

BREWING FLEXIBILITY IN MUNICIPAL ZONING LAWS, ONE PINT AT A TIME

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ABSTRACT

A fundamental incongruence exists between present-day zoning laws and the spectrum of small, independent brewers popping up in communities across the United States. Despite the overwhelming public support for these businesses and the economic benefits that they can provide their local economies, local zoning laws continue to challenge their

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growth by relegating these breweries to the industrial outskirts of town. As this Note will demonstrate, this disconnect stems from early twentieth-century regulatory schemes that no longer reflect the needs or conditions of the current market.

This Note argues for modernization and flexibility in local zoning laws that more accurately reflects the nature of small, independent brewers. This argument will highlight the importance of including small businesses in local planning efforts and recent attempts to do just that. Additionally, this Note will apply regulatory innovations at the federal and state level to a local context, providing a path forward for local zoning regulations in the era of the craft-beer revolution.

Ultimately, a modern, flexible approach to brewery zoning will foster more prosperous communities capable of attracting visitors, workers, and entrepreneurs. With this argument, this Note builds on previous literature advocating for craft brewery development by applying concepts to the local level. Furthermore, this argument lays the groundwork for an approach to zoning that fosters the establishment of new, innovative small businesses, beyond the brewing category, that break traditional molds.

INTRODUCTION

Siren Rock Brewing Company brings more to downtown Rockwall, Texas, than nearly two dozen handcrafted beers.¹ The brewery is “community driven,” providing a place for the community to gather—kids, dogs, and all.² From its central location, Siren Rock customers can walk through downtown, challenge each other to outdoor games, or relax and enjoy the view of city hall.³ To some, Siren Rock may seem like the latest in a long trend, but in important ways, Siren Rock is the first of its kind.⁴

Siren Rock is one of over 6,000 craft breweries in the United States, but in many municipalities, such a business would not exist—at least, not in its pedestrian-friendly, commercial location.⁵ With its dog-friendly

1. *Brewery Tasting Room*, SIREN ROCK BREWING COMPANY, <https://www.sirenrock.com/tasting-room.html> (last visited Nov. 1, 2019) [hereinafter “*Brewery Tasting Room*”].

2. *Brewery Tasting Room*, *supra* note 1; *Our Craft Beer Story*, SIREN ROCK BREWING COMPANY, <https://www.sirenrock.com/about.html> (last visited Nov. 1, 2019).

3. *Brewery Tasting Room*, *supra* note 1.

4. *See Brewery Zoning and a Community Supported Brewery*, SIREN ROCK BREWING COMPANY (Aug. 7, 2018), <https://blog.sirenrock.com/brewery-zoning-and-a-community-supported-brewery> (describing efforts to become the first brewery in downtown Rockwall).

5. *National Beer Sales & Production Data*, BREWERS ASS’N, <https://www.brewersassociation.org/statistics/number-of-breweries/> (last visited Jan. 10, 2019) [hereinafter “*National Beer Sales & Production Data*”].

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taproom and backyard-esque picnic area, Siren Rock is a far cry from the large-scale, industrial operations behind Budweiser and MillerCoors. Yet, many municipal zoning codes would treat these businesses as one and the same, failing to distinguish between the different types of brewing operations that fill today's marketplace. For instance, New York City classifies breweries, regardless of size or distribution model, as "manufacturing establishments" and relegates them to industrial areas also suitable for slaughterhouses, garbage incinerators, and cement plants.⁶ What flexibility does exist largely does not appear to work, according to industry professionals.⁷

The issue of outdated zoning codes is not new, and it certainly is not unique to the brewing industry. From their outset during the Industrial Revolution, zoning codes have sought to create distance between incompatible land uses within a community.⁸ In doing so, their specific, narrow categories of acceptable land uses often create "well-intentioned road-blocks" for small businesses and entrepreneurial ventures.⁹ In seeking to organize the community, municipal zoning codes can instead exclude innovative business practices that do not conform with the discrete list of land uses identified by local officials. In recent years, zoning codes have also clashed with the rise of Airbnb, food trucks, and tiny houses.¹⁰

Under rigid, dated zoning codes, communities can only grow in very specific ways. On the one hand, these laws may reflect the deliberate choices of local leaders to protect residents from nuisances or predatory business practices.¹¹ However, they can also threaten a community's

6. N.Y.C., N.Y., ZONING RESOLUTION ch. 2, art. IV, § 42-15 (2018).

7. Joe Anuta, *Changes Brewing for Beer-Makers*, CRAIN'S N.Y. BUS. (Mar. 26, 2018), <https://www.crainsnewyork.com/article/20180326/SMALLBIZ/180329920/zoning-changes-brewing-for-beer-makers>.

8. Patricia E. Salkin, *From Euclid to Growing Smart: The Transformation of the American Local Land Use Ethic into Local Land Use and Environmental Controls*, 20 PACE ENVTL. L. REV. 109, 110 (2002).

9. *Help Local Small Businesses by Revising Commercial Zoning Districts*, MCKENNA, <https://www.mcka.com/bulletin/help-local-small-businesses-by-revising-commercial-zoning-districts/> (last visited Jan. 11, 2019).

10. Scott Zamost, Hannah Kliot, Morgan Brennan, Samantha Kummerer & Lora Kolodny, *Unwelcome Guests: Airbnb, Cities Battle Over Illegal Short-Term Rentals*, CNBC (May 24, 2018), <https://www.cnbc.com/2018/05/23/unwelcome-guests-airbnb-cities-battle-over-illegal-short-term-rentals.html>; Yantis Green, *San Angelo City Council Moves Forward on Food Truck Zoning*, SAN ANGELO LIVE! (Jan. 8, 2019), <https://sanangelolive.com/news/business/2019-01-08/san-angelo-city-council-moves-forward-food-truck-zoning>; Kerry Charles, *Atlanta Lawmakers Debate Tiny Houses Ordinances*, FOX 5 ATLANTA (Dec. 14, 2018), <http://www.fox5atlanta.com/news/atlanta-lawmakers-debate-tiny-houses-ordinances>.

11. See Zamost, Kliot, Brennan, Kummerer & Kolodny, *supra* note 10.

ability to embrace forward-thinking economic development, environmentalism, and inclusivity.¹²

Small businesses like Siren Rock Brewing Company enrich their communities by creating jobs, reinvesting in the local economy, and elevating local sustainability.¹³ However, their impact is often stymied by outdated policies that do not leave room for modern innovations and customer preferences. This Note illustrates the need for flexibility and modernization in local zoning regulation with respect to one category of increasingly popular small businesses: independent breweries. Part I explains zoning more thoroughly, demonstrating the incongruence between historical zoning practices and modern small business development. Part II discusses today's brewing industry and the microbrewery movement. Part III describes the relationship between breweries and present-day zoning laws, including recent approaches to modernization and flexibility. Finally, Part IV offers a path forward, drawing on modernization in other areas of regulation to make recommendations for local zoning officials. Ultimately, these specific recommendations may not meet the needs or desires of every community across the country, but they nonetheless highlight the universal need for communities to appreciate and support the small businesses that sustain them.

I. THE HISTORY AND PURPOSES OF ZONING

At first glance, it may appear that zoning and entrepreneurship were destined for diametrical opposition. According to the late Justice Antonin Scalia, “[t]he very purpose of zoning regulation is to displace unfettered business freedom”¹⁴ In restricting land use, zoning law inevitably limits the ability of business owners and entrepreneurs to carry out their enterprises. Even still, a historical analysis of the zoning practice reveals that land-use regulation, like entrepreneurship, represents an important form of innovation in American society. The following section traces this history and highlights the need for zoning to re-embrace its innovative spirit.

12. See Stephen Clowney, *Invisible Businessman: Undermining Black Enterprise with Land Use Rules*, 2009 U. ILL. L. REV. 1061, 1066–67 (2009); see also Salkin, *supra* note 8, at 112.

13. Stacy Mitchell, *Top 10 Reasons to Support Locally Owned Businesses*, INST. FOR LOCAL SELF-RELIANCE (Dec. 10, 2012), <https://ilsr.org/why-support-locally-owned-businesses/>.

14. *City of Columbia v. Omni Outdoor Advert.*, 499 U.S. 365, 373 (1991).

A. From Twentieth-Century Solution to Twenty-First Century Roadblock

In the early twentieth century, zoning laws provided a modern solution to a new problem. As cities grew into complex and crowded urban jungles, local leaders saw the need to protect city dwellers from the harmful externalities of industrialization.¹⁵ In New York City, the nation's earliest zoning code divided the city into several land-use districts, restricting property owners to certain types of development based on the location of their property.¹⁶ Through these land-use districts, the zoning code separated residential areas from retail spaces and industrial development.¹⁷

Of course, the zoning innovation did not remain a strictly urban solution. It soon spread to suburbs, where it ultimately caught the Supreme Court's attention. In 1926, the Supreme Court declared zoning a valid exercise of the state's police power in *Euclid v. Ambler Realty Co.*¹⁸ There, the Supreme Court upheld a zoning plan created by the village of Euclid, Ohio, a suburb of Cleveland, even though the division of land uses would reduce the value of Ambler's property, which was located partially in an industrial area.¹⁹ Writing for the majority, Associate Justice George Sutherland asserted the power of municipalities to counteract through zoning "the evils of over-crowding," and to "exclud[e] from residential sections offensive trades, industries and structures likely to create nuisances."²⁰ At the same time, Justice Sutherland also recognized the power of zoning to guide local development in a very intentional way: "[The village's] governing authorities, presumably representing a majority of its inhabitants and voicing their will, have determined, not that industrial development shall cease at its boundaries, but that the course of such development shall proceed within definitively fixed lines."²¹

With its decision in *Euclid*, the Supreme Court ushered in an approach to local regulation that would become nearly universal, as so-called "Euclidean zoning" spread across the country.²² Today, most

15. See John R. Nolon, Comment, *The Intersection of Environmental and Land Use Law: A Special Edition of the Pace Environmental Law Review, Including Commentaries and a Collection of Articles by Professor John R. Nolon: Historical Overview of the American Land Use System: A Diagnostic Approach to Evaluating Governmental Land Use Control*, 23 PACE ENVTL. L. REV. 821, 829–30 (2006).

16. *Id.* at 830.

17. *Id.*

18. 272 U.S. 365, 389–90 (1926).

19. *Id.* at 379–84.

20. *Id.* at 388 (citing *Welch v. Swasey*, 214 U.S. 91, 106 (1909)).

21. *Id.* at 389.

22. Nolon, *supra* note 15, at 831.

American cities, villages, and towns follow some version of a zoning code, with the noteworthy exception of Houston, Texas, the only major U.S. city to forgo the zoning innovation.²³

As zoning spread, it came under close scrutiny from courts and academics alike. Although the practice of segmenting a community into land-use districts remained—and, indeed, continues to remain—an effective mechanism for preventing nuisances and planning for development, zoning’s critics and challengers raised important questions about equity, fairness, and sustainability. For instance, the Supreme Court of New Jersey in 1975 declared invalid a zoning ordinance in the township of Mount Laurel that prohibited all multi-family housing development from the community, thereby “mak[ing] it physically and economically impossible to provide low and moderate income housing in the municipality.”²⁴ In striking the ordinance down, the court required municipalities to “make realistically possible an appropriate variety and choice of housing,” including a “fair share” of housing opportunities for low- and moderate-income residents.²⁵ The so-called “Mount Laurel doctrine” has since received praise for addressing racial and economic inequities previously exacerbated by zoning.²⁶

Still, concerns about inclusivity persisted into the twenty-first century, as land-use districts continued to separate work from home. As one scholar has pointed out as recently as 2009, an entrepreneur from a historic black neighborhood in Oklahoma City, Oklahoma, would have to travel some twenty blocks to open a business in the nearest commercial district.²⁷ Similarly, the twentieth-century practice of zoning work away from residential areas can exclude the work-from-home mother from the job market, by limiting opportunities for home-based businesses.²⁸ Today, zoning’s widespread use has not foreclosed the many questions raised about its continued ability to represent a modern, innovative tool for communities.

23. Brady Getlan, Comment, *Houston Strong: A World Series Ring, But Is There a Problem with a Lack of Zoning Laws?*, 7 U. BALT. J. LAND & DEV. 63, 67 (2018).

24. S. Burlington Cty. NAACP v. Mount Laurel, 336 A.2d 713, 724 (N.J. 1975).

25. *Id.*

26. Daniel Meyler, Note, *Is Growth Share Working for New Jersey?*, 13 N.Y.U. J. LEGIS. & PUB. POL’Y 219, 231–32 (2010).

27. Clowney, *supra* note 12, at 1084.

28. Nicole Stelle Garnett, *On Castles and Commerce: Zoning Law and the Home-Business*, 42 WM. & MARY L. REV. 1191, 1215–16 (2001).

B. The Twenty-First Century Solution: Modernization and Flexibility

Ultimately, this historical account of zoning raises two important points. First, zoning once originated as a modern, innovative solution to the twentieth-century problem of rapid industrialization.²⁹ The idea behind those early zoning codes was, at its most basic, to separate “incompatible” land uses within a community.³⁰ By segmenting a city into various land-use districts, zoning could avoid the “inherent conflict between uses that were not identical,” such as single-family residential neighborhoods and large-scale industrial facilities, a conflict that did not exist before the Industrial Revolution.³¹

In this way, the history of zoning laws in the United States shows a need for modernization. The zoning codes that developed in the early to mid-twentieth century address the issues that were modern and relevant at that time, including over-crowding and unsanitary conditions arising from the manufacturing boom. By and large, they deem the commercial to be incompatible with the residential. While American urbanites scarcely may have enjoyed living near a post-Industrial Revolution business, such as a coal-powered brewery, city dwellers of today are more likely to crave the proximity to a diverse collection of businesses, including the dog-friendly neighborhood microbrewery.³² In order to remain an innovative solution to the modern problems of urban development, zoning must adapt to twenty-first century conditions.

Second, the history behind modern zoning laws shows that local officials have broad authority, under the state’s police power and the relevant enabling acts, to steer development within their borders in specific, intentional directions. With its decision in *Euclid v. Ambler Realty Co.*, the Supreme Court directly asserted the power of Euclid’s officials to guide industrial development “within definitively fixed lines.”³³ This power comes, according to the Supreme Court, from the democratic duty of local officials to represent the will of their constituents.³⁴ Although this power has been qualified over the years, municipalities remain

29. See Salkin, *supra* note 8.

30. *Id.*

31. *Id.*

32. See Matthew Farina, *Millennials Stampede to Riverside, Five Points, Brooklyn*, FIRST COAST NEWS (Sept. 18, 2018), <https://www.firstcoastnews.com/article/money/millennials-stampede-to-riverside-five-points-brooklyn/77-595773312> (arguing that “hip breweries” have made neighborhoods “havens” for millennials).

33. 272 U.S. 365, 389 (1926).

34. See *id.* (finding the ordinance is a “proper exercise of police power” by local officials, who are “presumably representing . . . and voicing” the will of their constituents).

empowered to place “well-intentioned roadblocks” in the way of small businesses and entrepreneurial innovations.³⁵

This second point demonstrates a need for flexibility in modern zoning practices. The power to zone is inherently the power to restrict. In *Euclid*, local leaders sought to limit industrial development within its suburban environment.³⁶ In *Mount Laurel*, zoning ordinances served to prevent affordable housing development altogether.³⁷ In each of these cases, the zoning policy at issue represented a deliberate, intentional decision by the local government to pursue a desired goal that presumably reflected the ideals of the local population.³⁸ In order to reflect the ideals of a twenty-first century population, zoning codes will have to look beyond their twentieth-century roots. The concepts of “industrial,” “commercial,” and “residential” have grown increasingly more nuanced since the advent of Euclidean zoning, as advancements in social, economic, and technological forces merge these “spheres” together.³⁹ Americans today seek the flexibility to start a business in their home,⁴⁰ raise chickens in their backyard,⁴¹ get married in refurbished, industrial warehouses,⁴² and buy their food from a truck.⁴³ More than embracing millennial trends,

35. MCKENNA, *supra* note 9.

36. *See Euclid*, 272 U.S. at 388 (“Here . . . the exclusion is in general terms of all industrial establishments[.]”).

37. *See S. Burlington Cty. NAACP v. Mount Laurel*, 336 A.2d 713, 724 (N.J. 1975) (“[B]y a system of land use regulation, [Mount Laurel made] it physically and economically impossible to provide low and moderate income housing in the municipality[.]”).

38. *Euclid*, 272 U.S. at 389 (explaining that the village’s leaders acted “presumably representing a majority of its inhabitants and voicing their will” to prevent development from “absorb[ing] the entire area for industrial enterprises”). In *Mount Laurel*, the policy to prohibit multi-family housing development served to protect the municipality’s tax base. *See Meyler, supra* note 26, at 235. The New Jersey Supreme Court’s decision to invalidate the ordinance has required local officials to look beyond economic factors and the will of the people in order to create a more equitable community. *See id.* at 225, 235 (quoting *Mount Laurel*, 336 A.2d at 726).

39. Garnett, *supra* note 28, at 1192, 1235–36.

40. Fiona Simpson, *Home Is Where the Work Is: The Rise of Home-Based Franchises*, FORBES (Nov. 26, 2018, 10:46 AM), <https://www.forbes.com/sites/fionasimpson/2018/11/26/home-is-where-the-work-is-the-rise-of-home-based-franchises/>.

41. Susan Vela, *Boone County Teens Push for Belvidere Backyard Chicken Ordinance*, ROCKFORD REG. STAR (Nov. 1, 2018, 11:50 PM), <https://www.rrstar.com/news/20181101/boone-county-teens-push-for-belvidere-backyard-chicken-ordinance>.

42. Mary Hanbury, *Millennials’ Preferences Are Leading to Major Changes in the Wedding Industry*, BUS. INSIDER (Aug. 15, 2018, 10:04 AM), <https://www.businessinsider.com/millennials-ditch-traditional-weddings-2018-8>.

43. Mitchell Northam, *City Council in N. Fulton Adjusts Zoning Laws to Allow Food Trucks*, ATLANTA J.-CONST. (Oct. 19, 2017), <https://www.ajc.com/news/local/city-council-fulton-adjusts-zoning-laws-allow-food-trucks/SewTIKtyDPqRUBmrqlivCP/>.

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zoning codes that adopt a flexible approach to land-use definitions and districts can take an inclusive approach to planned development, welcoming the green thumb, the mom-preneur, and the modern-day small business owner.⁴⁴

C. Moving Beyond the Euclidean Model

The preceding historical analysis does not suggest that zoning law has remained steadfastly tethered to its Euclidean roots. To be sure, zoning in many ways has evolved from its twentieth-century origins. Municipalities today often supplement or displace the strict Euclidean model with more modern approaches, such as performance zoning and mixed-use zoning.⁴⁵ These modern approaches allow for greater flexibility and attempt to address many of the concerns related to the obsolescence of Euclidean zoning laws.⁴⁶

Nonetheless, there appear to remain two practical challenges for entrepreneurship. First, these alternatives to Euclidean zoning often supplant rigid land-use categories with subjective criteria, which can lead to a highly politicized process.⁴⁷ Such a process may adversely affect marginalized business owners or communities.⁴⁸ Second, and more relevant to the narrower focus of this Note, the categorical model of Euclidean zoning continues to guide communities in their approach to small business zoning.⁴⁹

44. See Garnett, *supra* note 28; McKenna, *supra* note 9; Vela, *supra* note 41.

45. See Frederick W. Acker, Note, *Performance Zoning*, 67 NOTRE DAME L. REV. 363, 369 (1991); Nicolas M. Kublicki, *Innovative Solutions to Euclidean Sprawl*, 31 ENVTL. L. REP. 11001, 11006 (2001).

46. See *id.* Performance zoning de-emphasizes the particular use of land in favor of criteria relating to traffic, emissions, and similar factors. Acker, *supra* note 45, at 364. In this way, performance zoning seeks to reform the rigid Euclidean system that deems land uses incompatible from one another. See *id.* at 370–71. Meanwhile, mixed-use zoning attempts to solve the same problem by combining land uses in limited areas. See Kublicki, *supra* note 45.

47. See Acker, *supra* note 45, at 388.

48. See Henry A. Span, Note, *How the Courts Should Fight Exclusionary Zoning*, 32 SETON HALL L. REV. 1, 8, 13, 15, 56, 59, 66 (2001) (discussing the uneven political playing field in zoning decisions, the disparate impact on those without political power who are excluded in exclusionary zoning decisions, and noting that public choice theory and recent history suggest “that municipalities and state legislatures cannot be trusted to address [exclusionary zoning] appropriately”).

49. See Garnett, *supra* note 28, at 1205, 1208 (finding, as a general rule, zoning laws predetermine areas for different uses, with limited exceptions for professionals working from home, but not small businesses); Andrew J. Cates & Dwight H. Merriam, *Zoning for Home Occupations: “A Little Piece of Practical Poetry,”* LAND USE INST.: PLAN., REG., LITIG., EMINENT DOMAIN & COMPENSATION, 1, 5, 7, 11 (2006) (ALI-ABA CLE materials discussing the Euclidean zoning model, and how most zoning ordinances today are close to it, in that they are concerned about protecting residential zones from home-based businesses).

By and large, local officials have created opportunities for small businesses like microbreweries by adopting narrow exceptions or amendments to categorical zoning laws. For instance, officials in York County, Virginia, which includes the historic communities of Williamsburg, Jamestown, and Yorktown, in 2014 approved a plan to allow small brewers to enter the county.⁵⁰ The policy amended the county's zoning code "by creating a specific category" for those businesses.⁵¹ A similar approach, also common among municipalities considering the issue, involves moving microbreweries into a non-industrial category. An amendment adopted in Stafford, Virginia, between Washington, D.C., and Richmond, altered the categorical designation of microbreweries in this way.⁵²

Thus, the current approach to zoning for entrepreneurship, particularly in the brewing industry, largely represents an attempt to fit new businesses into specific categories. Accordingly, there is precedent for creating new policies specific to small brewers and that such policies enhance the prosperity and vitality of local communities. Even more flexible solutions may exist—such as multi-use zoning or performance zoning—but as long as the concept of Euclidean categories underlies these flexible models, a community looking to foster innovative entrepreneurship must address the rigid, categorical system of its zoning code.

II. THE MODERN BREWING INDUSTRY

The following sections highlight one application of zoning laws that is particularly ripe for change, with the goal of inspiring a more flexible approach to small business development in general. The modern brewing industry has evolved like few other sectors in the United States' economy. At a time when big businesses—online, brick-and-mortar, or both—control much of the economy, growth in the brewing industry has come largely from small organizations.⁵³ While sales from major brewers fell by fourteen percent between 2007 and 2016, employment among the

50. Marie Albiges, *Interest in Microbreweries Prompts York County Officials to Discuss Zoning Change*, WILLIAMSBURG-YORKTOWN DAILY (Sept. 18, 2014), <https://wydaily.com/local-news-old/2014/09/18/interest-in-microbreweries-prompts-york-county-officials-to-discuss-zoning-change/>. See *Demographics*, YORK COUNTY, VA. (last visited Nov. 15, 2019), <https://www.yorkcounty.gov/1389/Demographics>.

51. Albiges, *supra* note 50.

52. Memorandum from the Bd. of Supervisors to the Stafford Cty. Planning Comm'n (June 12, 2013), <http://plancomm.stafford.va.us/2013/06122013/Item9.pdf>.

53. Derek Thompson, *Craft Beer Is the Strangest, Happiest Economic Story in America*, ATLANTIC (Jan. 19, 2018), <https://www.theatlantic.com/business/archive/2018/01/craft-beer-industry/550850/>.

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brewing industry in general grew by 120 percent.⁵⁴ That growth came not from the big names like Anheuser-Busch, MillerCoors, and Heineken, but rather, from the smaller brewers behind the so-called “craft-beer revolution.”⁵⁵ In taking the market by storm, these small brewers have fundamentally challenged the traditional definition of a brewery. Their small-batch brews and tourism-generating taprooms have broken the industrial mold, taking on more of a consumer-facing, retail form.⁵⁶ This section takes a closer look at the craft-beer revolution, beginning with a historical analysis of the United States brewing industry and then distinguishing today’s small brewers from the large-scale, industrial operations that warranted relegation to the outskirts of communities.

A. The Prohibition Problem

The history of beer in the United States is even older than the country itself.⁵⁷ Bringing their taste buds with them, European settlers and immigrants introduced different styles of beer—first English ales, followed by lighter, German-style brews—to North America throughout early American history.⁵⁸ At its roots, the brewing industry in the United States closely resembled the brewing industry of today, as small, neighborhood breweries served local enthusiasts.⁵⁹ However, this model largely collapsed with the rise of Prohibition in the 1920s.⁶⁰ The nationwide ban on alcohol that lasted from 1920 until 1933, not surprisingly, sent the number of American breweries tumbling, from an estimated 1,300 breweries in 1916 to a mere “handful” after Prohibition ended.⁶¹ Thus, the Eighteenth Amendment “crippled a thriving brewing industry” in the United States.⁶²

54. *Id.*

55. *Id.*

56. Mary Ellen Shoup, *Beer Tourism Boom Brews Up Across the U.S., Showing No Signs of Slowing*, BEVERAGEDAILY (Jan. 24, 2017), <https://www.beveragedaily.com/Article/2017/01/24/Beer-Tourism-boom-brews-up-across-the-US-showing-no-signs-of-slowing>.

57. *Brewing History*, NAT’L MUSEUM OF AM. HIST., <http://americanhistory.si.edu/topics/food-history/pages/brewing-history> (last visited Jan. 25, 2019).

58. Ari Shapiro & Justine Kenin, *How the Story of Beer Is the Story of America*, NPR (July 3, 2017), <https://www.npr.org/sections/thesalt/2017/07/03/532250762/how-the-story-of-beer-is-the-story-of-america>.

59. *Id.*

60. *Id.*

61. Kate Vinton, *How Breweries like Coors, Yuengling and Anheuser-Busch Survived Prohibition*, FORBES (Nov. 4, 2015), <https://www.forbes.com/sites/katevinton/2015/11/04/how-breweries-like-coors-yuengling-and-anheuser-busch-survived-prohibition/#642c96c0fabd>.

62. *Id.*

What's more, the brewing industry that emerged after Prohibition looked "far different" from the neighborhood-based system that existed before it took effect.⁶³ The population of breweries that survived the debilitating era consisted primarily of large-scale, industrial operations.⁶⁴ In fact, many of the breweries that weathered the Prohibition storm will still sound familiar today. Anheuser-Busch, Coors, and Yuengling each survived, thanks to an ability to invest in other product lines.⁶⁵ Large brewers produced non-alcoholic products, such as sodas and ice cream, during Prohibition, then bought up smaller, struggling breweries to increase their market shares in the beer business.⁶⁶ Thus, while Prohibition stifled the American brewing industry as a whole, its impact particularly devastated the once-thriving small brewer.

This devastation ultimately helped to transform the brewing industry from local enterprise into big business. Following Prohibition, large-scale, industrial breweries remained dominant in the American market for generations. As recently as 2012, Anheuser-Busch and MillerCoors controlled a whopping ninety percent of beer production in the United States.⁶⁷ In fact, Anheuser-Busch alone accounted for more than fifty percent of the market.⁶⁸ Although still among the most recognizable names in the beer market, these brewing giants now represent just one side of the industry.

B. The Craft-Beer Revolution

A century after Prohibition, the small brewer is back. According to data from the Brewers Association, more than 6,000 breweries operated in the United States in 2017.⁶⁹ Of those, just seventy-one classified as "large non-craft" breweries.⁷⁰ The overwhelming majority of breweries in today's market fit into one of several categories of smaller brewers. The broadest of these categories is a craft brewer, which the Brewers

63. Adam Star, Note, *Getting a Handle on Growler Laws*, 39 SEATTLE U. L. REV. 1079, 1088 (2016).

64. Luke Basha, *It's Still 1970 Somewhere: How North Carolina's Small Craft Breweries Hope to "Craft Freedom" from Antiquated Statutes Friendly to Distributors and National Macrobreweries*, 18 WAKE FOREST J. BUS. & INTELL. PROP. L. 340, 348 (2018) (noting that "[o]nly the largest brewers survived Prohibition").

65. Vinton, *supra* note 61.

66. Basha, *supra* note 64; *see also* Vinton, *supra* note 61.

67. Barry C. Lynn, *Big Beer, a Moral Market, and Innovation*, HARV. BUS. REV. (Dec. 26, 2012), <https://hbr.org/2012/12/big-beer-a-moral-market-and-in>.

68. *Id.*

69. *Number of Breweries*, BREWERS ASS'N, <https://www.brewersassociation.org/statistics/number-of-breweries/> (last visited Jan. 25, 2019).

70. *Id.*

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Association defines as “a small and independent brewer.”⁷¹ More specifically, craft brewers produce no more than six million barrels of beer annually and maintain independent ownership.⁷² Within the craft category, a “microbrewery” generally produces fewer than 15,000 barrels of beer per year.⁷³ Microbreweries often sell their products through distributors and on-site through a tap room.⁷⁴ Finally, a “brewpub” represents a hybrid “restaurant-brewery” that typically produces beer for sale in an on-site restaurant and bar.⁷⁵ In 2017, the United States had more than 3,800 microbreweries and more than 2,200 brewpubs.⁷⁶ In total, more than ninety-five percent of breweries in the United States operated as either a microbrewery or a brewpub during 2017.⁷⁷

Despite their vast presence in the American marketplace, craft breweries have not displaced the large-scale, industrial breweries by any means. Even after years of growth, the craft beer segment represents less than thirteen percent of the overall beer market.⁷⁸ Nonetheless, the rise of the small-brewing community reveals a new dichotomy within the broader industry. Large brewers like Anheuser-Busch and MillerCoors thrive on volume, mass-producing their beer in industrial manufacturing facilities. Anheuser-Busch, for example, operates twenty-three breweries across the country,⁷⁹ including a 1.5-million-square-foot facility in Baldwinsville, New York,⁸⁰ a 1.6-million-square-foot facility in St. Louis, Missouri,⁸¹ and a 1.2-million-square-foot facility in Williamsburg, Virginia.⁸²

71. *Craft Brewer Definition*, BREWERS ASS’N, <https://www.brewersassociation.org/statistics/craft-brewer-defined/> (last visited Nov. 12, 2019).

72. *Id.*

73. *Craft Beer Industry Market Segments*, BREWERS ASS’N, <https://www.brewersassociation.org/statistics/market-segments/> (last visited Jan. 25, 2019).

74. *Id.*

75. *Id.*

76. *National Beer Sales & Production Data*, *supra* note 5.

77. *Id.*

78. *Id.*

79. *United States of Beer*, ANHEUSER-BUSCH, <https://www.anheuser-busch.com/about/usa.html> (last visited Jan. 25, 2019).

80. *Baldwinsville, N.Y.*, ANHEUSER-BUSCH, <https://www.anheuser-busch.com/about/breweries-and-tours/baldwinsville-ny.html> (last visited Jan. 25, 2019); *Anheuser Busch Baldwinsville NY*, NORTHEAST ENERGY EFFICIENCY PARTNERSHIP, <https://neep.org/case-study/anheuser-busch-baldwinsville-ny> (last visited Nov. 12, 2019).

81. *St. Louis, M.O.*, ANHEUSER-BUSCH, <https://www.anheuser-busch.com/about/breweries-and-tours/st-louis-mo.html> (last visited Jan. 25, 2019); *#14-17 Anheuser-Busch St. Louis Brewery*, FORBES, <https://www.forbes.com/sites/davidewalt/2011/04/16/14-17-anheuser-busch-st-louis-brewery/#4f76aa5f2598> (last visited Nov. 12, 2019).

82. *Williamsburg, Va.*, ANHEUSER-BUSCH, <https://www.anheuser-busch.com/about/breweries-and-tours/williamsburg-va.html> (last visited Jan. 25, 2019); *Anheuser-Busch Invests \$18*

Microbreweries and brewpubs lie at the other end of the brewing spectrum, substituting volume for quality by using non-traditional ingredients and innovative brewing techniques.⁸³ More than producers, these small brewers also serve their customers as retailers and destinations.⁸⁴ On-site sales account for approximately seven percent of total United States craft beer sales.⁸⁵ Microbreweries and brewpubs attract people to their locations with inviting tap rooms, unique restaurants, and in some cases, even boutique, overnight accommodations.⁸⁶ More than a “trendy hobby,” beer tourism now draws ten million visitors to craft breweries each year.⁸⁷ In other words, the craft-beer revolution has taken small brewers so far beyond the manufacturing function that Americans actually want to travel to them, dine at them, and even stay overnight at their facilities. This evolution naturally begs the question whether craft brewers still belong in the industrial land-use category.

III. BREWERY ZONING: A SPECTRUM OF LAND USES IN AN INDUSTRIAL CATEGORY

With roots in the early twentieth century, many zoning codes in the United States arose at a time when the brewing industry looked fundamentally different than it does today. For instance, when the Supreme Court decided *Euclid v. Ambler Realty* in 1926, the number of American breweries had plummeted to an unprecedented low thanks to Prohibition.⁸⁸ Around the same time, the federal government promulgated the Standard Zoning Enabling Act (SZE), which provided a model for states to use when delegating their zoning authority to municipalities.⁸⁹ Indeed, many states and municipalities subsequently followed the guidance from *Euclid* and the SZE to implement their own zoning policies in the years that followed.⁹⁰ With Prohibition in full swing, local governments first codified protections that separated their residents from industrial facilities at the precise moment in American history when the brewing industry was at its most industrial. The loss of neighborhood

Million in Local Brewery, JAMES CITY COUNTY VA., <https://jamescitycountyva.gov/CivicAlerts.aspx?AID=1321&ARC=2240> (last visited Nov. 12, 2019).

83. *Craft Brewer Definition*, *supra* note 71.

84. Shoup, *supra* note 56.

85. *Id.*

86. *Id.*

87. *Id.*

88. See *National Beer Sales & Production Data*, *supra* note 5 (reporting zero breweries between 1920 and 1931).

89. Shelby D. Green, *Development Agreements: Bargained-For Zoning that is Neither Illegal Contract nor Conditional Zoning*, 33 CAP. U.L. REV. 383, 385 (2004).

90. *Id.*

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breweries during Prohibition could not have come at a worse time for today's small brewers looking to return to their neighborhood roots.

As small brewers return, the incongruence between traditional zoning practices and the modern brewing industry has become painfully apparent to entrepreneurs across the country. This incongruence is perhaps best illustrated with a recent case study from Rockwall, Texas, where even present-day mechanisms for modernization and flexibility in the local zoning code struggled to overcome the rigid land-use definitions.

A. The Siren Rock Saga

In early 2018, a husband-and-wife team wanted to open the first brewery in downtown Rockwall, a growing city east of Dallas with a historic downtown district.⁹¹ At the time, the city's two existing breweries had set up shop along an interstate highway corridor, an area zoned for "light industrial" land use.⁹² Cory and Eva Cannon had a different vision for Siren Rock Brewing Company. Speaking to a local news team about the project, Cory Cannon said, "We really wanted to be downtown. We wanted to be part of the community, part of the downtown district, so that meant we had to go and have the [city's zoning ordinance] rewritten."⁹³ After the Cannons worked with the city for four months, local leaders passed an amendment to the zoning code that would allow breweries in the popular downtown district.⁹⁴

Still, Siren Rock would need a specific-use permit to actually open in the downtown district.⁹⁵ For that, the Cannons applied to the planning and zoning commission and attended a public hearing.⁹⁶ Again, Cory Cannon described his vision for the business. Rather than an industrial plant, Siren Rock would serve as "a community hub," with an "open concept and family friendly" atmosphere that had the potential to "draw

91. Allie Spillyards, *Plans for Rockwall's First Downtown Brewery in Limbo*, NBC 5 DFW (July 18, 2018), https://www.nbcdfw.com/news/local/Plans-for-Rockwall-First-Brewery-Limbo-488569531.html?fbclid=IwAR2ox-GAfEIDUucc9nqsbVs4Olt6yJLccQcWxakAs3X5Wfdhj_XypjquzM2I; CITY OF ROCKWALL, <http://www.rockwall.com/about/index.asp> (last visited Jan. 26, 2019).

92. Landon Fisher, *Siren Rock Brewery Hits Another Roadblock Despite Overwhelming Community Support*, ROCKWALL CTY. HERALD BANNER (July 18, 2018), https://www.rockwallheraldbanner.com/news/siren-rock-brewery-hits-another-roadblock-despite-overwhelming-community-support/article_be2a4500-8ad5-11e8-b90c-972d6e1c0865.html [hereinafter "*Siren Rock Roadblock*"].

93. Spillyards, *supra* note 91.

94. *Id.*

95. ROCKWALL, TEX., PLANNING AND ZONING COMM'N, MINUTES (June 26, 2018), http://www.rockwall.com/Meetings/PlanningMinutes/2018/06.26.2018_Signed.pdf.

96. *Id.*

tourism to the downtown area.”⁹⁷ However, the commission denied Siren Rock’s application.⁹⁸

Following the denial, the Cannons continued to negotiate with the city.⁹⁹ In order to obtain the permit over a planning and zoning commission denial, Siren Rock needed the Rockwall City Council to vote by “super-majority” to override the commission’s decision.¹⁰⁰ During the City Council’s next meeting, local citizens spoke up in support of the craft brewery, and the Council ultimately voted by a six to one super-majority to approve the permit for Rockwall’s first downtown microbrewery.¹⁰¹

The story of Siren Rock shows what many brewing entrepreneurs go up against in their local communities. Despite “overwhelming community support,” the microbrewery project almost never came to fruition because of zoning laws that relegated breweries to industrial areas.¹⁰² By restricting breweries to industrial zones, ordinances like the one in Rockwall adhere to an outdated, traditional definition of breweries, in which the facility is merely a means to an end. Siren Rock and its enthusiastic supporters, on the other hand, show that today’s microbreweries and brewpubs create spaces that are themselves an end: They provide “community hubs” that welcome the public and add to downtown entertainment.¹⁰³ In this way, zoning codes that fail to distinguish between large-scale, industrial breweries and their innovative, independent counterparts not only challenge small brewers, but also limit opportunities for tourism, economic development, and revitalization in their downtown districts.¹⁰⁴

B. Inconsistent Approaches to Modernization and Flexibility

In fairness, municipalities have not altogether ignored the craft-beer revolution. Many communities have grappled with—and continue to

97. *Id.*

98. *Siren Rock Roadblock*, *supra* note 92 (attributing the permit’s failure to “unusual” opposition from the mayor).

99. Landon Fisher, *Siren Rock Brewing Co. gets ‘OK’ from city*, ROCKWALL CTY. HERALD BANNER (Aug. 8, 2018), https://www.rockwallheraldbanner.com/news/siren-rock-brewing-co-gets-ok-from-city/article_f8d35642-9b51-11e8-8dff-2fcfb39cb93d.html [hereinafter “*Siren Rock ‘OK’*”].

100. ROCKWALL CITY COUNCIL, MINUTES FROM REGULAR CITY COUNCIL MEETING, 6 (Aug. 6, 2018), <http://www.rockwall.com/meetings/CouncilMinutes/2018/08-06-18%20cc%20mtg%20mins.pdf>.

101. *Id.* at 7, 9.

102. *Siren Rock Roadblock*, *supra* note 92.

103. See MINUTES, *supra* note 100.

104. See C.J. Hughes, *How Craft Breweries Are Helping to Revive Local Economies*, N.Y. TIMES (Feb. 27, 2018), <https://www.nytimes.com/2018/02/27/business/craft-breweries-local-economy.html> (asserting the ability of craft breweries to “giv[e] new fizz to sleepy commercial districts”).

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consider—the decision to permit small brewers beyond the industrial outskirts of town. In Charlotte, North Carolina, city councilors passed a text amendment to their zoning code to allow breweries beyond industrial areas in 2013.¹⁰⁵ Since the amendment took effect, the small-brewing scene “has exploded” in Charlotte, driving “ancillary development” in commercial areas along with the rise of microbreweries.¹⁰⁶ Similar amendments have earned approval in Enterprise, Alabama;¹⁰⁷ Smyrna, Georgia;¹⁰⁸ and Fairfax, Virginia;¹⁰⁹ to name a few. These amendments pave the way for exciting opportunities for business owners, residents, and visitors alike, but small brewers continue to face challenges in much of the United States, even where changes have taken effect.

These challenges stem largely from inconsistency in municipalities’ approaches to modernization and flexibility. In Muncie, Indiana, microbrewers have campaigned for a change to the city’s zoning code, which allows brewpubs to operate in commercial districts but restricts microbreweries to industrial areas, along with large-scale breweries.¹¹⁰ The ordinance amended by Siren Rock’s efforts in Rockwall, Texas, previously allowed wineries to operate downtown but refused to extend the same permission to small brewers.¹¹¹

Ultimately, this survey of local approaches to brewer zoning reveals two primary opportunities for achieving modernization and flexibility for small brewers. First, municipalities can amend their zoning codes to distinguish between small-scale, commercial breweries and large-scale, industrial operations. Second, in amending their zoning codes, municipalities can account for the diverse forms that these innovative businesses take by broadening the definitions of permissible businesses in a given commercial district. Together, these changes will transform an archaic,

105. Ashley Fahey, *As Bold Rock Hard Cider Pushes for Zoning Change, City Council Has Questions*, CHARLOTTE BUS. J. (Jan. 17, 2018), <https://www.bizjournals.com/charlotte/news/2018/01/17/as-bold-rock-hard-cider-pushes-for-zoning-change.html>.

106. *Id.*

107. Leah Lancaster, *City Approves Micro-Breweries Ordinance*, ENTERPRISE LEDGER (Jan. 3, 2019), https://www.dothanagle.com/enterprise_ledger/news/city-approves-micro-breweries-ordinance/article_dc2ee55c-0ecd-11e9-9827-0faa14f33863.html.

108. Haisten Willis, *Smyrna Breweries Might Be On The Way*, COBB CTY. COURIER (Dec. 19, 2018), <https://cobbcountycourier.com/2018/12/smyrna-breweries/>.

109. Brian Trompeter, *Fairfax Supervisors Open Door to More Craft-Brewing Operations*, INSIDE NOVA (Mar. 6, 2017), https://www.insidenova.com/news/business/fairfaxsupervisors-open-door-to-more-craft-brewing-operations/article_d1e6fd02-027a-11e7-9338-2b6d75d94c80.html.

110. Matthew Muncy, *New Resolution Could Open Commercial Zoning to Microbreweries in Downtown Muncie*, IND. ON TAP (Mar. 14, 2018), <https://indianaontap.com/news/new-resolution-could-open-commercial-zoning-to-microbreweries-in-downtown-muncie/>.

111. *Siren Rock Roadblock*, *supra* note 92.

one-size-fits-all approach into a modern, flexible policy that fosters entrepreneurship, innovation, and economic development within the community.

IV. INGREDIENTS OF CHANGE: A PRECEDENT FOR NEW APPROACHES TO BREWERY REGULATION

As craft beer has boomed, it has run up against stale regulations at all levels of government.¹¹² In fact, change has already brewed at the federal and state levels, offering a logical path forward for local zoning regulations. This section explores the modernization and flexibility that have occurred in other aspects of brewery regulation, which provide a precedent for distinguishing between small and large brewers at the local level.

In the last decade, numerous articles have analyzed the web of regulations surrounding breweries in an effort to encourage changes hospitable to the craft-beer revolution.¹¹³ These articles focus predominantly on the so-called “three-tier system” for alcohol distribution, which arose after the repeal of Prohibition.¹¹⁴ Like local zoning laws, the three-tier system has long challenged small brewers by preventing the vertical integration of beer—that is, consolidating the manufacture, distribution, and retail sale of beer into one business model.¹¹⁵ Thus, the three-tier system and its reforms represent a logical starting point for the argument in favor of craft brewing. Reforms to the three-tier system, however, do not foreclose the need for change when regulatory challenges continue to exist at the local level. Rather, the three-tier system and its subsequent reforms provide a model for the changes that should occur locally. In calling for this type of local application, this Note takes a new step in the argument for small brewers.

A. The Three-Tier System

Briefly put, the three-tier system prohibits vertical integration of the alcohol-distribution process.¹¹⁶ Instead, it separates this process into three distinct steps: manufacture, distribution, and retail.¹¹⁷ Under this system, a manufacturer of beer must sell its product to a distributor, who must

112. See Thompson, *supra* note 53.

113. See Ryan R. Lee, *Prohibition's Hangover: How Antiquated Illinois Beer-Law is Abused by Big Beer to the Substantial Detriment of Craft Breweries*, 37 N. Ill. U. L. Rev. 144, 147 (2016); see also Star, *supra* note 63, at 1080.

114. Star, *supra* note 63, at 1083.

115. Lee, *supra* note 113, at 151 (calling for reform to the three-tier system to protect small brewers in Illinois).

116. Star, *supra* note 63, at 1083.

117. *Id.*

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then pass it on to a retailer for sale to the consumer.¹¹⁸ The manufacturer, the distributor, and the retailer must operate completely independent of one another.¹¹⁹

Under the three-tier system, brewers fall plainly into the manufacturing category.¹²⁰ As the makers of beer, brewers accordingly must constrain their activities to the first phase of the process, ceding to other businesses control over the distribution and sale of their product.¹²¹ As a result, the three-tier system stands fundamentally incongruent to the craft-brewing business model, which often involves self-distribution and direct-to-consumer sale through an on-site tap room or restaurant.¹²²

Like many local zoning codes, the three-tier system originated when the brewing industry was at its most industrial. Following the repeal of Prohibition, supporters of the temperance movement proposed the three-tier system as a way to prevent breweries from abusing their newly re-established position in the marketplace.¹²³ In particular, those opposed to vertical integration wanted to dismantle the “tied-house” model, in which a brewery exerted considerable influence over retailers, either by direct ownership or some other clout.¹²⁴ Early proponents of the three-tier system primarily sought to address “large brewery abuses,” yet the system gave government significant power to regulate the entire beer market.¹²⁵

Today, the three-tier system continues to regulate the beer market to some extent at both the federal and state levels. Following the end of Prohibition in 1933, the federal government adopted the Federal Alcohol Administration Act (“Act”), which explicitly prohibits tied houses.¹²⁶ Separating the industry into at least two tiers, the Act makes it unlawful for a brewer to hold an interest in or otherwise unfairly influence a retailer of alcoholic beverages.¹²⁷

At the state level, the three-tier system goes much further.¹²⁸ Every state maintains some form of the three-tier system, licensing brewers,

118. *Id.*

119. *Id.*

120. Brian D. Anhalt, Comment, *Crafting a Model State Law for Today’s Beer Industry*, 21 ROGER WILLIAMS U. L. REV. 162, 172 (2016).

121. *Id.*

122. *Id.* at 188.

123. *Id.* at 171.

124. *Id.* at 171–72.

125. Anhalt, *supra* note 120, at 173.

126. See 27 U.S.C. § 205(b) (2018).

127. *Id.*

128. Andrew Tamayo, Comment, *What’s Brewing in the Old North State: An Analysis of the Beer Distribution Laws Regulating North Carolina’s Craft Breweries*, 88 N.C.L. REV. 2198, 2206 (2010).

distributors, and retailers separately.¹²⁹ Under these regulatory schemes, beer-related businesses must apply for one of three permit types: a brewery permit, a wholesaler permit, or a retail permit.¹³⁰ The type of permit then determines the type of activities that those businesses can engage in.¹³¹

By identifying brewers as little more than manufacturers, the three-tier system's rigid delineation is akin to the widespread zoning of brewers as industrial or light industrial operations.¹³² Both types of regulations box breweries into a traditional definition that reflects the post-Prohibition, twentieth-century mold.¹³³ Just as brewers have broken the industrial mold with new business models that welcome the public into a commercial or retail space, they have also grown beyond the manufacturing role.

B. Modernization and Flexibility: The Brewpub and Microbrewery Exceptions

As this transformation among brewers has occurred, change has begun to brew with respect to federal and state tied-house regulations. Federally, the Alcohol and Tobacco Tax and Trade Bureau (TTB)'s application for a federal brewery license now contains special provisions for applicants seeking to operate a brewpub.¹³⁴ These provisions were first added to the application in 2002.¹³⁵ Similarly, a majority of states now exempt small brewers from the three-tier system's rigid restrictions.¹³⁶ These exemptions generally take one of two basic forms: a brewpub license or a microbrewery license. A typical example of a brewpub exception comes from New Hampshire:

I. A brew pub license shall authorize the licensee to manufacture beer or cider in quantities not to exceed 2,500 barrels annually primarily for consumption on the licensed premises.

129. Star, *supra* note 63, at 1084 (identifying Washington as the "only partial exception" to the three-tier system).

130. Tamayo, *supra* note 128, at 2204.

131. *Id.* ("Holders of brewery permits can only sell to holders of wholesaler permits (with some exceptions), and holders of wholesaler permits can only sell to other licensed wholesalers or retailers.").

132. Anhalt, *supra* note 120, at 166.

133. Tamayo, *supra* note 128, at 2224.

134. See ALCOHOL AND TOBACCO TAX AND TRADE BUREAU, BREWER'S NOTICE, OMB No. 1513-0005, <https://www.ttb.gov/forms/f513010.pdf>.

135. U.S. DEP'T OF THE TREASURY, BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, INDUSTRY CIRCULAR, No. 2002-1 (2002), https://ttb.gov/industry_circulars/archives/2002/02-01.html.

136. Star, *supra* note 63, at 1086.

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II. A brew pub licensee may sell beer or cider manufactured on the premises . . . to individuals for on-premises and off-premises consumption and to New Hampshire licensed retailers and wholesalers. A brew pub shall maintain a full service (sic) restaurant. . . .¹³⁷

Likewise, a typical example of a microbrewery exception comes from Michigan, which uses the following definition: “‘Micro brewer’ means a brewer that manufacturers in total less than 60,000 barrels of beer per year and that may sell the beer manufactured to consumers at the licensed brewery premises for consumption on or off the licensed brewery premises and to retailers”¹³⁸

In each case, the licensed brewer may sell its product direct-to-consumer, avoiding the three-tier system altogether.¹³⁹ As defined by Michigan, microbrewers also may self-distribute their product directly to retailers, avoiding the second tier of the traditional manufacturer-distributor-retailer system.¹⁴⁰ Finally, each statute recognizes the small-scale nature of brewpubs and microbreweries by limiting the self-distribution and direct-to-consumer privileges to those brewers that fall beneath a production cap.¹⁴¹ Ultimately, these laws make it possible for small brewers to operate within the rigid landscape of the three-tier system.¹⁴²

C. Application to Zoning

Although the brewpub and microbrewery laws now common at the state level inject modernity and flexibility into an outdated regulatory scheme, these legal innovations only represent half of the equation. They no doubt allow small brewers to obtain a business license hospitable to their innovative retail and distribution models, but they do not give those licensees a place to actually do business. For many small brewers looking to take advantage of the craft-beer revolution, zoning remains an “often overlooked” yet particularly challenging step in the start-up process.¹⁴³ As a result, an otherwise prepared and license-able brewer may struggle to find a “properly zoned, yet desirable, location” because of the outdated

137. N.H. REV. STAT. ANN. § 178:13 (2018).

138. MICH. COMP. LAWS § 439.1109(5) (2018).

139. Star, *supra* note 63, at 1086.

140. *Id.* at 1087.

141. *Id.*

142. Justin M. Welch, Note, *The Inevitability of the Brewpub: Legal Avenues for Expanding Distribution Capabilities*, 16 REV. LITIG. 173, 176 (1997) (describing brewpub licenses as a “narrow exception” to tied-house statutes).

143. Chip Grieco, *Location, Location, Location*, N.Y. STATE BREWERS ASS’N (July 6, 2015), <https://newyorkcraftbeer.com/2015/07/location-location-location/>.

land-use regulations that remain at the local level.¹⁴⁴ For this reason, the revisions made at the federal and state levels serve as a powerful guide for local leaders.

The exceptions to the three-tier system represent appropriate models for municipal officials for at least three reasons. First, the brewpub and microbrewery exceptions demonstrate that government can make room for these small businesses in their regulatory schemes without throwing out the entire system.¹⁴⁵ To achieve modernization and flexibility, municipalities need not reclassify brewers as a whole, thereby allowing a flood of industrial activity into their commercial districts. On the contrary, municipalities can achieve modernization and flexibility merely by acknowledging the existence of different forms of brewing operations—and regulating those forms accordingly. As at the federal and state levels, municipalities can transform a one-size-fits-all approach into an adaptive system that accounts for the different dynamics of small brewers.

Second, the brewpub and microbrewery exceptions assert that, through small brewers, brewing has evolved beyond its industrial, manufacturing roots.¹⁴⁶ By allowing brewpubs and microbrewers to take on the part of retailer and distributor, the exceptions to the three-tier system recognize that these small brewers do more than manufacture.¹⁴⁷ Thus, it makes little sense to confine these businesses to industrial zones traditionally reserved for manufacturing facilities. As manufacturers, distributors, and retailers, modern-day small brewers require locations that are conducive to their holistic business models.

Third, the motivations behind the brewpub and microbrewery exceptions mirror the motivations for change at the local level. The exceptions to the three-tier system came about as a response to the innovative entrepreneurship of small brewers and demand from the public.¹⁴⁸ These forces continue to drive the need for comparable modernization and flexibility in local zoning laws. In recent years, overall beer consumption in the United States has fallen.¹⁴⁹ According to the Brewers Association, overall sales of beer in the United States declined by 1.2 percent in 2017.¹⁵⁰ Meanwhile, sales of craft beer actually rose four percent during

144. *Id.*

145. See Welch, *supra* note 142 (describing brewpub licenses as a “narrow exception” to tied-house statutes).

146. *Id.*

147. *Id.*

148. *Id.* at 177.

149. Thompson, *supra* note 53.

150. *National Beer Sales & Production Data*, *supra* note 5.

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that time.¹⁵¹ Furthermore, the number of breweries reached an all-time-high in 2017, with over 6,300 breweries operating in the United States.¹⁵² Of those, more than 6,200 were craft breweries.¹⁵³ With both sales of craft beer and the number of breweries up, the entrepreneurial spirit of small brewers and the demand for their product from the public appear alive and well.

Indeed, some communities have already begun to take the federal and state models to heart. In 2017, officials in New Rochelle, New York, passed an amendment to the city's zoning code to allow manufacture and retail on the same site in the downtown district.¹⁵⁴ Analogous to the state-level brewpub and microbrewery exceptions, this zoning amendment puts a stamp of approval on the small-brewing business model that combines the traditional phases of the brewing business. More recently, in 2018, municipal planners in Mathews County, Virginia, approved a proposal to allow small breweries in its own downtown districts.¹⁵⁵ Taking after the brewpub and microbrewery exceptions to the three-tier system, the Mathews County proposal allows both manufacture and retail to take place on the premises, provided that the brewery comply with maximum production caps.¹⁵⁶ There, the planning director pointed to the adequacy of federal and state regulations as a decisive factor in its consideration of the zoning amendment.¹⁵⁷ As these two local examples show, the federal and state approaches to small-brewer regulation translate aptly to the local level.

D. Brewing Change for Local Communities

By applying the concepts of these brewpub and microbrewery exceptions to local land-use control, municipalities can advance economic development, innovation, and diversity in their communities. Regardless of their industry, small businesses represent “the cornerstone or our local

151. *Id.*

152. *Id.*

153. *Id.*

154. Dan Reiner, *New Ro Brewery? City Zoning Welcomes Beer Makers*, LOHUD (July 22, 2017), <https://www.lohud.com/story/news/local/westchester/new-rochelle/2017/07/22/new-rochelle-brewery-zoning/489986001/>.

155. Sherry Hamilton, *Mathews Planners Endorse Microbrewery Zoning Change*, GLOUCESTER-MATHEWS GAZETTE-J. (Feb. 21, 2018), http://www.gazettejournal.net/index.php/news/news_article/mathews_planners_endorse_microbrewery_zoning_change.

156. *Id.*

157. *Id.*

and national economies.”¹⁵⁸ They have the power to create jobs,¹⁵⁹ develop environmentally friendly business practices,¹⁶⁰ revitalize down-trodden neighborhoods,¹⁶¹ and further economic justice.¹⁶²

Small brewers, in particular, stand capable of energizing their local economies through tourism. In 2015, researchers at Grand Valley State University in Michigan found that craft-beer tourism generates \$7.05 million in spending annually in Kent County, a western Michigan county that includes the city of Grand Rapids.¹⁶³ According to the study, this tourism further generates more than \$5.1 million in indirect spending in the community.¹⁶⁴ This economic impact creates jobs and additional earnings for residents of the county, as craft-beer tourists spend money not just at small breweries, but also on lodging, food, transportation, retail, and entertainment.¹⁶⁵ For the nation as a whole, the Brewers Association estimates that the craft-brewing industry generated \$79.1 billion for the United States economy in 2018, as well as 550,000 jobs.¹⁶⁶ As proven agents of revitalization, small brewers have the unique opportunity to further local economic development and bring prosperity to their communities.¹⁶⁷

CONCLUSION

Beyond the economic benefits of fostering small business growth, supporting small brewers with modernity and flexibility in land-use regulation will correct a long-overlooked incongruence in zoning law. In continuing to restrict breweries of all sizes, shapes, and forms to industrial districts, many modern zoning codes perpetuate outdated

158. Steven H. Hobbs, *Toward a Theory of Law and Entrepreneurship*, 26 *CAP. U. L. REV.* 241, 250 (1997).

159. See, e.g., Press Release, U.S. Small Bus. Admin., Small Businesses Drive Job Growth in the U.S. (Apr. 25, 2018), <https://www.sba.gov/advocacy/small-businesses-drive-job-growth-us>.

160. See, e.g., Sushil Cheema, *Going Green Is Growing Important to Small Businesses*, *ENTREPRENEUR* (Apr. 18, 2012), <https://www.entrepreneur.com/article/223377>.

161. See Susan R. Jones, *Small Business and Community Economic Development: Transactional Lawyering for Social Change and Economic Justice*, 4 *CLINICAL L. REV.* 195, 200–01 (1997).

162. *Id.* at 202.

163. DAN GIEDEMAN, PAUL ISELY & GERRY SIMONS, *THE ECONOMIC IMPACT OF BEER TOURISM IN KENT COUNTY, MICHIGAN I* (2015), https://www.gvsu.edu/cms4/asset/7A028470-B5EB-E9D6-C17010124D94A01E/beer_tourism_report_october_2015.pdf.

164. *Id.* at 8.

165. *Id.* at 7–8.

166. *Economic Impact*, BREWERS ASS’N, <https://www.brewersassociation.org/statistics/economic-impact-data/> (last visited Apr. 21, 2020).

167. See Hughes, *supra* note 104.

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circumstances and concerns. These codes fail to distinguish between different types and sizes of breweries, largely to the detriment of innovative entrepreneurs seeking to reinvest in downtown.

More than ripe for change, these zoning laws also have a logical path forward to modernization and flexibility. Federal and state innovations, such as the brewpub and microbrewery exceptions to the rigid, Prohibition-era three-tier system, provide a useful model for adaptation at the local level. These regulations recognize the small-scale and non-industrial nature of craft breweries and create opportunities for those businesses to operate within a system that still protects against abuses by large-scale, industrial brewers.

Ultimately, these exceptions provide merely a starting point for change. Although largely beyond the scope of this Note, rethinking the categorical model altogether may allow communities to embrace a forward-thinking approach to zoning for entrepreneurship. As the inventory of new business models that run up against local zoning laws increases, the most efficient way forward may not be a categorical exception for each business. The time has come to embrace entrepreneurship and to plan ahead for small business growth.