



UNIVERSITY  
OF WOLLONGONG  
AUSTRALIA

2005

# Taking 'land use' seriously: toward an ontology of municipal law

M. Valverde

Follow this and additional works at: <http://ro.uow.edu.au/ltc>

## Recommended Citation

Valverde, M., Taking 'land use' seriously: toward an ontology of municipal law, *Law Text Culture*, 9, 2005.

Available at: <http://ro.uow.edu.au/ltc/vol9/iss1/3>

---

## Taking 'land use' seriously: toward an ontology of municipal law

### **Abstract**

Municipal and quasi-municipal authorities have regulated activities and persons by exercising control over access to and use of spaces and municipal regulations targeting spaces but acting on groups of persons are scrutinized in the US and Canada, by those concerned with the rights of dispossessed urban groups. Land use is specific to planning and at the local level, 'use' is an absolutely crucial legal technology whose effects are best understood if 'governing through use' is contrasted to 'governing through persons'.

## **Taking ‘land use’ seriously: toward an ontology of municipal law**

**Mariana Valverde**

### **Introduction: legal tools for local governance**

That law often governs space, or governs people through space, is a well-known fact. Although the literature on ‘law and space’ and law and geography is recent (Blomley et al 2001), municipal and quasi-municipal authorities have for centuries now regulated activities and persons by exercising control over access to and use of spaces — private spaces such as pubs (Valverde 2003) and public or quasi-public spaces such as ports, parks, roadways and sidewalks (Cooper 1998, Hermer & Mosher 2002, Webb & Webb 1906, Frug 1999, Duneier 1999).

Municipal regulations targeting spaces but acting on groups of persons have been scrutinised in recent years, especially in the US and Canada, by those concerned with the rights of dispossessed urban groups. Canadian planning law, in keeping with this international trend, has developed the doctrine that ‘people zoning’ is impermissible (Hoehn 1996: 175–6, *Re Alcoholism Foundation of Manitoba et al and City of Winnipeg*).<sup>1</sup> Modern zoning is said to differentiate urban space (particularly privately owned urban space) by use, not by type of person. And regulations concerning the use of public space (for example, rules about permits to occupy a sidewalk, close a street temporarily, or hold a festival in a park) also have to be person-neutral on their face.

## Taking 'land use' seriously

Critical scholars from both law and urban studies have shown that even in those jurisdictions in which vagrancy laws and their modern successors are constitutionally impermissible, authorities can still easily govern both individuals and types of persons through regulations targeting uses and activities (Waldron 1991, Waldron 2000, Blomley 2004, Hermer & Mosher 2002). Much energy has thus been devoted to showing — both in the scholarly literature and in certain court challenges — that 'uses', 'spaces' and 'activities' are somewhat devious means to the old social-control end of regulating the poor.

From the point of view of experience, it may not matter at all whether one is being kicked out of a park because one is defined as a vagrant or because there is a bylaw of general application that bans sleeping on park benches. However, understanding the workings of law in their specificity is important, both intellectually and politically. Intellectually, it is high time that critical legal scholarship developed an understanding of law that eschews neo-Marxist structural stories in which the only question is whether the rich come out ahead. The rich are not all one group, and understanding conflicts among sectors of the bourgeoisie is crucial; but more importantly, even when the rich do come out ahead, how exactly 'they' manage to come out ahead in a particular legal arena is a matter for the careful empirical documentation and concrete analysis of the 'how' of governance that is so often neglected in structuralist-style analysis of the 'why'.

Politically too, if one is going to launch effective legal and political strategies to counteract some of the exclusionary moves that many contemporary cities have undertaken in recent years, we need to understand that municipal law has certain logics that are not unique but nevertheless characteristic of local governance. Activists and lawyers used to nation-wide struggles around constitutional rights need to understand that local struggles in which the legal 'funnel' for political and social disputes is local law take place on a specific terrain that is quite distinct and much less well known than the arena of federal constitutional rights.

## Valverde

Blackletter lawyers (and planners) would say that the difference between the local and the ‘big law’ of the constitutional arena is that local government governs property. There is certainly truth in the blackletter story: historically, local government has mainly organised public and regulated private property, relying on property taxes to do so. This has led to constructing local citizenship as a function of property, even if in the current day mere residency is sufficient to grant some notional property rights (for example, in the form of standing for purposes of planning and zoning).

Property is in turn usually defined in terms of access to material resources. Law students know that property includes entities such as easements and air rights, and of course also very abstract economic entities. But generally, municipal law and planning practitioners think about municipal law and policy as revolving, in the last instance, around access to, control over, and ‘enjoyment of’ spaces, buildings, parcels of land, and other largely material entities. This privileging of physically and geographically constituted entities is re-enacted every day in the visualisation practices of planning discussions and zoning hearings — meetings which are always awash in maps, photographs of buildings and streets, architectural drawings, and other visual formats that privilege space and matter rather than people.

My argument here is not, however, that space really matters and that legal scholars should drop what they are doing and read the literature on space. My argument is, instead, that local law and governance is not usefully differentiated from other juridical fields by deploying the things vs persons, nonhuman vs human binary. Actor-network scholars, Bruno Latour in particular (1987, 1993) have opened our eyes to the fruitfulness of an approach that begins by refusing to draw an ontological line separating nature from culture, things from people, objects from subjects. Latour’s work can, I argue, be adapted by legal scholars, in the first instance to help us to deconstruct the old textbook division between the law of persons and the law of things. Needless to say, critical scholarship has long challenged this binary: but, overwhelmingly, critical legal scholars deconstruct the binary only in one direction, namely by

## Taking 'land use' seriously

showing that legal tools designed to govern things, uses, and activities usually end up governing certain groups of persons (for example, those who are homeless). One of the most eminent critical scholars of planning, Peter Hall, typically introduces the history of zoning by mentioning early deployments of zoning bylaws aimed at getting rid of Chinese laundries and Jewish garment workers (Hall 1988, 2002: 58). This one-way deconstruction, however, has the effect of erasing the specificity of municipal legal and policy tools: it makes zoning bylaws seem essentially identical to criminal statutes (for example, the old vagrancy laws, always invoked in critical urban scholarship). The city councils that used zoning to get rid of Chinese laundries were clearly just as racist as the immigration authorities that imposed head taxes, but saying this does not help us to understand the specificity of local governance.

Municipal law certainly governs persons, and even specific groups of persons, and not only dispossessed or marginal groups: but it does so in a different manner than the criminal law or constitutional rights law. Local authorities govern persons as well as pieces of land and buildings, but they generally avoid governing *through* the category of 'person' that is so central to liberal governance and hence to law. Municipal rules and regulations generally govern through categories, such as 'use' and 'activity', that are somewhat removed from personhood partly because they also, and most importantly, simultaneously, govern spaces and things (nonhumans). Governing people, things, and spaces through 'use' is a different kind of governmental operation than the much better known operation of governing through legal categories of personhood and group identity.

The resources of actor-network (ANT) approaches are particularly useful in the study of municipal law, since ANT studies begin by sidelining that central traditional liberal legal category ('person') and treating all 'actors' in a network as presumptively on the same plane. From an ANT perspective, a building, the person owning the building, a drawing of the building, a lawyer making an argument about the building, and a court decision in regard to the building are all 'actors', whose relative weight in a particular network is a matter for documentation

## **Valverde**

(Riles 2000, Pottage & Mundy 2003, Valverde 2005). Or to put it differently, from a network point of view, the old neo-Marxist argument to the effect that regulations about uses and spaces are 'really' just covert ways of regulating persons loses some of its appeal. Of course persons are part of all legal networks: but so are sidewalks, streetcars, and the numerous pieces of paper used in the adjudication process. 'Use' (as in 'land use', but not limited to planning law) is a legal technology that constitutes a network that includes inanimate objects, spaces, property relations, persons, trees and plants, and other entities, but without privileging persons.

### **Governing through 'uses'**

'Land use' is of course specific to planning: but 'use' is a much more widely disseminated legal concept. At the local level, 'use' is an absolutely crucial legal technology, whose effects are best understood if we contrast 'governing through use' to 'governing through persons'. One difference with crucial political effects is that while the governance of persons through law has in recent decades undergone a number of changes increasing due process rights and antidiscrimination protection, uses, unlike persons, are not rights bearers at all. Changes in such areas as planning law thus proceed from causes other than political changes in rights consciousness or rights allocations. For example, it is now common for planners to support mixed-use developments (condos above shops, live-work units, etc), since the strict separation of land uses that gave us the dreary shopless and publess residential streets of the 1950s and 1960s is now unfashionable. But this change, through which 'uses' formerly thought incompatible are brought closer together, has nothing to do with any democratic vision of pluralism, people mixing, or empowerment of the dispossessed (uses). Studying municipal law reveals that events and processes that hinge on use governance (e.g. the ability of disabled or homeless people to live in group homes that are zoned differently from conventional family homes) do not today proceed any more democratically than in the past.

### Taking 'land use' seriously

An example from my ongoing research into urban law in action may help here. In the city of Toronto there was recently a bitter fight, lasting for about five years, concerning the bylaw requiring a 250-meter separation distance between shelters for homeless persons. The separation rule was challenged by advocates who used this little detail as the occasion to engage in an all-out political struggle about poverty, homelessness, and social rights in urban space. Ordinarily, anyone wanting to just put up one particular shelter close to another would seek only a suspension of the rule (a zoning variance). Variances are routinely granted through a process that is crucial to the relatively smooth governance of urban order. But suspending such rules can only be done one site at the time, through laborious and expensive public consultation processes that give middle-class homeowners inordinate power to effect denials of zoning variances, even small variances that are very similar to those that are routinely granted for less socially contentious uses.<sup>2</sup>

In the event, the almost final authority on all local zoning matters, the Ontario Municipal Board, decided to ease the separation distance restrictions imposed on the shelters in order to make it somewhat easier to build or renovate for shelter purposes. This responded to the socially progressive dimension of local Toronto politics — but without quite meeting the demands of the housing advocates, or otherwise radically challenging the vocal elements that cried out in favour of exclusionary measures. And legally, this compromise solution was fully in keeping with the practice of zoning law, since minor adjustments are often demanded (by the OMB or by city council or city planners) more because of their politically pacifying effects than because the adjustments are particularly good in strict planning terms.

Within what ANT would call the network of planning/zoning, it was thus possible to obtain a minor change making life somewhat easier for the city's shelter operators. By contrast, a simultaneous attempt by housing advocates to shift feet and move the struggle onto the terrain of 'persons', through a constitutional challenge arguing that the whole bylaw discriminated against an identifiable group (homeless people)



## Valverde

did not even get off the ground. The OMB panel stated that they had no jurisdiction over constitutional issues — which is certainly correct, the OMB being set up specifically to adjudicate planning disputes: but they offered the gratuitous comment that if they did have such jurisdiction, they would have found the claim baseless. The bylaw, the OMB found, does not discriminate at all, since ‘there is no distinction based on personal characteristics ... any person may access the facilities if they find themselves homeless’ (OMB 2004: 49).

The attempt to circumvent the relatively self-contained network of planning law by recourse to ‘big law’ thus failed miserably. It is nevertheless important to note that although the result was predictable, given the OMB’s jurisprudence (Chipman 2004), it was not completely a foregone conclusion. Rights claims can sometimes be effectively made within legal networks concerned with use. If a court (rather than an administrative tribunal) had heard the challenge, it is possible that such a court would have found (as the Manitoba Court of Appeal did in the *Alcoholism Foundation* case) that there was a breach of Charter rights, in the law’s effects if not on its face.

However, it is more likely that a court would simply defer to the OMB’s interpretation of the shelter bylaw — given courts’ traditional deference to ‘expert’ tribunals — and thus let stand an interpretation that harmed the interests of homeless persons by defining their refuges as non-housing.

Whatever the legal future of this or similar cases, the point is that arguments about persons and their rights can only be brought in as a wholly external limit on regulations regarding uses. Such external limits are necessarily very exceptional and require much legal and political work. And adjudicative arenas used to haggling about building heights, slight variations in density, and minor exceptions to rules regarding use are probably the worst possible forums to which one could bring constitutional challenges whose currency is persons and their abstract absolute rights. Given the strict limitations on judicial review of municipal and provincial/state decisions, it is very difficult to translate local issues that begin as fights about uses into legal currency valid in the ‘big law’ networks.

## Taking 'land use' seriously

By and large, municipal authorities regulate both people and spaces with legal tools whose logics are incommensurable with the logic of rights — and with the broader logic of 'personhood' that underlies the legal apparatus of rights. This is apparent even in one of the very few decisions that does set an external limit on the use-driven practices of local governance, namely the *Alcoholism Foundation* decision, which demanded that the city of Winnipeg rewrite its group-home zoning bylaws to ensure that Charter rights are not infringed. Even in that case, the judge insisted on keeping the logic of local governance in a separate universe from the world of rights. He stated that federal and provincial governments have all sorts of laws and policies designed to meet the needs of disabled and disadvantaged people for whom group homes and other institutional uses are intended, but added that these policies, despite their location in higher levels of government, are quite irrelevant for local law purposes: 'The purposes of objectives of the provincial legislation [on disability rights] ... are totally different from the purposes and objectives of the City of Winnipeg in attempting to zone land use as it did.' In case the incommensurability of the legal networks was still unclear, he repeated: 'There is absolutely no relation between what the city has been doing and what the province has to do under specific legislation' (703).

How is it that local use-based governance can so peremptorily be said to be separate from and not accountable to the dictates of higher levels of government about disability rights and so forth? It seems to me that the naturalisation of the legal invention of 'land use' in early zoning law (starting in the 1910s) makes it easy for the illiberal (or more accurately, nonliberal) governance of things and persons through 'land use' to go largely unquestioned and even unnoticed, except perhaps by a few practising lawyers. The homeless shelter bylaw mentioned above, for example, was publicised far and wide by activists as an attack on the rights of homeless persons; but little was said in the voluminous record of public debates about something that was legally much more central to the case, namely, the fact that in order to be subjected to quasi-industrial rules about separation and so forth, shelters had to be defined as non-housing — that is, as an institutional rather than residential use.

## Valverde

Redefining shelters as housing for zoning purposes might have been a much more fruitful and effective legal strategy than raising a constitutional challenge, in part because such a change could be effected outside of the courts, simply through a city council and/or provincial Ministry of Municipal Affairs decision. But while considerable political energy could be mustered, inside city council and outside of it, on behalf of the homeless as persons,<sup>3</sup> the more tactically appropriate attempt to redefine shelters as housing received no attention in the city council debates, being found only among the arguments of the lawyers for the housing advocacy groups.

I do not wish to claim that urban/local law is unique in slipping easily from persons to things via uses. The criminal law too is not simply a network of persons: it is fundamentally interested in ensuring security and minimising future disorder, perhaps more than in punishing persons as such. But the point is that the criminal law can only act upon future risks by acting on persons, through their acts. Land-use law seeks to minimise economic and aesthetic disutilities, thus working to produce order in ways that are compatible with the long term aims of the criminal law: but it does not work upon the future by acting on persons. And, contrary to planning law doctrine, neither does land-use law generally act on property as such (except in rare cases, such as expropriation). Rather, land-use law generally acts (as its name indicates) on the 'use' made of the property. This sets up an ontology of governance with distinct features — although admittedly, governing through use is not unique to planning law. Elsewhere in the local realm, a variety of regulations aimed at ensuring order in public space — park regulations, for example — also govern people, property, and space through 'use'.

Use is not a strictly legal term, of course: but nevertheless, when it becomes a key legal technology it has specific meanings and does specific work (just like 'person', also a nonlegal category with a specific legal genealogy). Urban studies scholars and legal historians who have documented the rise of use-based legal tools (such as planning and zoning law) have largely taken the category for granted, as if 'uses' were intrinsic characteristics of buildings and sidewalks and parks like

## Taking 'land use' seriously

mass, colour, and density. There are plenty of disputes among planners and urban studies specialists about how exactly to differentiate between residential and commercial uses; but such disputes presuppose and thus tend to reify the basic category of 'use'. Now, I cannot here undertake a full genealogy of 'use' in law, or even in one area of law: but I can offer some observations that may help to open the blackbox of 'use', with particular attention to 'land use'.

Latour's studies of particular scientific black boxes often take the reader back to the time when a technique or a 'fact' was being discovered and challenged. Similarly, it is useful at this juncture to look back at texts located at the beginning of the project to govern urban space through zoning, a time when 'zoning' and 'use' were new ideas still in need of explanation and justification. One such text is an early Canadian plea for a more modern urban law. The author was Noulan Cauchon, the city of Ottawa's main planner and a leading promoter of town planning across Canada. Stating what by the 1950s and 1960s would no longer need to be stated, Mr Cauchon tells us that planning is 'the scientific and orderly disposition of land and buildings in use and development' (1923: 3). This definition puts zoning fully on the side of nonhumans, but it would be no revelation to Mr Cauchon to add that zoning, which until the 1960s remained the practical core of municipal planning in Canada, does not merely distribute physical things and spaces. Cauchon himself says as much. In keeping with the British literature on planning of the time, planning/zoning is said in this Canadian text to have three purposes and rationalities. These are: 1) health (in the public health sense); 2) 'efficiency'; and 3) 'amenity'. That all of these reach far beyond the mere distribution of things in space was evident to urban planners of the time, who anticipated that human happiness would more or less automatically increase if 'land and buildings' were arranged properly (Perks & Jamieson 1991, Artibise & Shelter 1979, Gerecke 1976).

The first two of Cauchon's rationalities of planning, public health and national efficiency, were the basic rationalities of Canadian post-World War I governance across all levels of government and all governing sites, and they were explicitly inclusive of humans as well as

## Valverde

nonhumans (as the extensive discussions of human and natural resources prompted by the national Commission of Conservation, Canada's first planning think-tank, show).<sup>4</sup> In that sense there is nothing specific about planning or indeed about local as opposed to national governance in the two first rationalities mentioned. Thus, special importance attaches to Mr Cauchon's third town-planning objective and target, the only one that is specific to municipal law, namely 'amenity'.<sup>5</sup>

### Human and nonhuman: 'amenity'

What did Cauchon mean by 'amenity'?

In Cauchon's long list of the types of businesses that need to be governed through zoning there are many whose inclusion under the zoning banner is justified through 'health' and 'efficiency' — pollution-emitting factories, railways, etc. Health and efficiency are tried and true ways of governing persons and spaces through the category of population, as the vast literature on biopolitical state projects demonstrates. But what is of particular interest in Cauchon's list is that there are some uses that are legally governed through zoning, but without the biopolitical rationales of health and efficiency being involved. One such business use is 'undertaking establishments'. These do not pollute or cause traffic congestion. No biopolitical rationale would justify subjecting these to special separation requirements. Nevertheless, they ought to be regulated as if they were hazardous — because they cause 'distress'. (Hospitals too cause 'distress', as well as traffic, though we are not told if this is because the sight of hospitals reminds passersby of illness and death.) The presence of funeral homes distresses passersby and thus reduces the 'amenity' of the immediate neighbourhood. It is hence clear that amenity is something more than a biopolitical objective; it is also not reducible to an economic rationale, since there is no reason to think that hospitals and funeral parlours lower the value of surrounding homes.

Amenity is a wonderfully multivalent and heterogeneous category. Like many other terms in municipal law (for example, 'blight',

## Taking 'land use' seriously

'improvement' [Valverde 2005]), amenity encompasses physical and economic as well as cultural relations in one fell swoop, by quietly sidelining discussions about causation and about utility. 'Amenity' has a family resemblance to the extremely capacious notion of 'conservation' deployed by the short-lived Canadian Commission of Conservation: the Commission too erased the usual distinctions separating economic prosperity, public health, individual health, patriotism, and aesthetic values. Not surprisingly, given the complexity of the assemblage of purposes and rationalities that lurks under this word, 'amenity' allowed and continues to allow municipalities to govern people — and relations of class, ethnicity, and respectability — without governing *through* persons.

While the 1920s notion of national conservation has long disappeared, 'amenity' continues to allow and justify governance that does not respect conventional ontological distinctions. Today, in Toronto and other North American cities, planner-produced discourse assumes that special sidewalk treatments, 'pedestrian level lighting', and sidewalk trees are concrete ways of rendering 'amenity' visible and effective. There is a strong implication that this also increases the happiness of the people who live or work there, in keeping with the 19th century notion that architectural improvements would act directly upon the souls of urban dwellers. And yet, it would not be accurate to regard 'amenity' simply as a covert way of governing persons. 'Amenity' is connected to but is not quite the same as people's personal happiness.

This is apparent in the ambiguous wording of the Ontario *Planning Act* (1983). The statute states that the purpose of a zoning bylaw is 'to control the use of land to provide for the amenity of the area within the council's jurisdiction *and* for the health, safety, and general welfare of the inhabitants of the municipality'. The 'and' suggests that the amenity of the area is not the same as the health and safety of the people in it. Although amenity is linked to people's welfare — in a rather indeterminate manner — it is nevertheless somewhat disembodied, since it is not identical or even coterminous with human welfare. It is the area that has the amenity, not the persons — although in the process of

## Valverde

adjudicating amenity, the enjoyment and satisfaction of the persons in it figure very prominently.<sup>6</sup> In zoning hearings I have attended, ‘amenity’ is routinely said to be calculable merely from looking at plans and drawings that contain no images of persons or any references to actual or hypothetical residents<sup>7</sup>. In this way one slides from bricks and trees to human happiness in a vertiginously speedy manner, without any intermediaries.

Amenity is not a 20th century invention. The word was found in the legal technologies that governed land use before zoning was invented (for example, restrictive covenants and nuisance lawsuits). Like other rationalities of property and civil law, it seems to have been imported into modern zoning law without much discussion. One scholar tells us that ‘the concept of amenity was very powerful in late Victorian times, and seems to have been used in much the same spirit as “quality of life” is today. In its urban planning sense, amenity has been described as meaning “the provision of a good environment for the promotion of a healthy and civilized life”’ (P Smith 1979: 220).

Now, a humanist, modernist scholar, such as Pierre Bourdieu, would object that in the end, in the last instance, it is people (or class fractions) who are being regulated and excluded: he would say that ‘amenity’ is simply a vehicle to convey the cultural preferences of a particular socioeconomic sector so as to govern persons through classes and classes through persons and their habitus. Along similar lines, progressive urban studies writers such as Neil Smith and Mike Davis (N Smith 1996, Davis 1994) spend much time showing that architectural designs and bylaws about the use of space are nothing but vehicles of upper- middle-class hegemony, in keeping with this neo-Marxist approach.

This approach is certainly useful, and has been repeatedly deployed to document the effects on persons and social classes of various urban legal technologies, at the level of sociological effects. And yet, if we are going to understand how urban legal mechanisms today are different from Elizabethan vagrancy laws — if we are going to analyse legal mechanisms in some detail, instead of reducing them to mere effects of

### Taking 'land use' seriously

socioeconomic structures, as is generally done in the critical urban studies literature — it is important to grasp how governing urban problems through lists of activities, utilities, and 'uses' is not quite the same as governing through categories of persons.

One final example will illustrate the incommensurability of use-based and person-based governance. In February 2005, the city of Toronto passed an amendment to the bylaw governing Nathan Phillips square (a large, mostly empty space in front of and around City Hall) to ban sleeping. The hours of heated discussion on the bylaw made it very clear that councillors were not really wanting to govern use. One councillor said that lawyers taking a break from their cases at the nearby Court of Appeal and falling asleep on a bench would not be prosecuted for breaking the bylaw.<sup>8</sup> The target was quite specific: a group of homeless people, said to consist of 'only about 14 individuals', who according to city officials, persisted in sleeping overnight in the square despite municipal efforts to get them to sleep in the newly opened municipal shelter nearby.<sup>9</sup> (The square had previously been used as a nighttime refuge by larger numbers of homeless persons, but most of them took advantage of a new nearby shelter when it opened in the fall of 2004).<sup>10</sup>

It is tempting to focus analytical attention only on the antisleeping amendment to conclude that we now see a return to old vagrancy laws. Neo-Marxist urban studies (and most existing political activism on behalf of homeless and other marginalised persons) has alerted us to the effects of legal and urban-design technologies on certain groups of persons, and this amendment is almost a perfect case in point. But while this perspective is necessary politically, it is also important to see that providing a functionalist explanation that always talks about excluding or controlling persons of a certain type does not suffice as an analysis, especially as an analysis of the more routine processes of local governance. Direct targeting of persons is nowadays quite unusual. I would argue that the reason why hundreds of people, including myself, gave up the better part of a working day to go and intervene in the council debate was precisely that this plan to coercively govern a specific group of persons is, for Toronto, today, a cruel and unusual use of



## Valverde

municipal bylaws. To study everyday local legal governance seriously, one cannot focus exclusively on occasional high-profile campaigns, as is generally done by critical scholars who have documented how the homeless were booted out of People's Park in Berkeley or how Times Square was gentrified. I argue that one has to study the everyday processes of governance, the taken for granted background against which a large number of citizens (including myself in my participant role) found the new bylaw amendment appalling.

Some of the background is that residents of the city know that homeless persons regularly sleep on Toronto's squares and sidewalks. In the mid-1990s, when a viciously neoconservative provincial government cut the welfare rates drastically, homelessness became a sudden crisis — but in subsequent years the mere presence of panhandlers and people sleeping in parks has become routinised. Generally, visibly indigent people are tolerated (more or less grudgingly) by both officials and the public. Occasional campaigns by right-wing politicians create waves on this surface, but studying these or politically intervening in them does not reveal much about the everyday governance of the marginal.

It is quite telling, I think, that the city has an elaborate protocol instructing their employees how to move to one side belongings pertaining to homeless persons if when they are cleaning the sidewalk the owner is not present. The protocol sets out, in a neutral bureaucratic style, the exact steps to be taken when homeless persons need to reclaim belongings that appear to have been abandoned and that are put into storage by city workers. This routinises the interaction between officials and homeless people in a rather different way than the antisleeping City Hall Square bylaw amendment. Homeless persons might find that their belongings have been seized, but there is a clearly laid out (if bothersome) process to reclaim them. Critical scholars who focus their attention on particular campaigns of social exclusion need to remember that this low-key protocol, which, however reluctantly, admits the homeless into the circle of citizenship, is more typical of the day to day work of bylaw enforcement than the largely symbolic antisleeping amendment just discussed.

## Taking 'land use' seriously

Further to the normalisation of homelessness, a well-established program, Out of the Cold, provides sleeping bags to all who want and need them. These bags, which are often abandoned (especially when it rains) to be later picked up by program volunteers to dry clean them for re-use, act as powerful messages informing daytime passersby of what goes on under cover of darkness in numerous downtown locations. This program too governs homelessness in a manner that does not justify the 'new vagrancy' reading of current urban policy.

Corroborating my analysis of the importance of locating occasional outbursts of exclusionary politics within the context of the more established and more politically ambiguous everyday processes for governing the homeless population is the fact that about six months after the amendment was passed, it appears that no charges under the new bylaw amendment had been laid. The regular coverage of homelessness issues provided in *The Toronto Star* indicates that from February to August, the city carried out a fairly intensive, partly successful campaign to persuade/coerce homeless persons to accept living in cheap rooming houses. The coverage does not mention any bylaw charges being brought against any of the people, some of whom have lived for years under bridges, who in the summer of 2005 were being slowly housed through a combination of compassion and pressure, exerted by the city's newly hired 11 'outreach workers'.<sup>11</sup> Homelessness activists also stated that they did not know of any charges under the much-debated antisleeping amendment.

While studying and criticising the antisleeping amendment is certainly worthwhile, more typical of Toronto's everyday processes of governance, I would argue, and possibly illustrative of broader patterns in municipal governance, is the regulatory work provided in the old, unamended Nathan Phillips Square bylaw, which nobody mentioned in the debates about its amendment.

The text of Toronto Bylaw No 1994-0784 reveals a truly Benthamite series of restrictions and prohibitions — few of which seem to have a specific social or political group as their target. These prohibitions remained politically invisible throughout the debate on the antisleeping

## Valverde

amendment. Perhaps the activists and homeless persons present at City Hall did not know about the existing bylaw; but city councillors undoubtedly did, since the motion before them was an amendment to it. Be that as it may, what is very different about the old bylaw (by comparison with the amendment) is that the majority of its provisions do not target any particular group, that is, they do not govern persons as persons.

Releasing helium balloons is prohibited; so is speaking through a megaphone without a permit; so is being on skates anywhere except on the skating rink. Skateboarding is of course also banned, as is climbing trees (though there are hardly any trees to climb). Selling anything (except newspapers) is prohibited except by special occasion permit; and occasional vendors operating under a permit are subject to lengthy rules about the size, location, and physical character of their stalls. Setting off fireworks is banned, as is throwing anything (including pennies) in the reflecting pool. Riding a bicycle is also prohibited, even though the city provides a temptingly large number of bike parking spots in the square itself.

These are not idle prohibitions. My ongoing empirical research on bylaw enforcement has not yet shed much light on the policing of Nathan Phillips square, but (when arriving to interview a city official in charge of bylaw enforcement, ironically) I was once stopped by a city employee and given a warning as I parked my bike in the place provided. The warning about the bylaw was due to the fact that I had not walked my bike the whole way through the vast expanse of unadorned and treeless concrete that makes up most of the square.

Continuing with the text of the bylaw, we find that it is also forbidden to 'present or take part in any dramatic, musical, artistic or other performance'. Curiously, however, poetry reading is said not to be a performance, which means one can recite poetry in the square, but not sing. A rather politically remarkable fact is that holding a demonstration in Toronto's premier public space requires a permit. And, more relevant to the case at hand, camping is explicitly banned: it is forbidden to 'camp or erect or place a tent or temporary abode of any kind'. (This last

### Taking 'land use' seriously

bit shows that there was little legal point in passing the special antisleeping clause, since — especially in February of 2005, when temperatures were unusually cold, around 20 degrees Celsius below freezing— one cannot merely sleep outdoors, one has to have at least a sleeping bag and some cardboard).

The bylaw as a whole, then, envisions a totally disciplined urban space in which practically anything other than sedate walking is prohibited. The particular space that is city hall square undoubtedly owes something of its austereness to the cultural preferences arising out of Toronto's Protestant past: but today, when half of Toronto's residents have been born outside of Canada, culturalist explanations are less useful than ever. The order of the square (the lack of any non-permitted activity except winter-time skating in the ice rink) is reproduced every day mainly by rules that, unlike the antisleeping amendment, are not obviously targeting a specific group. *Nobody* can hold a demonstration and shout slogans through a microphone without a permit; *no business* can operate in the square; and so on.

So, let us now finally ask, what is this thing called a 'use', this entity that does so much work in the governance of urban space and urban life? One important clue to the ontology of 'use' is that, from the very beginning of zoning law, the adjective most frequently attached to 'use' is 'incompatible' (Fischler 1998, Platt 1991). Let us also note that the doctrine of incompatibility is not exclusive to zoning: the governance of sidewalks and roadways is also characterised by processes in which different uses can only be brought together as an exception, by means of bureaucratic permits that are not easy to obtain. (The very strict permitting of street and subway musicians and the tight restrictions on street vending are examples of this general logic.) While my research on the governance of sidewalks and streets is still at a very preliminary stage, it is not premature to state that the whole history of municipal law is built on a single premise about uses: namely, that different uses of the same urban space are presumptively incompatible.

It may be that the very term 'use' only began to be employed in those situations, such as New York City in the 1910s, in which there

## Valverde

were heated struggles about who and what ought to be given priority in the arrangement of prime urban spaces, both private and public (Fischler 1998, Hall 1988). It may well be that people did not think of selling fruit on the sidewalk, riding a bike, and singing as ‘uses’ until some citizens began to object to these traditional practices. However it developed, it is clear that the notion of land-use (together with its associated lexicon, which includes ‘amenity’, ‘improvement’ and ‘highest and best use’) soon acquired a certain facticity, an air of solidity.

The connection between ‘use’ and physical space helped in this reification process. To state that factory uses are incompatible with upscale residential and shopping uses is to make an apparently empirical statement, one that is formally homologous with the claim that railways and cars cannot use the same corridors. By talking about incompatible uses one forgets that subways and trains cannot physically travel along streets, while, by contrast, there are no physical barriers to shopping and sleeping being done in the same space; the barriers are normative and legal.

The religion of incompatible land uses that was codified in the 1916 New York City zoning ordinance and borrowed all around North America, including in Toronto, has been modified in recent years. Today we are seeing a retreat from the strict incompatibility thesis of the 1950s–70s, through which residents of countless North American and English cities were deprived of stores and leisure spaces within walking distance. But the post-Jane Jacobs Europhile integration of commercial and residential uses that one sees in fashionable downtown regeneration projects is still tentative and exceptional. First, the mixing seems to go only one way. As Nick Blomley has pointed out in his recent study of property law in action in Vancouver, ‘mixed-use’ tends to be deployed to justify architectural and legal changes facilitating middle- and upper-class households moving into and renovating previously working-class properties (Blomley 2004). Allowing the new self-employed petty bourgeoisie to conduct their (non-blue collar) business from a loft that is classed residential but is located above a shop does modify the ‘incompatible’ uses religion — in one direction; but it by no means

## Taking 'land use' seriously

abolishes it. Shelters for battered women and noisy auto-repair shops will not be able to take advantage of the 'mixed-use' rationality to locate themselves in upper-crust areas.

Secondly, even in its limited one-way form, mixed uses generally require some declaration of exceptionality. Following the American invention of 'Business Improvement Districts', Toronto too developed a special classification for old downtown areas (some formerly industrial and some occupied by discount stores and other 'cheap' uses). Declaring an area to be a Business Improvement Area allows for a number of exceptions to the usual zoning and planning rules (for example, higher densities, easier expropriations, involvement of private sector interests in street design and landscaping as well as in street security, etc).

Hence, mixed-use is not a logic that is being applied consistently and thoroughly around the urban sphere. It is deployed as an exceptional measure, even if more and more downtown districts, in post-industrial formerly blue-collar sections of old cities, are falling under the exceptional category and are being accordingly gentrified. But even if we see the extension of mixed-use planning principles to more and more areas of the city, it is highly doubtful that the uses will be mixed in both directions of the social/economic spectrum.

The reason why I predict that mixing uses will remain one-directional and somewhat exceptional is that, as those fighting for supportive housing in the city of Toronto and elsewhere in North America know, uses have no rights. And in local governance, turning an old home or a disused factory into a shelter is considered a question of uses, not a question of persons. This means that instead of clearly setting out a case about persons (for example, battered women, mentally challenged adults, etc) and their equal right to the city in order to mobilise resources, one has to engage in endless petty fights about uses — parking spots, densities, green spaces and elevations. The production and circulation of these entities needs to be carefully analysed, instead of being dismissed simply as stand-ins for types of persons.

Claims about persons and their rights can occasionally trump and negate some deployments of the power to order space that in the US is

## Valverde

called ‘the police power’ (for example, in the US strip clubs have been able to contest some zoning regulations on the basis that stripping is a form of speech and thus subject to constitutional protection). But such external limits will necessarily remain exceptional, since they do not affect the bulk of use-based law or challenge its logic.

Arguments seeking to realise democratic inclusionary strategies could perhaps be found that stay within the less humanist, more pragmatic field of ‘uses’. Seeking to redefine group homes as ‘housing’, as suggested in the first example given in the paper, does not satisfy radical lawyers’ yearning to make constitutional history, but it could be more effective in terms of actually getting more supportive housing built — as well as serving, at the academic level, to explore forms of critical legal thought that go beyond the human/nonhuman binary.

Governing urban life through ‘uses’ constitutes a certain terrain and sets out the parameters of the battles that can take place there. We should be able to devise ways to fight on that terrain; I do not see that deploying the liberal fiction of the ‘person’ with ‘rights’ is necessarily the only, or even the best, political move one can make when faced with use regulations that have socially exclusionary effects.

### **Conclusion: toward a parliament of uses?**

In imagining a world in which the binary opposition of things and persons would be critically challenged, Bruno Latour famously asked his readers to imagine re-making ‘the modern constitution’ (that is, the separation of things from people, nature from culture) through the convening of ‘a parliament of things’ (1993: 144–5). I have made a somewhat different argument here, since I have throughout emphasised that ‘uses’ govern things and people simultaneously. I am thus not wanting to emphasise the ‘things’ side of the binary or to repeat that space is important in and for law. Rather, I want to underline the complexity of the task of understanding (and possibly revising) legal mechanisms that have always already deconstructed the things/persons binary.

## Taking 'land use' seriously

At the end of *The Order of Things*, Foucault imagined that perhaps the figure of 'Man', like a drawing made in the seaside sand, was beginning to wash out. It has become apparent, however, that the work of imposing order on the modern world does not necessarily require governing through Man — the literature on space and law is ample proof of that. But neither legal humanism (such as that embodied in radical lawyers' attempt to introduce constitutional rights challenges into legal networks not suited to person-based claims) nor abstractions about space in general (for example, Lefebvre 1991) help much in understanding the working logics of certain very familiar and yet poorly understood forms of legal governance. Bruno Latour's deliberately provocative notion of a parliament of things could perhaps be borrowed in imagining a 'parliament of uses' — and parliaments of other entities that are neither persons nor things, neither cultural nor material, or more accurately both.

Whether using Latour's work or other resources for analysis, it should be possible to experiment with ways of working toward forms of governing (through use, through persons, or through anything else) that have more democratic effects than what we now have, at all political and legal levels. Intellectually, meanwhile, paying serious attention to taken-for-granted terms ('amenity', 'use', etc) and noting how they are deployed in everyday legal governance may prove more useful than any amount of conventional theorising.

## Notes

- 1 The ban on 'people zoning' is extremely weak, however. This weakness is illustrated in the key cases concerning one dimension of people zoning, namely, the restriction of certain urban spaces to 'family' (usually defined by blood and marriage). The *Alcoholism Foundation* involved an appeal by several organisations providing supportive housing in group home settings to a Winnipeg zoning bylaw that, like other similar bylaws around the country and in the US, differentiated group homes from family dwellings, imposing requirements on the former — primarily, separation distances — that make it onerous to provide the kind of housing in question. The



## Valverde

Manitoba Court of Appeal very reluctantly granted that given Supreme Court jurisprudence on discrimination, the Winnipeg bylaw had to be struck down, but the court intimated that it would be easy for municipal lawyers to Charter-proof zoning bylaws accomplishing the same purpose but not so clearly targeting identifiable groups (the disabled or other special-needs persons in supportive group homes). In a similar case, involving a zoning bylaw distinguishing between family and non-family occupiers of second suites (basement apartments), the British Columbia Court of Appeal overturned a lower court decision that had found the municipal discrimination against non-family occupiers to be ultra vires (*Faminow v Corporation of District of North Vancouver*). The lower court decision is a ringing indictment of people zoning, but one that was cut off on appeal.

- 2 This process is common across North America, being generally based on the original New York City zoning bylaw developed during World War I (Hall 1988: 58ff). The New York City Board of Zoning Appeals was the original inspiration for similar bodies across North America, e.g. the Committees of Adjustment of the city of Toronto. Little empirical research exists on zoning appeals/variances processes, but my own research in Toronto suggests that a large part of the city's built form consists of exceptions — for example, buildings and uses that pre-existed the bylaw and buildings (and uses) that obtained legal exceptions. Both of these legally ghostly forms of life are included under the interestingly liminal category of 'legal nonconforming use'.
- 3 This statement is based on a reading of all the relevant City Council debates and the coverage of the protracted dispute about the bylaw in the *Toronto Star*.
- 4 Mixing humans and nonhumans in a way that would later become unfashionable, and is described by historian Paul Rutherford as 'strange' (1971: 215), the Commission of Conservation was concerned both with the conservation of natural resources such as forests and fresh water and the conservation and maximisation of human resources through selective immigration and other means.
- 5 Paul Rabinow's excellent study of modernist colonial town planning in French North Africa demonstrates that, in settings governed directly from a far-away metropolitan centre, town planning can exhibit the same logic as national projects of colonisation and acculturation (1989). In early Canadian cities too one sees certain colonial, national, and imperial logics of governance

## Taking 'land use' seriously

at work in urban as well as rural settings. The kind of governance accomplished through today's zoning bylaws and similar legal tools is thus not coterminous with 'the local' as such. In other words, the differences between local law and governance and 'big law' outlined in this paper have little or nothing to do with scale.

- 6 Davina Cooper has recently alerted sociolegal scholars about the need to further investigate the curious category of 'enjoyment' that is central to nuisance law (2002). Like 'amenity', enjoyment links persons and things quietly and silently, since only persons can enjoy; but in nuisance law as in other areas of municipal governance, persons' enjoyment is not quite the same as the joy of rights, since enjoyment is always mediated by place and is furthermore often conditional on owning the place in question ('enjoyment of one's property' being the operative term). Nuisance law would be a fruitful arena for ANT-style analyses, given the notorious ontological hybridity of typical nuisances, such as loud/offensive noises and pests that are objectionable on both health and aesthetic grounds.
- 7 Over the past year I have observed several hearings of the Ontario Municipal Board and have collected ethnographic information from three of Toronto's four Committees of Adjustment, which grant zoning variances.
- 8 Field notes, city council committee meeting, 5 February 2005.
- 9 I have not been able to confirm whether the opening of this shelter was a direct result of the OMB decision mentioned earlier in the paper, but I suspect that it wasn't, since the property was already owned by the city, and there are no residences anywhere near it. Indeed, it seems as if the OMB decision did not have any
- 10 See Staff Report from Chief Administrative Officer et al, 13 January 2004. The figure of 14 is on page 12.
- 11 While deploying social-work style 'outreach workers' instead of bylaw enforcement officers to deal with homeless persons face to face, and widely publicising this 'carrot' approach as compassionate, the city also deployed a less visible stick: it cut much of the funding it traditionally provided to civil-society groups (such as 'Out in the Cold') that had for years handed out free sandwiches, soup, and toiletry items so as to make it possible for people to continue living on the streets ('Last of the homeless' *Globe and Mail* 23 July 2005: M1).

## References

- Artibise A and Shelter G A eds 1979 *The usable past: planning and politics in the modern Canadian city* Macmillan Toronto
- Blomley N 2004 *Unsettling the city* Routledge New York
- Blomley N, Delaney D and Ford R eds 2001 *The legal geographies reader: law, power, and space* Blackwell Oxford
- Bunting T and Fillion P eds 1991 *Canadian cities in transition* Oxford University Press Oxford
- Cauchon N 1923 'The zoning of Ottawa' *The Journal* Town Planning Institute of Canada II/5
- Cooper D 1998 *Governing out of order: space, law and the politics of belonging* Rivers Oram Press London
- 2002 'Far beyond "the early morning crowing of a farmyard cock": revisiting the place of nuisance within legal and political discourse' *Social and Legal Studies* 11/1: 5–36.
- Davis M 1994 *City of quartz* Vintage New York
- Duneier M 1999 *Sidewalk* Farrar, Strauss and Giroux New York
- Fischler R 1998 'The metropolitan dimension of early zoning: revisiting the 1916 New York City Ordinance' *American Planning Association Journal* Spring: 170–87
- Frug G 1999 *City making: building communities without building walls* Princeton University Press Princeton
- Gerecke K 1976 'The history of Canadian city planning' *The city magazine* 1976/2: 12–23.
- Hall P 1988 *Cities of tomorrow* Blackwell Oxford
- Hermer J 2002 *Regulating Eden: the nature of order in North American parks* University of Toronto Press Toronto
- Hermer J and Mosher J eds 2002 *Disorderly people: law and the politics of exclusion in Ontario* Fernwood Toronto
- Hoehn F 1996 *Municipalities and Canadian law: defining the authority of local government* Purich Saskatoon
- Latour B 1987 *Science in action* Harvard University Press Cambridge Mass
- 1993 *We have never been modern* Harvard University Press Cambridge Mass

## Taking 'land use' seriously

- Lefebvre H 1991 *The production of space* Blackwell Oxford
- Perks and Jamieson 1991 'Planning and development in Canadian cities' in Bunting and Fillion 1991: 487–98
- Platt R 1991 *Land use control* Prentice Hall Toronto
- Rabinow P 1989 *French modern: norms and forms of the social environment* MIT Press Cambridge Mass
- Rutherford P 1971 'Tomorrow's metropolis: the urban reform movement in Canada 1880–1920' *Canadian Historical Association Historical Papers*
- Smith N 1996 *The new urban frontier: gentrification and the revanchist city* Routledge New York
- Smith P 1979 'The principle of utility and the origins of planning legislation in Alberta' in Artibise and Shelter 1979
- Valverde M 2003 'Police science British style: pub licensing and knowledges of disorder' *Economy and Society* 32/2: 234–52
- 2005 'Authorizing the production of urban moral order: appellate courts and their knowledge games' *Law and Society Review* 39/2: 419–55
- Waldron J 1991 'Homelessness and the issue of freedom' *UCLA Law Review* 39: 295–324
- 2000 'Homelessness and community' *University of Toronto Law Journal* 50: 371–406

### Cases

- Faminow v Corporation of District of North Vancouver* (1988) 24 BCLR (2d)
- Ontario Municipal Board decision No 0569 15 March 15 2004
- Re Alcoholism Foundation of Manitoba et al v City of Winnipeg* (1990) 69 DLR (4<sup>th</sup>)