The City used a comprehensive development zone, which might be conceived of as a command and control instrument, but it is important to understand the wider context in which that instrument was adopted. Recall that the city engaged in an open bidding process for development of the site that ultimately involved the sale of the land and the completion of a detailed contract. Moreover, the regulatory form chosen was a departure from the basic aims of Euclidean zoning, with its emphasis on separation of uses. The project blended together mandatory regulation, in the form of the zoning by-laws that created the comprehensive development zone, with softer instruments such as the Master Development Agreement and the instruments referred to in it, including design guidelines,⁵⁸ annual reports,⁵⁹ and ongoing monitoring.⁶⁰ This blending of instruments is consistent with the mixing of regulatory instruments that

57. Chris Ling, Katherine Thomas & Jim Hamilton, *Triple Bottom Line in Practice: From Dockside to Dockside Green*, COMMUNITY RESEARCH CONNECTIONS (last updated Feb. 22, 2008), <http://www.crcresearch.org/case-studies/case-studies-sustainable-infrastructure/land-use-planning/triple-bottom-line-practice-f>.

58. E.g., DOCKSIDE WORKING GROUP, DESIGN GUIDELINES FOR THE DOCKSIDE AREA (Sept. 8, 2005), *available at* <http://www.victoria.ca/assets/Departments/Planning~Development/Development~Services/Documents/neighbourhoods-dockside-design-guidelines.pdf>.

59. E.g., DOCKSIDE GREEN, ANNUAL SUSTAINABILITY REP. (2011), *available at* http://www.docksidegreen.com/Portals/0/pdf/sustainability/Sustainability_Report_2011.pdf; CITY OF VICTORIA, GOVERNANCE AND PRIORITIES COMM. REP. (2011), *available at* https://victoria.civicweb.net/FileStorage/346EF64D8D9C4BBDBC6C8265740E4C05-WorkspaceReport_2010%20Dockside%20Green%20Annual%20Report.pdf.

60. E.g., CITY OF VICTORIA, DOCKSIDE GREEN PERFORMANCE INDICATORS (Mar. 2007).

instrument choice, New Governance, and Modular scholars all understand to be appropriate to contemporary regulation.

Finally, consider the nature of the stakeholder engagement in Dockside Green. The engagement was broad and intensive, drawing together diverse professional groups and the community. The interactions between various City departments, the Building Development Corporation, and the City followed the Modular scholars' emphases by breaking down formal divisions within government agencies and departments and between jurisdictions and creating a jointly-funded staff position to monitor the development project. The engagement of the public, in the form of the local community association, responds to the New Governance scholars' concerns about the democratic legitimacy and effectiveness of the regulation that is undertaken in the absence of public engagement. Finally, the drawing together of the various stakeholder groups, with their divergent areas of expertise but common concern for the specific regulatory issue, calls to mind the understanding, shared among New Governance, Modular, and instrument choice scholars, that the "public" interests in a particular instance of regulation are contingent and fluid. They escape a simple definition and they do not divide themselves along the boundary lines of the political or administrative state.⁶¹

C. A Defense of the Instrument Choice

To this point in this Part, I have attempted to demonstrate how the overlap between two contemporary movements in administrative law theory and land use scholarship on sustainability issues is evident in a specific instance of instrument choice. One objective has been to show, generally, the relevance of an administrative law perspective in the context of sustainable land use regulation. I hope to have shown that the general concerns of administrative law with the values, forms, and legitimacy of state regulation are directly pertinent to questions of land use regulation in the sustainable development context. This kind of analysis may help to redirect the land use law literature away from its tendency to focus on property law issues and towards general questions of public law and instrument choice. I close this Part with what I hope will be an argument that demonstrates the value of an instrument choice analysis. I hope to demonstrate that an instrument choice approach has a critical edge in the

61. Freeman & Farber, *supra* note 20, at 835–36; Dorf & Sabel, *supra* note 11, at 314.

land use context, and that it does not merely offer a plausible description of what is at stake in a particular choice of regulatory instrument.

With this discussion, I join arguments recently advanced by Professor Daniel Selmi, who adopts a perspective that resonates with this paper's attempt to draw the insights of administrative law scholarship into an analysis of land use regulation. As does this paper, Selmi notes that there is a similarity between the concerns of New Governance scholarship on administrative law and the rationales for regulation of land uses, which incorporates private law instruments into public law decision-making.⁶² In what follows, I will outline Selmi's arguments and respond to some issues that he raises with respect to an instrument of land use regulation that resembles the coupling of a comprehensive development zone with a master development agreement in the Dockside Green development.

Selmi notes that there has been an increasing recourse to contractual forms in the regulation of land uses in the United States. In the United States, the primary contractual form adopted is the development agreement, wherein a developer commits to providing funds for public projects in exchange for the zoning desired by the developer and the municipality commits to refraining from further regulation of the property in question.⁶³ Selmi places development agreements on a historical continuum that includes the planned unit development, which, like the comprehensive development zone, permits an owner to custom-design zoning and then seek approval from the municipality.⁶⁴ Although there are some differences between the Master Development Agreement coupled with the comprehensive development zone in the Dockside case on the one hand, and the development agreements described by Selmi⁶⁵ on the other, the core similarity is that they both involve a degree of negotiation that is absent from standard zoning processes.

62. Selmi, *supra* note 42, at 595.

63. *Id.* at 593, 609–10. See Michael H. Crew, *Development Agreements After Nollan v. Cal. Coastal Comm'n*, 22 URB. LAW. 23, 27 (1990) (describing development agreements).

64. Selmi, *supra* note 42, at 601.

65. Perhaps the most salient difference is that the Master Development Agreement does not exempt the property in question from future regulatory changes. The Master Development Agreement takes the form of a restrictive covenant pursuant to section 219 of the Land Titles Act, and this provision does not expressly authorize a fettering of discretion. See *Pac. Nat'l Investments Ltd. v. Victoria (City)*, [2004] 2 S.C.R. 919 (Can.) (holding that the requirement that such express authorization is necessary for an agreement to fetter the exercise of a municipality's legislative powers). By contrast, the legislation governing phased development agreements seems to authorize explicitly the fettering of municipal discretion by means of these agreements. Local Government Act, R.S.B.C. 1996, ch. 323, §§ 905.4(4), 905.1, available at http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/96323_30.

There are two consequences that flow from this difference that are significant for this paper. Selmi argues that these standard land use law processes rest on a public law logic that is vertical and hierarchical, and that places developers in a dependent position relative to municipalities. The procedures governing this relationship, he claims, aim to structure the discretion of the decision-makers in order to satisfy a norm of neutrality.⁶⁶ By contrast, Selmi argues, land use regulation that is based on a contract model shifts the governing logic of regulation from one grounded in a hierarchal relationship towards one that emphasizes the mutual interests of the municipality and the developer.⁶⁷ According to Selmi, because interests that are necessarily partial drive the parties in this latter logic and because the parties seek to maximize those interests, there is no pretense that the resulting decisions reflect a neutral perspective.⁶⁸

One further consequence of this shift towards a land use development model grounded in negotiation is pertinent for the present discussion. Selmi argues that norms of transparency and public participation govern standard zoning processes and, as a result, that land use decisions serve democratic ends, generate information for decision makers, and prevent abuses of power by decision-makers.⁶⁹ In contrast, a land use process that is marked by a logic of negotiation, Selmi claims, undermines democratic norms because negotiations typically do not involve third parties. Moreover, he concludes that, because the negotiating process is informal and difficult to monitor, it is less open and transparent than the public hearing processes that accompany standard land use decision-making in a municipality.⁷⁰

The Dockside Green project manages to evade these criticisms of contractual zoning. As we have seen above, the initial stages of the development project involved determining and articulating criteria of evaluation that would be applied in the bidding process. These criteria were publicly available and were generated with an eye towards achieving public policy objectives that were at least in part independent of the partial interests of the parties to the subsequent agreement. In addition, the decision-making process was public and involved interested third parties, including a local community association, and, therefore, achieved some measure of democratic participation and transparency. Finally, the ongoing process of reporting required by the master development agreement opens

66. Selmi, *supra* note 42, at 612.

67. *Id.* at 613.

68. *Id.* at 615–16.

69. *Id.* at 638–39.

70. *Id.* at 643.

the activities of the developer to public scrutiny and introduces an element of transparency that is consistent with the democratic norms that underlie the public hearings of standard land use processes.

There are three final, general concerns that can be raised about the City's choice of a comprehensive zoning district. First, consider issues related to the effect of private involvement in public projects on the capacity of these projects to advance the public interest. Scholars writing in other contexts, particularly those involving public-private partnerships, have noted that, when the state enters into agreements with private actors for the provision of services that the state itself cannot afford, concerns arise about whether the public interest is adequately protected.⁷¹ In the case of Docksider Green, and of comprehensive development zones generally, one might be concerned about the capacity of a municipality to advance a specific element of the public interest, namely the protection of disadvantaged populations' interests. Indeed, the most serious criticism of the project has been directed against the measures providing for affordable housing. Commentators have noted that affordable housing was not initially a part of the development bidding process and that its subsequent integration has posed serious challenges for the project, as it increased the complexity of realizing the project.⁷²

Two additional concerns relate to the effects of instruments, such as comprehensive development zones, on an individual landowner's interest and on regional interests. One might be concerned that this form of zoning results in municipalities engaging in undemocratic extractions from developers.⁷³ Moreover, one might worry about the appropriateness of pursuing objectives on a site-specific scale that are better regulated on a

71. See William J. Novak, *Public-Private Governance: A Historical Introduction*, in GOVERNMENT BY CONTRACT 23 (Jody Freeman & Martha Minow eds., 2009) (providing an historical overview of debates around public-private partnerships); E.S. SAVAS, PRIVATIZATION AND PUBLIC-PRIVATE PARTNERSHIPS 238–42 (2000) (reviewing the specific advantages of public-private partnerships); Pauline Vaillancourt Rosenau, *The Strengths and Weaknesses of Public-Private Policy Partnerships*, in PUBLIC-PRIVATE POLICY PARTNERSHIPS 217 (Pauline Vaillancourt Rosenau ed., 2000) (providing a general assessment of private-public partnerships, including their democratic and efficiency dimensions); Mario Iacobacci, *Steering A Tricky Course: Effective Public-Private Partnerships for the Provision of Transportation Infrastructure and Services*, THE CONFERENCE BOARD OF CANADA (Oct. 2008), available at <http://www.conferenceboard.ca/documents.aspx?did=2751> (providing an overview of the uses of these partnerships in Canada).

72. Ultimately, the developer included in the development a contribution of “3 [million] dollars to go towards providing approximately 50 rental units and 26 ownership units that are geared towards families with incomes in the range of \$30,000–\$60,000.” Ling, *supra* note 46.

73. See Vicki Been, *Community Benefits Agreements: A New Local Government Tool or Another Variation on the Exactions Theme?*, 77 U. CHI. L. REV. 5 (2010) (addressing a related concern in the context of Community Benefit Agreements).

broader geographic scale.⁷⁴ A response to both of these concerns could take the form of a regulatory instrument that would force municipalities passing any bylaw, including one that is a condition precedent for a master development agreement, to consider explicitly the interests of the particular entity being regulated, as well as regional concerns.⁷⁵ In other words, in order to improve upon the instrument chosen in Docksides Green, a municipality might deploy further regulatory instruments that offset the potential cost of that choice. Such a reform would be consistent with the aspirations of an instrument choice approach to land use regulation.

CONCLUSION

In this paper, I have examined an instrument that addresses concerns that are shared by administrative law scholars working on environmental issues and by an emerging body of scholarship on land use regulation, in general, and on sustainability issues, in particular. In so doing, I have assessed the benefits and trade-offs involved in an instrument choice, and I have suggested ways in which the instrument choice of the municipality in question might be altered to offset some potential costs of the instrument selected. One conclusion that can be drawn from this case study is that a range of instruments optimally regulates land uses and that the central challenge for those interested in land use regulations lies in assessing how to select instruments and how to coordinate the deployment of multiple instruments. This conclusion, and the administrative law concerns that underwrite it, serve as a counter-weight to the property law focus of much land use law scholarship. Finally, the case study suggests that these kinds of arguments apply in the specific context of sustainable land use regulation. My goals on this dimension have been relatively modest. I hope to have shown, *contra* some critics of the concept of sustainable development, that the concept can have real analytic force. I hope also to have contributed to the growing body of scholarship on the use of local government powers in the service of sustainable development ends. I have benefitted from the insights of participants in this workshop of sustainable development and I

74. *Id.* at 24, 28.

75. In order to address the concern about extractions from a single developer, courts might develop doctrines that impose a high burden of justification for such regulation. Moreover, in order to address regional concerns, provinces might *require* that municipal bylaws conform to provincially-articulated regional policies. See Hoi Kong, *Something to Talk About: Regulation and Justification in Canadian Municipal Law*, 48 OSGOODE HALL L.J. 499, 528, 539 (2010) (discussing the instruments that achieve these two effects).

hope that we have initiated an ongoing conversation about issues that are of deep and abiding concern on either side of the 49th parallel.