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## City Unplanning

**ABSTRACT.** Generations of scholarship on the political economy of land use have tried to explain a world in which tony suburbs use zoning to keep out development but big cities allow untrammelled growth because of the political influence of developers. But as demand to live in them has increased, many of the nation's biggest cities have substantially limited development. Although developers remain important players in city politics, we have not seen enough growth in the housing supply in many cities to keep prices from skyrocketing. This Article seeks to explain this change with a story about big-city land use that places the legal regime governing land-use decisions at its center. In the absence of strong local political parties, land-use laws that set the voting procedure in local legislatures determine policy results between cycling preferences. Specifically, the Standard Zoning Enabling Act (SZEa) creates a peculiar procedure that privileges the intense preferences of local residents opposed to new building. Amendments to zoning maps are considered one-by-one, making deals across projects and neighborhoods difficult. Legislators may prefer to allow some building rather than stopping it everywhere, but are most concerned that their districts not bear the brunt of the negative externalities associated with new development. Absent deals that link zoning changes in different neighborhoods, all legislators will work to stop the zoning amendments that effect their districts. Without a strong party leadership to whip votes into line, the preferences of legislators about projects in their districts dominate and building is restricted everywhere. Further, the seriatim nature of local land-use procedure results in frequent downzonings, as big developers do not have an incentive to fight reductions in the ability of landowners to build incremental additions to the housing stock as of right. The cost of moving amendments through the land-use process means that small developers cannot overcome the burdens imposed by downzonings. The Article concludes by considering several forms of legislative process reform that mimic procedural changes Congress adopted in order to pass international trade treaties.

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**INTRODUCTION**

There is something stale about most public debates about land use. Year after year, we see the same rhetoric coming from the same players. Developers of skyscrapers promise jobs and growth when they debate plucky community groups worried about gentrification or access to sunlight. Environmental groups denounce minimum lot requirements for generating sprawl, while suburban homeowners claim these rules help preserve the character of their communities. And so on. The frequent use of shorthand and acronyms—NIMBY, LULU, BANANA, etc.<sup>1</sup>—reminds all involved that this year’s controversy is not much different from last year’s. While there have been new movements among city planners, like “New Urbanism,”<sup>2</sup> and some new tools for getting political approval of new projects, like community benefits agreements (CBAs),<sup>3</sup> the rhetoric in today’s debates about zoning differs little from the rhetoric in similar fights decades earlier.

Law and economics scholarship about the efficiency of zoning has been quite consistent as well, the basic shape of the debate having taken its modern form around thirty years ago. Supporters of a community property-rights theory of zoning, like Robert Nelson and William Fischel, argue that zoning regimes give local governments the right to prevent new development but allow landowners to negotiate for permission to build. This is efficient, as it reduces the transaction costs for negotiations between builders and incumbent residents over the effect new projects have on property values in a jurisdiction. As long as transaction costs are low, assigning the right to permit development to the local government instead of giving landowners the ability to build as of right should not matter.<sup>4</sup> On the other hand, the classic critique of zoning, by

1. That’s “Not In My Back Yard,” “Locally Unwanted Land Uses,” and “Build Absolutely Nothing Anywhere Near Anything,” for the uninitiated. See Vicki Been, *What’s Fairness Got To Do with It? Environmental Justice and the Siting of Locally Undesirable Land Uses*, 78 CORNELL L. REV. 1001, 1001, 1015 (1993) (providing definitions).
2. For a description of New Urbanism, see ANDRES DUANY, ELIZABETH PLATER-ZYBERK & JEFF SPECK, *SUBURBAN NATION: THE RISE OF SPRAWL AND THE DECLINE OF THE AMERICAN DREAM* 256-61 (2000). For further discussion, see *infra* note 69.
3. For a discussion of community benefits agreements (CBAs), see generally Vicki Been, *Community Benefits Agreements: A New Local Government Tool or Another Variation on the Exactions Theme?*, 77 U. CHI. L. REV. 5 (2010).
4. See WILLIAM A. FISCHEL, *THE ECONOMICS OF ZONING LAWS: A PROPERTY RIGHTS APPROACH TO AMERICAN LAND USE CONTROLS* 74-149 (1985) [hereinafter FISCHEL, *ECONOMICS OF ZONING LAWS*]; WILLIAM A. FISCHEL, *THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLITICS* 39-71 (2001) [hereinafter FISCHEL, *HOMEVOTER HYPOTHESIS*]; ROBERT H. NELSON, *ZONING AND PROPERTY RIGHTS: AN ANALYSIS OF THE AMERICAN SYSTEM OF LAND-USE REGULATION*

Robert Ellickson and Bernard Siegan among others, maintains that zoning restricts the supply of housing and office space, artificially pushing property prices upward and separating land uses. Further, zoning regimes do not do much better in practice than the market, courts, or private contracts at minimizing nuisances.<sup>5</sup> While there has been much excellent work in the field, the terms of the debate have not shifted substantially in some time.

One might take from this that little about zoning has changed in the last few decades, either on the ground or intellectually. This would be wrong on both counts. The major intellectual development has been the rise of agglomeration economics, most notably the work of Paul Krugman, Robert Lucas, and Edward Glaeser. Their work explores exactly what benefits individuals and businesses get from colocating, or existing in close physical proximity to others.<sup>6</sup> This research, largely unincorporated into legal scholarship until quite recently, has shown that urban density provides individuals with reduced shipping costs, the benefits of market depth, and information spillovers. Further, certain agglomerative factors—particularly information spillovers between highly educated residents—have become increasingly important in the modern economy. As zoning regimes reduce density and separate individuals and businesses that would like to be near one

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22-51 (1977); Robert H. Nelson, *A Private Property Right Theory of Zoning*, 11 URB. LAW. 713 (1979).

5. See Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 682 (1973) [hereinafter Ellickson, *Alternatives to Zoning*] (setting out the argument that “conflicts among neighboring landowners are generally better resolved by systems less centralized than master planning and zoning”); Robert C. Ellickson, *The Irony of “Inclusionary” Zoning*, 54 S. CAL. L. REV. 1167, 1184-87 (1981) [hereinafter Ellickson, *Irony of “Inclusionary” Zoning*] (arguing that inclusionary zoning reduces the supply of affordable housing); Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385, 400 (1977) [hereinafter Ellickson, *Suburban Growth Controls*] (“Antigrowth measures have one premier class of beneficiaries: those who already own residential structures in the municipality doing the excluding.”); see also BERNARD H. SIEGAN, LAND USE WITHOUT ZONING 85-140 (1972) (arguing that the costs of zoning exceed the benefits and that zoning should therefore be abolished); Bernard H. Siegan, *Non-Zoning in Houston*, 13 J.L. & ECON. 71, 91-129 (1970) (using Houston’s lack of a zoning code to show that zoning regulations excessively limit building with little benefit in terms of reducing nuisances).
6. For a full survey of this research, see David Schleicher, *The City as a Law and Economic Subject*, 2010 U. ILL. L. REV. 1507, 1515-29. For classic reviews of the subject, see generally MASAHISA FUJITA, PAUL KRUGMAN & ANTHONY J. VENABLES, THE SPATIAL ECONOMY: CITIES, REGIONS, AND INTERNATIONAL TRADE 1-6 (1999); EDWARD L. GLAESER, CITIES, AGGLOMERATION AND SPATIAL EQUILIBRIUM 1-14 (2008); EDWARD GLAESER, TRIUMPH OF THE CITY: HOW OUR GREATEST INVENTION MAKES US RICHER, SMARTER, GREENER, HEALTHIER, AND HAPPIER (2011) [hereinafter GLAESER, TRIUMPH OF THE CITY]; and Robert E. Lucas, Jr., *On the Mechanics of Economic Development*, 22 J. MONETARY ECON. 3 (1988).

another, the increasing empirical validation of the importance of agglomeration economies has helped explain how strict zoning regimes harm the efficiency of property markets and regional economies.

While economic thought has moved substantially against increased stringency in zoning (and intellectual movements inside city planning have pushed for increased density and mixed-use development), practice has moved in the other direction. Zoning policy has become much stricter over the last thirty or so years, and it has done so in ways not predicted by those who study the political economy of urban development. During the formative debates about the law and economics of zoning in the 1970s, there were only three metropolitan areas in the United States in which land-use policy had a significant effect on housing prices region-wide, as judged by the existence of a gap between the cost of housing and the combined cost of empty land and construction.<sup>7</sup> (Absent supply restrictions, they should be roughly equal.) Now, such gaps have emerged in many metropolitan areas on both coasts of the United States and a number of inland regions as well.<sup>8</sup> And where such gaps have emerged, they have grown substantially. In the most regulated regions, legal restrictions on the supply of housing are likely responsible for as much as half of the cost of any given housing unit.<sup>9</sup>

These changes in the strictness of land-use policy have helped to cause massive shifts in population across the country. Rich, restrictive regions like

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7. Edward L. Glaeser, Joseph Gyourko & Raven Saks, *Why Have Housing Prices Gone Up?* 4-9 (Nat'l Bureau of Econ. Research, Working Paper No. 11129, 2005), <http://www.nber.org/papers/w11129> [hereinafter Glaeser et al., Working Paper, *Housing Prices*]; see also Edward L. Glaeser & Bryce A. Ward, *The Causes and Consequences of Land Use Regulation: Evidence from Greater Boston*, 65 J. URB. ECON. 265, 265 (2008) ("Over the past 25 years, many U.S. cities have experienced a remarkable combination of increases in housing prices and decreases in new construction."); Edward L. Glaeser & Joseph Gyourko, *The Impact of Building Restrictions on Housing Affordability*, 9 FED. RES. BANK N.Y. ECON. POL'Y REV. 21, 35 (2003) [hereinafter Glaeser & Gyourko, *Impact*] (noting a gap between construction costs and housing prices in many coastal cities); Edward L. Glaeser, Joseph Gyourko & Raven E. Saks, *Why Have Housing Prices Gone Up?*, 95 AM. ECON. REV. 329, 329 (2005) [hereinafter Glaeser et al., *Why Have Housing Prices Gone Up?*] ("In many parts of the country, new housing units still are abundant, and housing prices remain relatively low. In a small, but increasing number of metropolitan areas (primarily, but not exclusively on the coasts), housing prices have soared and new construction has plummeted."); Edward L. Glaeser, Joseph Gyourko & Raven Saks, *Why Is Manhattan So Expensive? Regulation and the Rise in Housing Prices*, 48 J.L. & ECON. 331 (2005) [hereinafter Glaeser et al., *Why Is Manhattan So Expensive?*] (noting substantial gaps between housing and construction prices in Boston, New York, Newport News, Salt Lake City, Washington, D.C., and a number of cities in California); Edward Glaeser & Joseph Gyourko, *Zoning's Steep Price*, REGULATION, Fall 2002, at 24, 26 [hereinafter Glaeser & Gyourko, *Zoning's Steep Price*] (same).
  8. Glaeser et al., Working Paper, *Housing Prices*, *supra* note 7, at 4-7.
  9. Glaeser et al., *Why Is Manhattan So Expensive?*, *supra* note 7, at 360.

San Francisco and Boston have seen large increases in housing prices but only small increases (or decreases) in population. At the same time, there were huge population inflows into less productive but unrestrictive regions like Houston and Atlanta but only small increases in housing prices.<sup>10</sup> Even in the most successful parts of the country during their most successful periods, zoning rules limited entry: Silicon Valley *lost* population in the late 1990s, and lost domestic population from 2000 to 2010, as housing prices increased faster than wages.<sup>11</sup> Strict zoning rules in productive regions not only cause static efficiency losses but can also reduce economic growth. Artificially high housing prices limit employment in the fast-growing industries that are prevalent in what Paul Krugman calls the “Zoned Zone” of the country, and they reduce the number of people who can capture the human-capital-enhancing information spillovers available in these areas.<sup>12</sup>

Not only has the amount of restriction changed, but the kinds of local governments engaged in restricting development have changed as well. Scholarship on the political economy of land use—using methodologies ranging from public choice to regime theory—has tried to explain a world in which tony suburbs run by effective homeowner lobbies use zoning to keep out development, but big cities allow relatively untrammelled growth because of the political influence of developers. But the world has changed. Over the past few decades, as demand to live in them has increased, big cities have become responsible for substantial limits on development, particularly in desirable neighborhoods. Fixing supply in the face of heavy demand, unsurprisingly, has led to skyrocketing prices. Although developers are the major players in city politics, we have not seen enough growth in the housing supply in many cities to keep prices in line with construction costs.

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10. GLAESER, TRIUMPH OF THE CITY, *supra* note 6, at 183-93. This pattern was consistent through the housing boom of the 2000s, with the exception of several less restrictive cities (e.g., Phoenix and Las Vegas) that saw both price increases and population booms. But the bursting of the bubble returned prices in these cities back to a level equal to construction costs, while prices in the Zoned Zone stayed elevated. *See id.* at 188-89; Edward L. Glaeser, Joseph Gyourko & Albert Saiz, *Housing Supply and Housing Bubbles*, 64 J. URB. ECON. 198, 211-13 (2008) (noting that bubble behavior in zoned and nonzoned areas follows this trend).
  11. *See* RYAN AVENT, THE GATED CITY 799-914 (2011) (noting that Silicon Valley lost overall population in the late 1990s and lost domestic population, or population of persons other than foreign immigrants, in the 2000s).
  12. *See* Edward L. Glaeser, *Houston, New York Has a Problem*, CITY J., Summer 2008, at 62, 67 (noting migration from high-income heavily zoned coastal regions to less productive and less heavily zoned inland and southern metropolitan areas); Paul Krugman, Op-Ed., *That Hissing Sound*, N.Y. TIMES, Aug. 8, 2005, <http://www.nytimes.com/2005/08/08/opinion/08krugman.html> (using the term “Zoned Zone” to refer to heavily zoned coastal regions).

We need a new story about the political economy of land use in big cities. Further, for those who believe that the zoning regimes are too strict, there is a need for new ideas for reform rooted in a realistic view of how land-use politics actually work. That is what this Article aims to provide.

Part I will review the law and economics literature on zoning and will make the case that, although an exacting cost-benefit analysis has proven difficult, there is a growing consensus that the harsher restrictions of the last twenty years have come at a substantial cost to the affordability of housing and the vibrancy of local and regional economies (and even the national economy). It will also show that the increased restrictiveness of big-city governments is inconsistent with the predictions of the existing literature on the political economy of zoning.

Part II will sketch out a story about the political economy of zoning in big cities, one that places the *legal* regime governing land-use decisions at the center. Previous scholarship has looked at the spending power of relevant interest groups and argued that, although consumers of housing individually suffer harms that are too small to provide sufficient incentives to get involved in land-use disputes, the supply of housing should not be substantially constrained in cities due to the influence of developers.<sup>13</sup> In smaller towns, opposition from homeowners near proposed new developments (or “neighbors” in an evocative, commonly used term in the literature) may rule the day, but most scholars assume that developers use their lobbying muscle to dominate the political process in big cities and make development relatively easy.

However, the fights between developers and neighbors do not exist in the aggregate. As such, it is important to understand the context in which such disputes take place. Importantly, most cities do not have competitive party politics—they either have formally nonpartisan elections or are entirely dominated by one party that rarely takes stances on local issues.<sup>14</sup> Absent

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13. See generally ROBERT C. ELLICKSON & VICKI L. BEEN, *LAND USE CONTROLS: CASES AND MATERIALS* 304-08 (3d ed. 2005) (summarizing the literature on the influence of developers on big-city zoning policy).

14. See David Schleicher, *Why Is There No Partisan Competition in City Council Elections?: The Role of Election Law*, 23 *J.L. & POL.* 419, 419-22 (2007). Explaining why cities do not have much partisan competition is, it turns out, extremely difficult. It runs counter to Downsian models of partisan competition, which assume that no level of government will be uncompetitive for very long, as the minority party will propose policies that will attract the median voter at that level of government. I have developed a theory that suggests that, because election laws ensure national parties appear on local ballots and limit party switching between elections, local elections can be persistently uncompetitive if voters know little about individual local candidates and care more about national politics than local politics. *Id.* at 448-59. Christopher Elmendorf and I argue that voter difficulties with

partisan competition, there is little debate over citywide issues in local legislative races, and there is no party leadership to organize the legislature, making the procedural rules governing the order in which the legislature considers land-use issues far more important.<sup>15</sup> The content of land-use procedure can generate “localist” policymaking: seriatim decisions about individual developments or rezonings in which the preferences of the most affected local residents are privileged above more weakly held citywide preferences about housing. This occurs for two kinds of reasons.

First, the absence of party competition and organization in local legislatures can result in individual representatives having outsized control over policies that have a predominant effect on their districts. Individual legislators frequently face prisoner’s dilemmas, preferring the achievement of citywide goals like increasing the housing supply to universally restrictive policies, but preferring restrictions on new development in their districts regardless of what happens elsewhere.<sup>16</sup> Without party leadership that can organize deals and whip votes into line, legislatures cannot easily make deals that stick for generally beneficial legislation. Legislators “defect” as a matter of course, and building is restricted everywhere. Giving individual councilmembers de facto control over zoning amendments in their districts limits the influence of developers because developers have to do more than shift the positions of a dominant party coalition. Instead, they have to create coalitions between legislators that span time and projects. But the laws governing land-use procedure make this difficult by requiring each project or rezoning to be considered individually. It is easier for developers simply to buy off local opposition using tools like CBAs, but this raises the cost of development.

Second, the specifics of land-use law and procedure serve to divide the

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assigning responsibility between levels of government, other effects of limited information, and strategic concerns on the supply side of local candidates also contribute to the problem of long-term uncompetitive local and state legislatures. Christopher S. Elmendorf & David Schleicher, *Informing Consent: Voter Ignorance, Political Parties, and Election Law*, 2013 ILL. L. REV. (forthcoming), <http://ssrn.com/abstract=2010115>.

15. The model of legislative parties described here is the classic positive political theory model developed by Gary Cox, Roderick Kiewiet, and Mathew McCubbins. See GARY W. COX & MATHEW D. MCCUBBINS, *LEGISLATIVE LEVIATHAN: PARTY GOVERNMENT IN THE HOUSE* (2d ed. 2007) [hereinafter COX & MCCUBBINS, *LEGISLATIVE LEVIATHAN*]; GARY W. COX & MATHEW D. MCCUBBINS, *SETTING THE AGENDA: RESPONSIBLE PARTY GOVERNMENT IN THE U.S. HOUSE OF REPRESENTATIVES* (2005) [hereinafter COX & MCCUBBINS, *SETTING THE AGENDA*]; D. RODERICK KIEWIET & MATHEW D. MCCUBBINS, *THE LOGIC OF DELEGATION: CONGRESSIONAL PARTIES AND THE APPROPRIATIONS PROCESS* (1991).
16. Cf. Barry R. Weingast, *A Rational Choice Perspective on Congressional Norms*, 23 AM. J. POL. SCI. 245, 249-53 (1979) (suggesting that universal logrolls can be maintained in Congress through the development of norms).



interests of developers from those of consumers of housing. Under the Standard Zoning Enabling Act, cities must create a map detailing the potential uses and development of each parcel in a city. Changes to the map, either amendments or variances, are made seriatim. Further, a variety of land-use rules and institutions create high fixed costs for achieving any substantial change in the zoning code. While big new rezonings feature the expected face-offs between developers and neighbors, big developers have little incentive to care about “downzonings,” or reductions in the size of the “zoning envelope,” or the height and density up to which current landowners are allowed to develop as of right. This situation leaves the field to neighbors’ antidevelopment sentiment, as big developers’ lobbying muscle only goes as far as achieving success on their own projects. Once imposed, these downzonings limit development, contrary to Fischel’s and Nelson’s claims, as the cost of getting a zoning change through the local policymaking apparatus can be higher than the benefits arising from small-scale development. Limits on incremental increases in the housing supply can raise the cost and distort the location of housing inside a city.

These stories leave out a great deal about land-use politics and only describe mechanisms through which restrictive land use can entrench itself in a city despite the influence of big developers. They can provide only some guidance about when and where urban housing prices will rise. But they are consistent with what is known about land-use policy in big cities, particularly the strong power individual city council members have over projects in their own districts and the tendency of zoning maps to get stricter over time unless there is a comprehensive rezoning. They also suggest that the traditional policy prescription among critics of exclusionary zoning—regional planning bodies—would not be successful without other types of political reform.<sup>17</sup> Other common approaches to reforming zoning amount to little more than exhorting homeowners to stop being NIMBYs and accept changes in land use that harm the value of their most important asset—their home. If the analysis in this Article is right, it suggests a way to address the costs of excessive zoning, taking as given the interests of homeowners and other players in land-use politics. If procedure is to blame, procedure may be the answer.

Part III suggests several types of procedural reform. Each proposal has been modeled on procedural changes Congress has adopted to ensure the passage of international trade deals. Trade and land use feature similar interest group dynamics: the lack of a clear partisan structure to preferences; consumers who

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17. See, e.g., ANTHONY DOWNS, *NEW VISIONS FOR METROPOLITAN AMERICA* 31-42 (1994) (advocating regional land-use planning); Richard Briffault, *Localism and Regionalism*, 48 *BUFF. L. REV.* 1, 1-5 (2000) (same).

face small harms individually; concentrated and heavily invested protectionist groups (e.g., neighbors and import-competing firms); and potential allies for consumers who, depending on how issues are posed, may sit out certain fights (e.g., developers and exporters). Procedural reform has been crucial to the passage of widely beneficial free trade policies. Land-use reformers could use similar tools.

The most promising proposal is modeled on Trade Adjustment Assistance (TAA) and tries to address the problem that consumers of housing have no direct representation in land-use politics because of collective action problems and the absence of party competition. In many cities, community boards often perform the first level of review of new map amendments and special permits to build. Each time a community board approves a new development, the city could provide a time-limited property tax rebate to residents in the board's district equal to a percentage of the "tax increment" created by the development (the tax increment is the increase in tax revenues caused by increasing property values<sup>18</sup>). The payments would head off local opposition to new development and generally move new projects from mere Kaldor-Hicks efficiency toward Pareto efficiency. Unlike CBAs, these payments would not constitute a tax on developers, but instead would seek to pay off opposition from a different source—the fiscal benefits a city as a whole gets from new development—and would therefore reduce housing costs. In effect, land-use procedure would encourage the striking of deals between consumers of housing, a group without Olsonian incentives to be involved in politics, and the neighborhood groups that currently dominate local land-use hearings.<sup>19</sup> This arrangement would thus make automatic the type of logrolling we see when competitive political parties pay more attention to generalist interests.

A legislature could also modify the order in which land-use decisions are made and, by doing so, change the dynamics of interest group competition. As Rick Hills and I have argued, cities could adopt "zoning budgets," which would work much like the Reciprocal Trade Agreements Act of 1934<sup>20</sup> did in enlisting exporters to fight import tariffs.<sup>21</sup> Each year, a city would adopt a planned increase (or decrease) in the housing stock. Until new projects met the

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18. See Richard Briffault, *The Most Popular Tool: Tax Increment Financing and the Political Economy of Local Government*, 77 U. CHI. L. REV. 65, 67 (2010) (defining tax increment).

19. See MANCUR OLSON JR., *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 1-18 (1965) (arguing that large, diffuse groups like consumers with little at stake in any given governmental decision will lose out in political competition to concentrated, small groups, each of whose members has a great deal at stake).

20. Act of June 12, 1934, ch. 474, 48 Stat. 943 (codified as amended at 19 U.S.C. § 1351 (2006)).

21. For such a comparison, see Roderick J. Hills, Jr. & David N. Schleicher, *Balancing the "Zoning Budget"*, 42 CASE W. RES. L. REV. 81, 112-18 (2011).

called-for increase, downzonings that reduce the potential housing stock would be prohibited (and after the target is met, they would have to be offset one-for-one with rezonings that increase the housing supply). The fight over the size of the budget would happen before any specific project was considered, making developers fight for generalized increases in supply rather than simply for their own projects, which would bring the interests of big developers into line with those of consumers.

Finally, risk-averse homeowners could be given insurance against developments that produce greater-than-expected externalities, removing one of the reasons for local opposition to development. There have been a number of interesting proposals of this kind, but none has been particularly successful in providing landowners with much confidence that developers are not lying about the effects of new development. Instead of providing direct financial insurance, local opposition groups could be given conditional control over the city council's land-use agenda as a form of political insurance, just as "safeguards" measures in trade law give industries that are unexpectedly harmed by import competition the ability to apply for temporary protection. If a development substantially exceeded its predicted effect on certain measurable variables, affected groups could be given the power to design a remedy that the city council would have to vote on under a closed rule.<sup>22</sup> This would allow neighborhood groups to accept new development knowing that they had an effective tool to mitigate the effects of greater-than-expected externalities, taking advantage of the degree to which procedure can structure outcomes in local legislatures without party organization.

## I. THE LAW AND ECONOMICS OF CITY PLANNING: A REVIEW

What are the economic justifications for zoning as currently practiced? This Part summarizes the arguments for and against our system of zoning, but does so without the aim of comprehensiveness. Instead, it will try to establish three propositions. First, while the basic contours of the debates about the economics of zoning have been well established for many years, recent research on what economists call "agglomeration economies" and real-world changes in the types of agglomeration economies that drive urban growth have substantially strengthened the case that zoning rules are too strict in much of the United States. Second, as the case for comprehensive zoning has weakened, modern zoning regimes have actually become much stricter, with substantial implications for regional and even national economic growth and population

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22. A closed rule means that no legislator could propose amendments. See Jacob E. Gersen & Eric A. Posner, *Timing Rules and Legal Institutions*, 121 HARV. L. REV. 543, 574 (2007).

flows around the country. Third, despite widespread belief that the political economy of zoning results in exclusionary suburbs and “growth machine” cities, there have been enormous increases in the restrictiveness of zoning in central cities.

*A. Economic Theory and Zoning*

The initial justification for zoning was reducing nuisances. As Ronald Coase famously showed, nuisances are not caused by the tortfeasor alone; they are equally caused by the existence of an incompatible land use nearby.<sup>23</sup> By dividing cities into zones, each with permitted uses for land, local governments could reduce the incidence of nuisance administratively, rather than by relying on litigation. This reasoning was central to the Supreme Court’s decision in *Village of Euclid v. Ambler Realty Co.*, which upheld the constitutionality of zoning.<sup>24</sup>

Whatever the merits of this view, it became clear that zoning regimes did far more than reduce traditionally justiciable nuisances.<sup>25</sup> Particularly after World War II, zoning policy expanded from traditional height limits and “cumulative zoning”—which barred higher-intensity uses like heavy manufacturing from single-family areas but not vice versa—to more aggressive techniques that gave planners both more flexibility to condition approvals on meeting requirements set by the city and more ways to restrict building, including noncumulative zoning rules that assigned uses to specific areas.<sup>26</sup> These changes were incompatible with the view that zoning primarily served to limit nuisances. Instead, zoning was seen as a tool for fulfilling a city’s comprehensive plan, justified on the ground that cities would evolve better if they followed a predetermined plan for the places and sizes of all things in a community, from public services like roads to private land uses.<sup>27</sup>

The idea that a government planner should decide the best uses for private real property may seem like an odd economic theory, but it has a basis in the economics of property law. Robert Nelson and William Fischel developed a theory of zoning to justify such comprehensive planning built around a

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23. R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 2 (1960).

24. 272 U.S. 365 (1926).

25. RICHARD F. BABCOCK, *THE ZONING GAME: MUNICIPAL PRACTICES AND POLICIES* 3-4 (1966). As Babcock notes, even *Euclid* relied on a flexible conception of nuisance, viewing apartment buildings near single-family homes as “similar to the intrusion of a tuberculosis sanitarium which could be kept out under orthodox common law principles.” *Id.* at 4.

26. *Id.* at 7-16, 127-29.

27. *Id.* at 120-37.

government's ability to negotiate on behalf of all property owners in the jurisdiction.<sup>28</sup> Their thinking was explicitly Coasean. If landowners have an absolute right to build, and a landowner wants to build something that has a negative effect on her neighbors, the transaction costs and collective action problems of getting all the neighbors together to pay the property holder not to build (or to build less) would be prohibitive.<sup>29</sup> If, on the other hand, local governments, representing the interests of property holders in a city, have the ability to deny a landowner the right to build for any reason, the potential developer can simply pay the city for the right to build.<sup>30</sup> The assignment of the right should not matter if transaction costs are low, as Coasean bargaining between the developer and the city should ensure that we get to the optimal amount of development. While both the Supreme Court's "exactions" doctrine and state laws on impact fees limit the ability of local governments to condition land-use decisions on unrelated conditions or cash gifts, local governments still can negotiate with developers over certain terms or let in only those developments they find appealing.<sup>31</sup>

This view has been criticized on a number of practical, ethical, and legal grounds, but it still serves as the basic economic justification for the type of comprehensive zoning regimes we have in most local governments.<sup>32</sup> Two criticisms stand out: representation and externalities. The community property-rights theory of zoning is dependent on the idea that local governments represent the collective interest of property holders. Some have challenged this, arguing that urban elections are not particularly responsive, but Fischel argues that this describes most small towns and suburbs (if not big

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28. FISCHEL, *ECONOMICS OF ZONING LAWS*, *supra* note 4, at 72-149; NELSON, *supra* note 4, at 39-51. While Nelson and Fischel were extremely important in formalizing, developing, and extending the logic of collective property rights as a justification for zoning, some version of this idea had been the basis of economic thinking on zoning for many years. See BABCOCK, *supra* note 25, at 115-20.

29. The incumbent property holders would have to discover the builders' intention to build something that would harm property values and then pay them off—a difficult endeavor.

30. This arrangement has distributional effects, transferring wealth from owners of property that might be used for commercial purposes to those who own property ill suited for commercial or high-intensity use. See Jeremy R. Groves & Eric Helland, *Zoning and the Distribution of Location Rents: An Empirical Analysis of Harris County, Texas*, 78 *LAND ECON.* 28, 28-29 (2002).

31. See generally Vicki Been, "Exit" as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine, 91 *COLUM. L. REV.* 473, 478-83 (1991) (reviewing the limits on exactions).

32. See generally Richard Schragger, *Consuming Government*, 101 *MICH. L. REV.* 1824, 1833-34 (2003) (reviewing FISCHEL, *HOMEVOTER HYPOTHESIS*, *supra* note 4) (surveying and making criticisms of the property rights theory of zoning).

cities) relatively accurately because “homevoters” – homeowners worried about the value of their houses – tend to dominate local elections.<sup>33</sup>

Placing the defense of zoning in a suburban milieu raises the stakes of the second major problem with the community property-rights view: externalities. Small suburban governments may represent *their* homevoters, but they don’t much care about people beyond their boundaries. Whatever effects development has on landowners and residents beyond the boundaries of a local government are excluded from consideration, and hence are undervalued in zoning decisions.<sup>34</sup> While they have not been very specific about what form those externalities take, scholars have suggested that a number of ills result from local governments’ failure to internalize externalities, including interlocal economic inequality and sprawl.

This defense of zoning, with its focus on suburban politics and development, was easy to integrate with the central theory of the economics of local government law: the Tiebout model. As famously argued by Charles Tiebout, local government services are provided at the efficient level because individuals can sort among the many local governments in a region to select their ideal package of services.<sup>35</sup> So too with capital, the story goes: there will be some local governments in a region that want new development, and so we need not worry about those governments that exclude it. Further, zoning solved one of the great internal problems in the Tiebout model. As Bruce Hamilton showed, in local governments funded by property taxes, the basic Tiebout model has no equilibrium.<sup>36</sup> Any time a city establishes a high level of

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33. See Schleicher, *supra* note 14, at 419-24 (arguing that city elections lack competitive political parties and therefore are unlikely to produce responsive results); Schragger, *supra* note 32, at 1832-33 (suggesting that there is little reason to think that most urban elections are very responsive). “Homevoters,” in Fischel’s argument, are residents who vote and own homes and have a strong incentive to care about local politics because almost all of their assets are tied up in the value of their home. FISCHEL, HOMEVOTER HYPOTHESIS, *supra* note 4, at 4-14. Fischel, however, argues that big cities cannot be understood the same way, because the interests of homevoters are diluted. *Id.* at 14-16. Fischel’s suburban focus fits the general attitude of much of the field. Richard F. Babcock’s classic work on the politics of zoning, *The Zoning Game*, notes that “the primary emphasis” in his work “is upon suburban, not urban, activity. One hunts where the ducks are believed to be . . . .” BABCOCK, *supra* note 25, at xvi.

34. See Richard Briffault, *The Local Government Boundary Problem in Metropolitan Areas*, 48 STAN. L. REV. 1115, 1133-44 (1996) (pointing to the external effect of city policies on sprawl and interlocal fiscal disparities); Schragger, *supra* note 32, at 1831 (“The existence of externalities means that the quality or availability of ‘local’ amenities is often beyond the control of a specific local government or the homeowners who vote within it.”).

35. Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956).

36. Bruce W. Hamilton, *Zoning and Property Taxation in a System of Local Governments*, 12 URB. STUD. 205, 210-11 (1975) (developing a Tiebout theory consistent with local zoning and

services and taxes, it gives property owners an incentive to subdivide their property, allowing more residents to receive the average level of services in the city but pay a lower individual amount of property taxes. Zoning rules like minimum lot requirements allow cities a way out of this problem by giving them a tool to fix the population.

However, what counted as a solution in the world of the Tiebout model also served as the basis for the most common critique of modern zoning. When cities engage in fiscal zoning, rich localities can avoid any responsibility to pay taxes for programs for the poor.<sup>37</sup> When states and courts limit local zoning authority—such as in the *Mount Laurel* decisions in New Jersey and Massachusetts’s “anti-snob” zoning laws—they often do so to stop localities from excluding poor residents.<sup>38</sup>

This stripped-down version of the basic economic case *for* zoning, and common criticisms of that model, will be relatively familiar to many readers. The basic economic case *against* it is equally well known. Robert Ellickson laid it out in its classic form in a series of articles in the late 1970s and early 1980s.<sup>39</sup> Ellickson’s central claim is that zoning regimes work as supply restrictions that serve to artificially boost the price of homes, harming those who want to buy into communities and holders of developable land.<sup>40</sup> Local governments can be thought of as monopolists: their success in increasing the value of existing houses will turn on their degree of market power (i.e., how much people value their specific location or public services) and the behavior of other, similar towns. Ellickson also argued that the positive effects of zoning were substantially overstated. Although zoning regimes reduce nuisances,

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property tax powers); *see also* FISCHER, HOMEVOTER HYPOTHESIS, *supra* note 4, at 65-66 (discussing Hamilton’s work).

37. Notably, this is not a problem in a Tiebout world because redistribution is, by assumption, impossible. Clay Gillette has shown quite conclusively, however, that this is simply false—cities do redistribute income and can do so largely because of the existence of agglomeration economies. CLAYTON P. GILLETTE, LOCAL REDISTRIBUTION AND LOCAL DEMOCRACY: INTEREST GROUPS AND THE COURTS 72-105 (2011).
38. *See* MASS. GEN. LAWS ANN. ch. 40B, §§ 20-23 (West 2004) (Massachusetts’s “Anti-Snob” Zoning Act); *S. Burlington Cnty. NAACP v. Township of Mount Laurel (Mount Laurel II)*, 456 A.2d 390, 489-90 (N.J. 1983); *S. Burlington Cnty. NAACP v. Township of Mount Laurel (Mount Laurel I)*, 336 A.2d 713, 731-34 (N.J. 1975); Quintin Johnstone, *Government Control of Urban Land Use: A Comparative Major Program Analysis*, 39 N.Y.L. SCH. L. REV. 373, 411 (1994); Note, *Making Mixed-Income Communities Possible: Tax Base Sharing and Class Desegregation*, 114 HARV. L. REV. 1575, 1576 n.13 (2001).
39. *See* Ellickson, *Alternatives to Zoning*, *supra* note 5, at 695-705 (arguing that zoning is both inefficient and causes substantial inequity); Ellickson, *Irony of “Inclusionary” Zoning*, *supra* note 5, at 1184-85 (arguing that inclusionary zoning will reduce the supply of affordable housing); Ellickson, *Suburban Growth Controls*, *supra* note 5, at 400.
40. Ellickson, *Suburban Growth Controls*, *supra* note 5, at 394-403.

individuals operating in an unregulated land market have the ability and the incentives to address problems of negative externalities,<sup>41</sup> and the “prevention costs,” or the foregone gains from using property as landowners intended, could be quite large.<sup>42</sup> Notably, he also argued that inclusionary zoning, or policies that require the building of low-income housing near high-income housing, has similar negative effects to ordinary growth controls as it serves as a tax on development and provides benefits only to a fortunate few.<sup>43</sup> Ellickson suggested a reformulation of nuisance law, implemented by “nuisance boards” instead of courts, to replace zoning as the primary means of regulating land use.<sup>44</sup> Alternatively, the Takings Clause could be used to restrict excessive uses of the zoning power.<sup>45</sup> Richard Epstein, writing in a similar vein, argued that many zoning regimes, particularly those that bar development in currently undeveloped property, should be considered violations of the Takings Clause.<sup>46</sup>

Bernard Siegan’s roughly contemporaneous critique was built around his in-depth analysis of Houston, a city without a zoning map and with more limited land-use regulations than other cities.<sup>47</sup> He argued that zoning distorted the property market by moving development away from its intended locations, increased the cost of housing, led to slower growth, and did little to reduce genuine nuisances. Instead, it was merely a means for the politically powerful to extract rents.

These critiques of zoning were unclear on one key issue. The analyses showed that zoning created costs in the aggregate—by, say, reducing the supply of housing across a region—but they also maintained that it prevented landowners from realizing mutual gains from locating specific uses close

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41. How private landowners work outside of legal structures to resolve disputes is the subject of his classic book, ROBERT C. ELICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991).

42. Ellickson, *Alternatives to Zoning*, *supra* note 5, at 694-97.

43. Ellickson, *Irony of “Inclusionary” Zoning*, *supra* note 5, at 1184-1204.

44. Ellickson, *Alternatives to Zoning*, *supra* note 5, at 762-66.

45. Ellickson, *Suburban Growth Controls*, *supra* note 5, at 418-22. For similar reasons, Michelle White proposed taxing local governments that engage in excessive zoning. Michelle J. White, *Suburban Growth Controls: Liability Rules and Pigovian Taxes*, 8 J. LEGAL STUD. 207, 209-10 (1979).

46. See RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN*, at x, 130-34 (1985).

47. Siegan, *supra* note 5, at 91-129. Houston does not have a zoning code, but—contrary to common belief—it does have some substantial land-use regulations, including minimum lot-size requirements for single-family dwellings, restrictions on building townhouses, and minimum parking requirements. Michael Lewyn, *How Overregulation Creates Sprawl (Even in a City Without Zoning)*, 50 WAYNE L. REV. 1171, 1177-94, 1199-1204 (2004).



together.<sup>48</sup> While identifying nuisances is not difficult, it was a bit unclear what form the gains from colocation took. In his prescient discussion of them, Ellickson noted that our knowledge of the benefits of density was “still fragmentary.”<sup>49</sup> Similarly, critiques of the Tiebout model frequently focused on the externalities of local governmental decisions when making zoning policy, or on what cities failed to include in their consideration when making zoning decisions. These criticisms, however, were not particularly clear about exactly what it was that cities were failing to consider. As noted above, much of their focus was on fiscal externalities, which are certainly real but are as dependent on the tax system enacted by the state as they are on the zoning regime.<sup>50</sup> Claims that such development led to “sprawl” are similarly common, but lack a clear definition of what sprawl is. The development of modern “agglomeration” economics, which only blossomed as a field in the 1980s, stepped into this void.

Agglomeration economists aim at a somewhat different and larger question: Why do cities form in the first place?<sup>51</sup> After all, there have to be benefits to residents and businesses from crowding into cities that match the costs of congestion—e.g., higher land costs, increased crime, general frustration—or else no one would live or locate businesses in cities.<sup>52</sup> The

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48. See Ellickson, *Alternatives to Zoning*, *supra* note 5, at 694-97.

49. Ellickson, *Suburban Growth Controls*, *supra* note 5, at 443.

50. Schleicher, *supra* note 6, at 1544-45.

51. For a fuller summary of this work, see *id.* at 1515-29. This literature has mostly been ignored in legal scholarship, at least until recently. In the last few years, however, the insights of agglomeration economics have been employed by a few scholars, particularly Clay Gillette, Steven Eagle, Rick Hills, Daniel Rodriguez, Richard Schragger, and me. See, e.g., GILLETTE, *supra* note 37, at 72-105 (discussing how the gains from agglomeration economics permit local governments to engage in redistribution); Steven J. Eagle, *Public Use in the Dirigiste Tradition: Private and Public Benefit in an Era of Agglomeration*, 38 *FORDHAM URB. L.J.* 1023, 1070-74 (2011) (using agglomeration economics to discuss issues in government takings); Roderick M. Hills & David Schleicher, *The Steep Costs of Using Noncumulative Zoning To Preserve Land for Urban Manufacturing*, 77 *U. CHI. L. REV.* 249, 262-67 (2010) (discussing the effect of noncumulative zoning on agglomeration economics); Daniel B. Rodriguez & David Schleicher, *The Location Market*, 19 *GEO. MASON L. REV.* 637 (2012) (arguing that zoning rules frequently move development around inside a city to the detriment of agglomerative efficiency); Schleicher, *supra* note 6, at 1525-34 (discussing tensions between agglomeration economic models and the Tiebout model); David Schleicher, *I Would, but I Need the Eggs: Why Neither Exit nor Voice Substantially Limits Big City Corruption*, 42 *LOY. U. CHI. L.J.* 277, 281-84 (2011) (exploring how agglomeration economics explain a greater degree of corruption in big city local governments); Richard C. Schragger, *Rethinking the Theory and Practice of Local Economic Development*, 77 *U. CHI. L. REV.* 311 (2010) (claiming city policies do little to generate economic growth).

52. Usually agglomeration economists refer to the negative side of density as congestion costs, but this elides two different types of harms. See Schleicher, *supra* note 6, at 1528-29. True

answer that agglomeration economists give is that close physical proximity between individuals and firms provides them with an increased ability to learn and trade. Or, as Robert Lucas put it, “What can people be paying Manhattan or downtown Chicago rents *for*, if not for being near other people?”<sup>53</sup>

The gains from proximity come in three basic flavors. The first is reduced transport costs for goods—it’s cheaper to ship things cross-town than cross-country.<sup>54</sup> Factories that supply one another with goods collocate, with auto parts suppliers moving to Detroit to be near car manufacturers, creating a positive feedback loop. Paul Krugman won his Nobel Prize in part for explaining how “backward and forward linkages” between producers of goods could lead to regional success or failure and patterns of trade.<sup>55</sup> Shipping costs, and the need to reduce them, played probably the central role in determining how cities developed over the course of American history.<sup>56</sup> But this story does not do much to explain why individuals and businesses continue to locate in cities, as domestic shipping costs have become rounding errors due to innovations ranging from the combustion engine to the shipping container.

The second major kind of agglomerative gains are market-size effects, particularly in labor markets. Being part of a big labor market provides employees with a greater ability to match skills to jobs, an opportunity to specialize, and insurance against the failure of a single employer. We also see

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congestion costs are the increased expenses caused by many people crowding into a small area. Higher land costs are the primary congestion cost, but traffic and things like noise or other forms of pollution also fall into this camp. Crime, however, is best thought of as a negative agglomeration. Density provides the same type of benefits to criminals that it does to other professions—forward and backward linkages between primary producers and secondary ones (between robbers and fences), the efficiency effects of having a large number of targets (e.g., the ability to specialize in, say, one particular form of purse snatching), and information spillovers between criminals (although there are probably fewer information spillovers among criminals in cities than in the densest agglomeration of criminals: prisons).

53. Lucas, *supra* note 6, at 39.

54. Schleicher, *supra* note 6, at 1516-20.

55. Krugman was awarded the Nobel Prize in 2008 for “his analysis of trade patterns and location of economic activity.” *The Sveriges Riksbank Prize in Economic Sciences in Memory of Alfred Nobel 2008, Paul Krugman*, NOBEL PRIZE, [http://nobelprize.org/nobel\\_prizes/economics/laureates/2008/index.html](http://nobelprize.org/nobel_prizes/economics/laureates/2008/index.html) (last visited Oct. 29, 2012). For a clear explanation of how “backward and forward linkages” can drive the location decisions of businesses, see FUJITA ET AL., *supra* note 6, at 4-6.

56. See Edward L. Glaeser & Janet E. Kohlhase, *Cities, Regions and the Decline of Transport Costs*, 83 PAPERS REGIONAL SCI. 197, 198-99 (2004) (arguing that the decline in transport costs explains the history of American cities); Edward L. Glaeser & Giacomo A.M. Ponzetto, *Did the Death of Distance Hurt Detroit and Help New York?*, in AGGLOMERATION ECONOMICS 303, 305 (Edward L. Glaeser ed., 2010) (arguing that the decline in transport costs harmed cities that relied on industrial agglomerations while it helped cities that relied on knowledge transfers among skilled residents); Schleicher, *supra* note 6, at 1549-54 (same).

market-size effects in retail markets: people like to shop in collections of stores rather than in dispersed ones, leading to extreme concentrations like the thousands of diamond merchants that work on one block of 47th Street in Manhattan.<sup>57</sup> There are market-size effects that drive urbanization even in non-transactional “markets,” like dating markets. The bigger dating market in cities makes it easier for singles to find people to date who fit their preferences and provides insurance that a single breakup will not result in going without a date. Notably, and importantly, some market-size effects matter at the regional level—labor markets are largely regional<sup>58</sup>—but some are extremely local, like the diamond merchants of 47th Street.

Finally, there are information spillovers. Firms and individuals like to locate near each other so they can learn from one another. There is strong evidence that both wage levels and wage growth are higher in cities than in rural areas because cities provide individuals with a rich learning environment that promotes the development of human capital.<sup>59</sup> Patent applications cite other patents from the same region at a higher-than-expected rate, suggesting learning across inventors.<sup>60</sup> And there is strong correlation between new industries and urbanization, suggesting that the patron saint of agglomeration economists, Jane Jacobs, was right when she claimed that “new work” is

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57. Lauren Weber, *The Diamond Game, Shedding Its Mystery*, N.Y. TIMES, Apr. 8, 2001, <http://www.nytimes.com/2001/04/08/business/the-diamond-game-shedding-its-mystery.html>.
  58. Metropolitan statistical areas—the Census Bureau’s term for regions—are defined in terms of commuting (and population). See *About Metropolitan and Micropolitan Statistical Areas*, U.S. CENSUS BUREAU, <http://www.census.gov/population/metro/about> (last visited Oct. 29, 2012) (noting that outlying counties are included in metropolitan statistical areas only if there is a high degree of social and economic integration with the urban core, as measured by commuting to work).
  59. See Edward L. Glaeser & David C. Maré, *Cities and Skills*, 19 J. LAB. ECON. 316, 316-19 (2001) (finding that the thirty-three percent urban wage premium in cities is partially a function of faster increases in wages among urban residents, and that wage levels stay constant when urban residents move away from cities, suggesting that these are real productivity gains).
  60. The strongest direct evidence of spillovers comes from research on patents. Patents are far more likely to cite other patents developed nearby, and urban density is correlated with increased patent applications per capita. Adam B. Jaffe, Manuel Trajtenberg & Rebecca Henderson, *Geographic Localization of Knowledge Spillovers as Evidenced by Patent Citations*, 108 Q.J. ECON. 577, 588-91 (1993) (finding that patent applications are more likely to cite other patents from nearby inventors); Gerald Carlino, Satyajit Chatterjee & Robert Hunt, *Urban Density and the Rate of Invention* 3 (Fed. Reserve Bank of Phila., Working Paper No. 06-14, 2006), <http://www.philadelphiafed.org/research-and-data/publications/working-papers/2006/wp06-14.pdf> (finding that population density is positively correlated with patents per person).

generated by interactions among the densely packed.<sup>61</sup> Spillovers happen at the firm level as well, both inside industries as best practices are learned, and between them as methods of production jump from industry to industry.<sup>62</sup>

Agglomeration economics helps explain what is lost when city planners move development around.<sup>63</sup> When planners use zoning rules to move development around a city, they may reduce nuisances, but they also interfere with what Jacobs called the “sidewalk ballet” of urban development, the rich interactions individuals on a block create among themselves.<sup>64</sup> When development is forced to move, we see what Ellickson referred to as “micromisallocations’ in the location of activities.”<sup>65</sup> Zoning rules can reduce the depth of very local markets or stop information spillovers from occurring because they distort where people and firms locate inside a city. When developers “buy” the right to build, they partially represent the interests of the rest of the region—they know they have to sell their property to someone—but only partially, as there is consumer as well as producer surplus, and most developers do not produce projects of sufficient scale to capture these types of spillovers.

Changes in the economy have increased the cost of these “micromisallocations.” Cities have grown increasingly reliant on being hubs for commercial and social activity, particularly for information spillovers among educated residents, as the decline in shipping costs in the second half of the twentieth century allowed manufacturers to move to cheaper and more rural locations.<sup>66</sup> In an economy that relies heavily on the free flow of ideas, say, among colocating software engineers in Silicon Valley, zoning can be particularly costly, as it can restrict entry into human capital-enriching urban

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61. See JANE JACOBS, *THE ECONOMY OF CITIES* 50-51, 122 (1969). One fascinating recent paper found that “new work”—defined in the paper as jobs in newly created occupation titles in U.S. Commerce Department classifications—is significantly more likely to appear in cities dense with college graduates and with a wide variety of firms. Jeffrey Lin, *Technological Adaptation, Cities, and New Work*, 93 *REV. ECON. & STAT.* 554, 555 (2011).

62. See ALFRED MARSHALL, *PRINCIPLES OF ECONOMICS* 271 (8th ed. 1953) (“The mysteries of the trade become no mysteries; but are as it were in the air . . .”). As Robert Lucas noted, “New York City’s garment district, financial district, diamond district, advertising district and many more are as much intellectual centers as is Columbia or New York University.” Lucas, *supra* note 6, at 38.

63. See Rodriguez & Schleicher, *supra* note 51, at 647-56.

64. JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* 44, 50 (1961).

65. Ellickson, *Suburban Growth Controls*, *supra* note 5, at 409.

66. See Glaeser & Kohlhase, *supra* note 56, at 198-99; Glaeser & Ponzetto, *supra* note 56, at 305; Edward L. Glaeser & Albert Saiz, *The Rise of the Skilled City*, *BROOKINGS-WHARTON PAPERS ON URB. AFF.*, 2004, at 47 (finding that human capital externalities have grown in importance in determining urban growth).

areas and separate types of uses and thereby reduce potential spillovers.<sup>67</sup>

Just as zoning harms agglomeration inside cities, it does so across cities. As I have argued elsewhere, if individuals get benefits from locating in specific places in a region, then requiring individuals and businesses to move from that location in order to receive their preferred package of local government services is something like a tax, forcing development away from its preferred location.<sup>68</sup> Zoning exacerbates this by further spreading development apart. The externalities created by sorting are not dependent on the tax system; they come in the form of reduced regional agglomerative efficiency.<sup>69</sup> Agglomeration can also explain why the threat of exit might not reduce local restrictiveness. If localities are attractive for reasons other than governmental policies—that is, because of the agglomeration benefits created by their residents—governments need not be as responsive to exit threats.<sup>70</sup>

Further, reductions in the efficiency of agglomeration do not merely entail the static costs that the classic case against zoning focused on—they also matter

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67. This is Ryan Avent's central argument. See *infra* notes 84-89 and accompanying text.

68. Schleicher, *supra* note 6, at 1543.

69. It is worth taking a moment to compare the similarities and differences between this line of critique and criticisms of modern zoning coming from the architects, city planners, and theorists associated with "New Urbanism." In terms of their characterization of the negative effects of current policy, the basic line is similar—minimum lot zoning rules and restrictions on mixed-use development reduce density and inhibit interaction in ways that are costly to the economy and life generally. See AVENT, *supra* note 11, at 1108-66 (presenting these arguments from an agglomerative economics perspective); DUANY ET AL., *supra* note 2, at 39-84 (presenting these arguments from a new urbanist perspective). However, the positive recommendations that follow take a very different form: new urbanists generally recommend that use-based zoning be replaced with "form-based zoning," removing most limitations on different uses for buildings and replacing them with strict limitations on the size and shape of buildings in ways that encourage graduated density (bigger in cities and smaller in rural areas along a principle called the urban-rural transect). New urbanists also favor low-rise mixed-use development and particular forms of private development, like houses with front porches and short setbacks to encourage socializing. See DUANY ET AL., *supra* note 2, at 10-11, 218-27. From a more market-driven perspective, this is excessively proscriptive. There is no reason to favor density over spread-out development if people prefer the latter, aside from environmental externalities that could more easily be responded to with other policies like carbon taxes or congestion charges. Cf. AVENT, *supra* note 11, at 739 ("I can't say what the right level of density is. I doubt anyone can."). Nor is there any reason to be particularly specific about building form—if someone wants to build a tower in the woods or a building downtown in an untraditional style, there is no particular reason to stop them aside from ordinary concerns about nuisances. But this opposition should not be taken too far. Form-based proposals are almost surely less restrictive than the use-based zoning regimes that exist in most places today, both in terms of heights and limits on uses.

70. See Schleicher, *supra* note 6, at 1530-45.

to economic growth.<sup>71</sup> Modern theorists of economic growth argue that information externalities help individuals generate the new technologies that drive growth.<sup>72</sup> Lucas famously linked his model of endogenous growth to Jacobs's work on how human capital develops in cities through information spillovers across industries.<sup>73</sup> Wages are about thirty-five percent higher in cities, and research shows that this is because urban residents tend to have greater wage growth than residents in rural areas, suggesting that growth in human capacity is enhanced by density and learning from closely situated others.<sup>74</sup> Estimates of the effect of doubling density on productivity have been all positive but wildly mixed in amount, ranging from two percent to twenty-eight percent.<sup>75</sup> A number of scholars have argued that more than half of the variation in productivity across states can be explained by density.<sup>76</sup> Leading contemporary writers on economic growth point to zoning's effect on density as a major limit on American economic growth. For instance, Tyler Cowen, the author of one of the most discussed recent books on economic growth, points to reducing limits on density as one of the few policy levers that the United States could use to achieve the type of high growth rates it experienced in the middle of the twentieth century.<sup>77</sup>

Thus, the economic case for zoning, while still very much in question, has weakened over time. As we will see in the next Section, however, this criticism of zoning has not slowed its progress.

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71. Recent work has suggested that the effect of information spillovers increases with density: the closer together workers with high human capital are, the greater the increases in productivity. Jaison R. Abel, Ishita Dey & Todd M. Gabe, *Productivity and the Density of Human Capital*, FED. RES. BANK OF N.Y. 2-3 (rev. Sept. 2011), [http://www.newyorkfed.org/research/staff\\_reports/sr440.pdf](http://www.newyorkfed.org/research/staff_reports/sr440.pdf).

72. See Schleicher, *supra* note 6, at 1523-28.

73. Lucas, *supra* note 6, at 38-39.

74. See, e.g., Glaeser & Maré, *supra* note 59, at 316-17 (finding that the urban wage premium is a function of faster increases in wages among urban residents); Edward L. Glaeser & Matthew G. Resseger, *The Complementarity Between Cities and Skills*, 50 J. REGIONAL SCI. 221 (2010) (finding that density increases productivity in cities with skilled residents but not in cities with less skilled residents).

75. AVENT, *supra* note 11, at 620 (reviewing the literature and noting the range in estimates from two percent to twenty-eight percent).

76. See *id.* at 613-14 (reviewing the literature).

77. Tyler Cowen and Matthew Yglesias, BLOGGINGHEADS.TV 21:09 to 23:05 (Feb. 14, 2011), <http://bloggingheads.tv/videos/2893>.

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*B. Changes in Zoning Regimes over Time*

As scholars debated the costs and benefits of zoning in theory, enormous change occurred on the ground. Over the last forty and particularly the last twenty years, zoning regimes seem to have become much stricter. One way to assess the stringency of land-use regimes is to compare the cost of building housing to the actual cost of housing. Absent supply restrictions, we might expect the cost of housing to roughly equal the cost of empty land plus construction costs. As Edward Glaeser, Joseph Gyourko, and Raven Saks have shown, for most of the twentieth century, this relationship held up. During the 1970s, there were only three metropolitan areas—those of San Francisco, Los Angeles, and San Diego—where the cost of housing was substantially higher than the cost of building housing.<sup>78</sup> In the 1980s, gaps had emerged in other West Coast markets, from Seattle to Sacramento, and throughout the Northeast, including New York, Washington, D.C., and Boston. In the 1990s, gaps emerged in a large number of interior markets as well, although by no means all.<sup>79</sup> Notably, where we have seen such gaps emerge, they have become increasingly large. In the most regulated markets, supply restrictions—or as Glaeser and his coauthors call it, the “regulatory tax”—are responsible for one-third to one-half of the price of homes.<sup>80</sup>

Notably, the result of these supply restrictions has been to shift population across the country. That is, land-use regulations may do more than create “micromisallocations” of development—they may also create macro ones.

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78. Glaeser, Gyourko, and Saks compare the prices of an equal amount of developed land and undeveloped land—two acres with two houses to two acres with one house. In theory, without zoning regulations, the price should be equal except for the cost of building houses. And in fact, in regions where it is easy to build, they are equal. But in areas with lots of restrictions, they find huge “regulatory taxes.” They also find that high cost areas have similar average lot sizes as lower cost areas, suggesting severe limitations on subdividing property. See Glaeser et al., *Why Is Manhattan So Expensive?*, *supra* note 7, at 356–61; Glaeser & Gyourko, *Zoning’s Steep Price*, *supra* note 7, at 25–30; Glaeser et al., Working Paper, *Housing Prices*, *supra* note 7, at 4–7; see also William A. Fischel, *The Evolution of Homeownership*, 77 U. CHI. L. REV. 1503, 1515–16 (2010) (“Before the 1970s, it was difficult to discern the impact of zoning on general housing prices. After the 1970s, regions that had the most restrictive zoning—California and the Northeast—had the highest prices. This was not just a bubble. The bicoastal housing premium, which had not prevailed before 1970, became persistent. The new exclusion also probably encourages metropolitan-area sprawl.”).

79. These cities where the cost of housing substantially exceeds the cost of construction score high on surveys aimed at discovering which regions are most restrictive of new building, and therefore support these findings. See Joseph Gyourko, Albert Saiz & Anita Summers, *A New Measure of the Local Regulatory Environment for Housing Markets: The Wharton Residential Land Use Regulatory Index*, 45 URB. STUD. 693, 713 (2008).

80. Glaeser et al., *Why Is Manhattan So Expensive?*, *supra* note 7, at 335.

Interestingly, when the classic cases for and against zoning were being developed, this seemed impossible, as scholars of all stripes assumed that some local governments in every metropolitan area would accept new development except where state and regional governments worked with cities to restrict housing growth, as in Hawaii. For instance, Ellickson wrote in 1977: “[I]t is highly unlikely that local land-use controls have distorted the allocation of population or activities *among metropolitan areas* in the United States.”<sup>81</sup> But today, metropolitan areas that do not substantially restrict new development, like Houston and Atlanta, have seen huge population inflows with small or no increases in the price of housing, while the richest and most productive regions, like San Francisco, Boston, and New York, have seen huge price increases but no population increases. (Krugman calls these two areas “Flatland” and the “Zoned Zone,” respectively.<sup>82</sup>) This misallocation harms the national economy. “[I]t’s a bad thing for the country that so much growth is heading to Houston and Sunbelt sister cities Dallas and Atlanta,” Glaeser notes. “These places aren’t as economically vibrant or as nourishing of human capital as New York or Silicon Valley. When Americans move from New York to Houston, the national economy simply becomes less productive.”<sup>83</sup>

In his new book, *The Gated City*, Ryan Avent has shown that most of the growth in productivity and wages in the United States has come from the Zoned Zone, but that contrary to expectations (and historical patterns), people have moved away from these flourishing areas.<sup>84</sup> Further, the most productive and highest paying sectors of the economy (e.g., technology and finance), which are heavily located in the Zoned Zone, have not added much in the way of employment in the last twenty years, while less productive and remunerative sectors have been responsible for almost all new job growth in the United States. The best explanation for this, Avent argues, is that entry into the regions with high productivity is gated by zoning, keeping individuals out and ensuring that the growing sectors are not able to add more workers because they would have to pay to offset the increasing cost of living.<sup>85</sup> This hypothesis is borne out in recent research by Peter Ganong and Daniel Shoag. From 1880 to 1980, average U.S. state incomes continuously converged: “one of the most

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81. Ellickson, *Suburban Growth Controls*, *supra* note 5, at 409.

82. Krugman, *supra* note 12.

83. See Glaeser, *supra* note 12.

84. AVENT, *supra* note 11, at 883-98.

85. *Id.* at 883-968; see also Raven E. Saks, *Job Creation and Housing Construction: Constraints on Employment Growth in Metropolitan Areas* 2-3 (Harvard Univ. Joint Ctr. for Hous. Studies, Working Paper No. W04-10, 2004), [http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/wo4-10\\_saks.pdf](http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/wo4-10_saks.pdf) (finding that land-use restrictions reduce employment gains).



striking relationships in modern macroeconomics.”<sup>86</sup> Population also flowed from poor states to rich ones. Since 1980, however, convergence in incomes has slowed substantially, and population flows to rich states have stopped. Ganong and Shoag show that these outcomes are largely a function of land-use regulation. While income convergence has continued in states with little land-use regulation, rich states with more restrictive land-use regimes have impeded population inflows and reduced convergence in incomes.

Silicon Valley, our fastest growing modern boomtown, illustrates this phenomenon perfectly. During the first dot-com boom in the late 1990s, Silicon Valley actually *lost* residents as housing prices appreciated at a higher rate than did rapidly rising wages among residents and profits from firms in the area.<sup>87</sup> Further, between 2000 and 2009, the Valley only gained 100,000 residents and actually lost 250,000 domestic residents (immigrants made up the balance). This is despite the fact that, in 2009, the average wage in Silicon Valley was \$85,000, roughly \$35,000 above the national median wage. By comparison, the median wage in Phoenix was about sixty percent of the Silicon Valley average, but Phoenix gained over half-a-million Americans between 2000 and 2009.<sup>88</sup> Land-use restrictions, AVENT claims with substantial empirical backing, have limited employment, wages, and wage growth across the economy by restricting access to the nation’s most productive sectors.<sup>89</sup>

It is extremely hard to determine when any given change in zoning policy is having a negative or positive effect, as both restricting supply and reducing nuisances serve to increase the prices of neighboring properties.<sup>90</sup> However, some economic consensus is forming that, at least for the nation’s largest and richest metropolitan areas, land-use restrictions have become much too strict, with a number of studies showing that the run in property values due to

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86. Peter Ganong & Daniel Shoag, *Why Has Regional Convergence in the U.S. Stopped?* 1 (Harvard Kennedy Sch., Working Paper No. RWP12-028, 2012), <http://ssrn.com/abstract=2081216>.

87. AVENT, *supra* note 11, at 799-850.

88. *Id.* at 157.

89. *Id.* at 902-1296.

90. The effect of zoning will in almost all cases—good or bad—be to increase the value of nearby housing, because zoning will reduce nuisances (good) or restrict supply (bad). The best possible measure would be to study the value of all land in a region before and after some change in zoning rules (preferably one created exogenously), so that all effects on property markets are captured and one does not have to worry about governments reacting to changes in the property market. But zoning changes are not created exogenously, and the regional housing market is sufficiently big and subject to other forces that any individual zoning amendment is unlikely to register much effect.

zoning is mostly due to supply restrictions, not nuisance reduction.<sup>91</sup> Even modern zoning's most sophisticated defenders, like Fischel, believe this: "The problem is that local zoning allocates too little land for all uses, including housing. This withdrawal of land from available supply, and the difficulty of getting it back into play, causes housing prices everywhere to be too high and probably causes excessive metropolitan decentralization . . . ."<sup>92</sup>

Further, the huge run-up in housing prices without any population inflows in regions where zoning restrictions are known to be strict is a stark fact. It is strongly consistent with the claim that zoning serves as a major supply restriction, and largely inconsistent with other, more benign stories about the effects of zoning.<sup>93</sup> Similarly, market behavior during housing booms and crashes is consistent with zoning rules having major effects on the housing market.<sup>94</sup> Heavily zoned areas see huge price rises, as the increase in demand is not matched by increases in supply; less zoned areas see small increases in price during the boom because supply followed demand. During the last boom, a few notable less regulated areas like Las Vegas saw a bubble form, during which increases in supply did not stop temporary price surges, but then saw major crashes that brought the cost of new housing in line with construction costs.<sup>95</sup>

The other major trend has been an expansion in central city land-use restrictions, from increased use of historical preservation to lower limits for the heights of new buildings. Consider facts gathered about Manhattan, the archetypal central city, by Glaeser, Gyourko, and Saks.<sup>96</sup> In the go-go 1950s

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91. See, e.g., Paul Cheshire & Stephen Sheppard, *The Welfare Economics of Land Use Planning*, 52 J. URB. ECON. 242, 243 (2002); Glaeser et al., *Why Is Manhattan So Expensive?*, *supra* note 7, at 362-67; David Albouy & Gabriel Ehrlich, *Metropolitan Land Values and Housing Productivity* 23-24 (Nat'l Bureau of Econ. Research, Working Paper No. 18,110, 2012), <http://www.nber.org/papers/w18110>.
  92. Fischel, *supra* note 78, at 1525. In his defense, Fischel has been consistent in warning about the agglomeration-based costs of zoning regimes. FISCHEL, *ECONOMICS OF ZONING LAWS*, *supra* note 4, at 269-70.
  93. It is inconsistent with stories related to nuisance minimization unless either nuisances have gotten far worse recently (or people care about them more now), or they were insufficiently protected against in the past. It is inconsistent with a "zoning does not matter" story. That prices are going up means that people want to live in these regions—there is demand—and unless there are restrictions, this increase in demand should also result in an increase in the number of residents.
  94. See GLAESER, *TRIUMPH OF THE CITY*, *supra* note 6, at 188-89; Glaeser et al., *supra* note 10, at 198-99.
  95. See GLAESER, *TRIUMPH OF THE CITY*, *supra* note 6, at 188; Glaeser et al., *supra* note 10, at 204-05.
  96. Glaeser et al., *Why Is Manhattan So Expensive?*, *supra* note 7, at 335-51.

and 1960s (and in all earlier periods), the pace of building in Manhattan increased when demand for housing increased. When demand for living in New York increased in the 1980s and 1990s, however, the zoning regime began to seriously limit new building. For instance, during the entire 1990s, the housing stock in Manhattan increased by only about 21,000 units, in comparison to an increase of 13,000 in 1960 alone.<sup>97</sup> Unsurprisingly, because supply was not allowed to meet demand, housing prices skyrocketed.<sup>98</sup> The “regulatory tax” is now roughly fifty percent, much higher than in the rest of the region.<sup>99</sup> The average price of an apartment in Manhattan in 2011 was \$1.43

97. *Id.* at 332-33.

98. Two quick notes: First, high prices in big cities have nothing to do with the housing bubble—the effects of these restrictions were seen well before any bubble formed. Second, these price increases were not the result of rent control limiting supply. The number of rent-controlled and rent-stabilized apartments has been falling since the 1970s due to vacancy decontrol and luxury decontrol. See Guy McPherson, *It's the End of the World As We Know It (and I Feel Fine): Rent Regulation in New York City and the Unanswered Questions of Market and Society*, 72 *FORDHAM L. REV.* 1125, 1146 n.164 (2004) (noting that the number of rent-controlled and rent-stabilized apartments has been falling since the 1970s); David W. Chen, *Bit by Bit, Government Eases Its Grip on Rents in New York*, N.Y. TIMES, Nov. 19, 2003, <http://www.nytimes.com/2003/11/19/nyregion/bit-by-bit-government-eases-its-grip-on-rents-in-new-york.html>; Christine Haughney, *Vanishing Treasure: The Rent-Regulated Apartment*, N.Y. TIMES, May 24, 2010, <http://www.nytimes.com/2010/05/25/nyregion/25appraisal.html>; Dennis Hevesi, *The Slow Fadeout of Rent-Regulated Apartments*, N.Y. TIMES, Apr. 10, 2005, <http://www.nytimes.com/2005/04/10/realestate/10cov.html>. One move toward more controlled rents has been the rise in the number of so-called “80/20” buildings, in which, under a federal program, developers are allowed access to federal tax-exempt credit from state and local bonds if twenty percent of the apartments are rented at rates affordable to lower- and middle-income families. The remaining eighty percent are rented at market rates but move into rent stabilization. Building an 80/20 building also gives developers in the most developed parts of Manhattan access to state tax breaks that they otherwise would not be able to access. See Josh Barbanel, *Residential Real Estate; Subsidy Program Makes Its Way to Brooklyn*, N.Y. TIMES, Dec. 26, 2003, <http://www.nytimes.com/2003/12/26/nyregion/residential-real-estate-subsidy-program-makes-its-way-to-brooklyn.html> (explaining the expansion of the 80/20 program outside of Manhattan); Marc Santora, *Across the Hall, Diversity of Incomes*, N.Y. TIMES, Sept. 2, 2011, <http://www.nytimes.com/2011/09/04/realestate/across-the-hall-diversity-of-incomes.html> (describing the increasing reliance on 80/20 in New York development).

99. Glaeser et al., *Why Is Manhattan So Expensive?*, *supra* note 7, at 350-51. And this is Manhattan, an island so devoted to growth and density that Rem Koolhaas, in his brilliant “retroactive manifesto” for the borough, wrote: “Manhattanism is the one urbanistic ideology that has fed, from its conception, on the splendors and miseries of the metropolitan condition—hyper-density—without once losing faith in it as the basis for a desirable modern culture. *Manhattan's architecture is a paradigm for the exploitation of congestion.*” REM KOOLHAAS, *DELIRIOUS NEW YORK* 10 (1994). Like Ellickson's claim that zoning would never cause housing price increases at the regional level, Koolhaas's belief that Manhattan would never lose faith in the benefits of density has been undone by the relentlessly increasing restrictiveness of modern planning.

million, and the average rental cost was over \$3,300 a month.<sup>100</sup> The same thing happened in Washington, D.C., during the first decade of the 2000s. A spike in demand drove prices up, but instead of a rise in new construction, there was actually a large *decrease* in the number of new housing permits granted.<sup>101</sup>

Vicki Been, along with others, has shown how the process of “shrink wrapping” a big city can take place.<sup>102</sup> Mayor Michael Bloomberg made a

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100. Marc Santora, *The Lease Is Up, and Now, So Is the Rent*, N.Y. TIMES, Oct. 14, 2011, <http://www.nytimes.com/2011/10/16/realestate/rents-in-manhattan-rebound-to-record-highs.html> (noting that the average rental price in Manhattan in 2011 was \$3,331); Vivian S. Toy, *Rise in High-End Sales Buys Manhattan Housing Market*, N.Y. TIMES, July 1, 2011, <http://www.nytimes.com/2011/07/01/nyregion/manhattan-housing-market-lifted-by-rise-in-high-end-sales.html> (noting that the average apartment price was \$1.43 million in the second quarter of 2011).
101. Matthew Yglesias, *In Defense of Chart-Reading*, THINKPROGRESS (July 21, 2011, 1:45 PM), <http://thinkprogress.org/yglesias/2011/07/21/275454/in-defense-of-chart-reading>. It should be noted, however, that after a long-term downward trend, there was a large increase in new building permits in D.C. in 2011. Lynda DePillis, *The Apartment Iceberg Cometh*, WASH. CITY PAPER: HOUSING COMPLEX (June 13, 2012, 7:30 AM), <http://www.washingtoncitypaper.com/blogs/housingcomplex/2012/06/13/the-apartment-iceberg-cometh>. Contrast this with a relatively unrestricted property market. When prices rose recently in the River Oaks neighborhood in Houston, apartment construction followed almost automatically, with more new housing being constructed in this area alone in 2012 than was built in the entirety of Silicon Valley in 2011. See Chris Bradford, *This Is How Housing Markets Are Supposed To Work*, AUSTIN CONTRARIAN (Mar. 19, 2012, 12:48 AM), <http://www.austincontrarian.com/austincontrarian/2012/03/this-is-how-housing-markets-are-supposed-to-work.html>.
102. See Amy Armstrong et al., *How Have Recent Rezoning Affected the City's Ability To Grow?*, FURMAN CENTER FOR REAL ESTATE & URB. POL'Y 8 (Mar. 2010), [http://furmancenter.org/files/publications/Rezoning\\_Furman\\_Center\\_Policy\\_Brief\\_March\\_2010.pdf](http://furmancenter.org/files/publications/Rezoning_Furman_Center_Policy_Brief_March_2010.pdf) (finding that gains in housing capacity in New York from rezonings have been eroded by a substantial number of downzonings); see also Simon T. McDonnell, Josiah Madar & Vicki Been, *How Do New York City's Recent Rezoning Align with Its Goals for Park Accessibility?*, 3 CITIES & ENV'T (2010), <http://digitalcommons.lmu.edu/cate/vol3/iss1/6> (showing that downzoning has substantially eroded upzoning gains for housing that is close to city parks); Kareem Fahim, *Despite Much Rezoning, Scant Change in Residential Capacity*, N.Y. TIMES, Mar. 21, 2010, <http://www.nytimes.com/2010/03/22/nyregion/22zoning.html> (quoting Been as saying that “[t]here are an awful lot of downzonings and contextual-only zonings that may limit the city's ability to” meet Mayor Bloomberg's goal of housing one million new residents by 2030). The term “shrink-wrapping” was coined by Rick Hills. Rick Hills, *Shrinking-Wrapping NYC: How Neighborhood Activists Are Strangling a City*, PRAWFSBLAWG (Nov. 29, 2009, 1:47 PM), <http://prawfsblawg.blogs.com/prawfsblawg/2009/11/shrinking-wrapping-nyc-how-neighborhood-activists-strangle-a-city.html> (summarizing Been's work on the subject); see Rick Hills, *The Big City as Gated Community: Is an Unholy and Unwitting Alliance Between Big Developers and Neighborhood Activists Strangling Our Cities?*, PRAWFSBLAWG (Sept. 5, 2011, 2:34 PM), <http://prawfsblawg.blogs.com/prawfsblawg/2011/09/the-big-city-as-gated-community-how-neighborhood-activism-can-strangle-the-economy-and-ruin-the-envi.html> (discussing work by Avent, Hills, and Schleicher).

strong political commitment to increasing the housing stock of New York City enough to house one million new residents in response to growing demand to live in the city and a crisis of affordable housing.<sup>103</sup> And in fact, under his administration, the city has approved a large number of “upzonings,” or amendments to the zoning code that allow for new buildings to rise above previous limits. But a substantial amount of the gain in potential new units was given back in “downzonings,” or reductions in the size of the zoning envelope up to which current owners of property can build as of right.<sup>104</sup> These downzonings were frequently passed with no reference during the map-amendment process to their effect on overall housing supply and were often made in attractive locations, particularly in those areas well served by mass transit. While the combination of upzonings and downzonings permitted an increase in area under the envelope between 2003 and 2007, it did so during a time when demand for housing in the city was exploding.<sup>105</sup>

Notably, big-city restrictiveness is in direct contrast with ordinary assumptions about the political economy of zoning. Scholars of all stripes make a basic division in their view of how the politics of land use work—suburbs are exclusionary, while cities are the fiefdoms of big developers. As noted above, Fischel argues that homevoters dominate small-government elections, but will be defeated in large cities by big developers in the big-city political arena.<sup>106</sup> Ellickson makes a similar claim, arguing that elite suburbs are governed by majoritarian politics in the interest of landowners while big-city politics are best described by an “influence” model, in which developers’ political muscles can overrun local opposition.<sup>107</sup> Writing within a very different tradition, political scientists like Harvey Molotch argue that big cities are “growth machines,” dominated by a “regime” of downtown builders and compliant political figures seeking to expand the local tax base by allowing development to run wild.<sup>108</sup> Scholars working in the critical legal studies tradition like Gerald

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103. Armstrong et al., *supra* note 102, at 1.

104. *Id.* at 8; Hills & Schleicher, *supra* note 21, at 83-89.

105. Armstrong et al., *supra* note 102, at 8-10.

106. FISCHEL, HOMEVOTER HYPOTHESIS, *supra* note 4, at 14-16, 90-92.

107. ELICKSON & BEEN, *supra* note 13, at 305-08; Ellickson, *Suburban Growth Controls*, *supra* note 5, at 404-09.

108. Harvey Molotch, *The City as a Growth Machine: Toward a Political Economy of Place*, 82 AM. J. SOC. 309, 309-310 (1976) (“I speculate that the political and economic essence of virtually any given locality, in the present American contest, is *growth*. I further argue that the desire for growth provides the key operative motivation toward consensus for members of politically mobilized local elites, however split they might be on other issues, and that a common interest in growth is the overriding commonality among important people in a given locale—at least insofar as they have any important local goals at all. Further, this

Frug make similar claims.<sup>109</sup>

While each of these stories explains some places at some times, none of them fits the modern reality of growth-limiting big cities. We need a new model for understanding the political economy of big-city zoning decisions. The next Part aims to provide one.

## II. LAND-USE LAW AND THE POLITICAL ECONOMY OF CITY PLANNING

Analyses of the political economy of big-city land use usually begin with facts about interest groups: developers, NIMBY landowners, construction unions, and the like. After all, these are clearly the biggest players in land-use fights, and the next Section will come back to them. But this move—common across scholars using widely divergent methodologies—fails to acknowledge that land-use decisions are not made in the aggregate, but rather are made seriatim and according to a specific and very peculiar legal procedure. This Section argues that, due to the lack of competitive political parties inside city politics, the laws governing land-use procedure substantially affect the outputs of land-use policy, and their structure biases the results toward restriction.

### *A. The Role of Procedure in the Absence of Local Party Politics*

The most important, but least remarked-upon, difference between national politics and local politics is the absence of political party competition. Most local elections are formally nonpartisan, and most cities with partisan elections are so dominated by one political party that all relevant political competition happens inside political parties and not between them.<sup>110</sup> As I have argued elsewhere, this is a result of election laws that ensure that voters see national parties on local ballots and that the membership of these parties does not

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growth imperative is the most important constraint upon available options for local initiative in social and economic reform. It is thus that I argue that the very essence of a locality is its operation as a growth machine. The clearest indication of success at growth is a constantly rising urban-area population . . . .”). David Barron has argued that local governments’ home-rule powers put them in a position of either being exclusionary or choosing rampant local development. David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2255, 2345-46 (2003). *But see* Schleicher, *supra* note 6, at 1556-58 (critiquing Barron’s conception of home rule).

109. Frug’s position on this is characteristically multifaceted, but generally conceives of big-city land-use policy as aimed at generating relentless growth, different in kind from suburban usage, although he argues that both are forms of exclusion. GERALD E. FRUG, *CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS* 143-49 (1999).

110. *See* Schleicher, *supra* note 14, at 419.

change substantially between elections.<sup>111</sup> Voters know little about individual candidates and thus rationally use national party preferences when voting for local officials, even when there is only a little correlation between preferences on local issues and national ones. When voters largely make party-affiliation decisions based on national issues, laws that require primaries in local elections and that limit party switching between elections make it difficult for local minority parties to develop city-specific brands to appeal to voters on local issues. As most cities are dominated by one party in national elections, there is little competition in local legislatures. (This is true to a lesser degree in races for mayor, as discussed below.)

Whatever the reason for the lack of locally competitive political parties, their absence influences land-use politics in a number of ways. As Gary Cox, Roderick Kiewiet, and Mathew McCubbins have shown, parties provide legislatures with their basic organizing principles.<sup>112</sup> As multimember organizations governed by majority rule, legislatures regularly suffer from inconsistency. Legislative results can cycle: a legislature can prefer proposal *A* to proposal *B*, proposal *B* to proposal *C*, and yet prefer proposal *C* to proposal *A*.<sup>113</sup> Under Kenneth Arrow's famous Impossibility Theorem, there is no way—using ordinary democratic principle—to produce a unique outcome, and the order in which issues are presented will determine the policy result.<sup>114</sup> Further, a legislature can suffer from what one might call game-theoretical breakdowns. For instance, a legislature may prefer low taxes and low spending everywhere to high taxes and high spending everywhere, but each legislator may prefer spending in her district regardless of what else occurs. Absent some way to enforce agreements through limiting the amendment process, the legislature can easily end up in the “defect” position. As Barry Weingast and John Ferejohn have shown, this type of “distributive politics” can be a stable

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111. See Elmendorf & Schleicher, *supra* note 14, at 32-49; Schleicher, *supra* note 51, at 284-89; Schleicher, *supra* note 14, at 419-30.

112. See COX & MCCUBBINS, LEGISLATIVE LEVIATHAN, *supra* note 15, at 84-97; COX & MCCUBBINS, SETTING THE AGENDA, *supra* note 15, at 18-20; KIEWIET & MCCUBBINS, *supra* note 15, at 43-55.

113. See KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES 22-23 (2d ed. 1963). Arrow's assumptions and arguments have come under substantial criticism. For the best critique in the legal literature, see Richard H. Pildes & Elizabeth S. Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 COLUM. L. REV. 2121 (1990). However, these critiques do not give any reason to doubt that legislatures that lack coordinating institutions like strong political parties can and do feature unstable preferences (whether due to cycling or distributive politics).

114. ARROW, *supra* note 113, at 22-23; Michael E. Levine & Charles R. Plott, *Agenda Influence and Its Implications*, 63 VA. L. REV. 561 (1977) (discussing how decisionmaking processes determine outcomes in the context of cycling preferences).

policy equilibrium.<sup>115</sup>

Parties provide legislatures with a way to solve these problems. Members of a party, some subset of the legislature as a whole, appoint a leader—say, the Speaker of the House—and give her the power to decide how to set the voting order on behalf of her copartisans.<sup>116</sup> Party members also give the leader tools, from the ability to assign plum committee spots to control over campaign cash, to “whip” recalcitrant members into supporting the party line.

By appointing a leader, the party members have come up with a means of avoiding cycling and game-theoretical breakdowns. But this leads to a question: Why would party members trust some leader to decide outcomes by organizing voting procedure, particularly when it occasionally limits their own ability to offer amendments that would pass? The answer lies in the nature of the delegation.<sup>117</sup> Party leaders have strong incentives to remain party leaders (being Speaker of the House is a lot more satisfying, after all, than being an opposition backbencher). As a result, legislative leaders want to maximize the political gains to the caucus of party members, lest their party lose control of the legislature and they lose their positions. Leaders do this by organizing votes in such a way as to enhance the value of the party brand or public perceptions of the party caucus as a whole. Party members are willing to give up the freedom to make amendments as they see fit because their leadership has every incentive to promote a collective image that voters will like.<sup>118</sup> On almost all issues, today’s Congress votes in party line fashion for this reason.<sup>119</sup> Notably, this constrains the ability of interest groups or other particularistic interests to dominate politics, as a party aiming to appeal to the entire electorate must make proposals that appeal to all, not just to a narrow few.<sup>120</sup>

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115. See JOHN A. FERREJOHN, *PORK BARREL POLITICS: RIVERS AND HARBORS LEGISLATION, 1947-1968*, at 233-52 (1974); Weingast, *supra* note 16, at 245.

116. COX & MCCUBBINS, *LEGISLATIVE LEVIATHAN*, *supra* note 15, at 115-23, 135-48; COX & MCCUBBINS, *SETTING THE AGENDA*, *supra* note 15, at 25-31.

117. COX & MCCUBBINS, *LEGISLATIVE LEVIATHAN*, *supra* note 15, at 87-100; KIEWIET & MCCUBBINS, *supra* note 15, at 43-55.

118. COX & MCCUBBINS, *LEGISLATIVE LEVIATHAN*, *supra* note 15, at 93-125.

119. There are issues—e.g., base closing and international trade deals—where party line voting is not particularly common, because party coalitions are split or where local demands are sufficiently strong. In these areas, we frequently see Congress resort to “extra-congressional procedure” of the type advocated in Part II. See LAWRENCE BECKER, *DOING THE RIGHT THING: COLLECTIVE ACTION AND PROCEDURAL CHOICE IN THE NEW LEGISLATIVE PROCESS 2* (2005) (coining the term “extra-congressional legislative procedures”).

120. Unsurprisingly, this does not result in policies evenly affecting all citizens. Although they need to make general appeals, parties favor policies in districts they either control or might control. See Gerald Gamm & Thad Kousser, *Parties and Pork: Historical Evidence from the American States* 22 (Am. Political Sci. Ass’n Annual Meeting Paper, 2011),



Further, the existence of party caucuses makes popular involvement in legislative politics possible. It is one of the best-established facts in modern political science that voters know very little about individual candidates or policies.<sup>121</sup> If elections are going to serve the functions we assign them—that is, produce results that are representative of the preferences of the electorate and hold incumbent officials accountable for their performance—voters need lots of help. Party labels provide voters with a shorthand guide to the policy preferences of politicians.<sup>122</sup> Further, party labels allow voters, as Morris Fiorina famously argued, to develop a “running tally” of preferences about the performance of parties over time.<sup>123</sup> As long as party labels have a roughly consistent meaning over time, voter observations about the performance of party members in the past can usefully inform voting decisions today. Putting accurate and consistent party labels on the ballot next to candidate names is the best existing tool for aiding uninformed voters. While there is a great deal of debate about how well voters perform *with* the help of such labels, there is little doubt that *without* them, voters have much less ability to contribute to the project of self-governance.

Big cities, of course, have some political competition at the primary level (or in general elections in nonpartisan cities). But voters in these elections are not given the tools—that is, clear party labels—necessary to produce much in the way of popular representation. As a result, these elections feature low turnout; little popular knowledge of candidates’ stances on issues; heavy reliance on candidates’ ethnic, racial, and gender status as a guide to voting; and extremely strong incumbency effects.<sup>124</sup> Further, the organizational strength of local political machines matters far more in these elections than in ordinary general elections because they can provide information to otherwise uninformed voters.<sup>125</sup> Local primary elections do not force politicians to be

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<http://ssrn.com/abstract=1900816> (finding that polarized parties bias statewide spending toward their constituents).

121. For a summary of this literature, see Elmendorf & Schleicher, *supra* note 14, at 8-22.

122. See ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY 238-60 (1957); ARTHUR LUPIA & MATHEW D. MCCUBBINS, THE DEMOCRATIC DILEMMA: CAN CITIZENS LEARN WHAT THEY NEED TO KNOW? 69-77 (1998).

123. See MORRIS P. FIORINA, RETROSPECTIVE VOTING IN AMERICAN NATIONAL ELECTIONS 89-106 (1981); Elmendorf & Schleicher, *supra* note 14, at 13-16.

124. Elmendorf & Schleicher, *supra* note 14, at 24-25.

125. In an interesting recent book, Seth Masket has shown that candidates promoted by strong in-party interest groups and factions dominate primary elections. SETH E. MASKET, NO MIDDLE GROUND: HOW INFORMAL PARTY ORGANIZATIONS CONTROL NOMINATIONS AND POLARIZE LEGISLATURES 8-10, 116-29 (2009). Groups ranging from the ideologically driven Lincoln Club, a group of conservative Republicans in Orange County, to more personal machines, like Maxine Waters’s organization in South Los Angeles, are able to take

particularly responsive to the electorate's preferences on citywide issues because ordinary voters just do not have enough information about the candidates, but they do force politicians to be responsive to the interests of well-organized local groups.

The lack of competitive parties creates two major differences between local legislatures and today's highly partisan Congress. First, in legislatures without much organized competition, there is no easy way to organize agreements to avoid prisoner's dilemma-style problems. As a result, noncompetitive legislatures frequently feature universal logrolls, in which each member is given the power to decide issues specific to her district.<sup>126</sup> City councils generally feature little organized competition of any type, and as a result, members end up with an outsized degree of control over issues in their districts.<sup>127</sup> Not only do individual legislators have control over issues in their districts, but these very local issues play a major role in city council elections. In primary and nonpartisan elections, the absence of on-ballot cues provided by competitive parties means that voters do not have the heuristic tools to use these elections to express their preferences on citywide issues.

Second, the laws and rules governing legislative procedure are much more important in the absence of party organization. In a partisan legislature, we can assume that procedural choices are largely epiphenomenal: the majority party

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advantage of the low turnout and even lower voter knowledge of candidates to dominate elections. Such machines matter much less in determining high-profile elections. After all, people have the tools and the information (at least more of it) to determine their vote in presidential elections without looking at a voter guide provided to them by a small political machine.

126. This insight runs through the political science literature from V.O. Key through Barry Weingast's work on distributive politics. See V.O. KEY, JR., *SOUTHERN POLITICS IN STATE AND NATION* (1949) (describing universal logrolls in one-party southern state legislatures); Barry R. Weingast, *Reflections on Distributive Politics and Universalism*, 47 *POL. RES. Q.* 319, 319-30 (1994) (summarizing literature about the same phenomenon). This can be seen directly in a recent series of empirical pieces by Gerald Gamm and Thad Kousser, which found that state legislators are given significantly more deference on bills specific to cities in their districts in uncompetitive legislatures than they are in competitive ones. See Gerald Gamm & Thad Kousser, *Broad Bills or Particularistic Policy? Historical Patterns in American State Legislatures*, 104 *AM. POL. SCI. REV.* 151 (2010); Gamm & Kousser, *supra* note 120, at 31 (finding that competitive-party states spend more money on general programs and one-party states spend more on direct aid to local governments, suggesting universal logrolling coalitions, but that polarized parties do bias statewide spending toward their constituents); see also JESSICA TROUNSTINE, *POLITICAL MONOPOLIES IN AMERICAN CITIES: THE RISE AND FALL OF BOSSES AND REFORMERS* 139-71 (2008) (showing that political monopolies—either old-style machine or reformist movements—tend to distribute money among constituents and spend less on generally applicable public goods).

127. For evidence of this phenomenon in the land-use context, see *infra* notes 154-156 and accompanying text.

simply chooses a voting order that best fits the goals of its caucus. In a nonpartisan or one-party legislature, however, legislative procedure determines the order and the method in which issues are decided. As there is no simple mechanism for changing voting procedure in order to produce the desired ends of some caucus, the formal procedure can decide the voting order. In the presence of cycling preferences, the formal legislative procedure thus can have the power to determine when cycling stops, and it is therefore central to determining the substantive result.

*B. How Land-Use Procedure Produces Strict Land-Use Policy*

Scholars working in a number of different intellectual traditions have long believed that the political influence of big developers should lead to big cities being easy places to build. And yet, zoning has become much more restrictive in our biggest and richest cities, so much so that it has begun harming regional and national economic growth.

This Section attempts to develop a theoretical argument, consistent with a number of known facts about land use, as to why this might be the case. It argues that the pathologies of legislative decisionmaking in the absence of locally competitive political parties discussed above have a big effect on local land-use decisions. Procedural rules organize land-use politics in ways that bias the results against incremental increases in the supply of housing. And deference to legislators on issues specific to their districts gives neighborhood groups outsized control over land-use decisions, leading to sharp limits on construction. These problems can explain why housing prices increased in many cities despite the influence of powerful developers.

Ever since the Hoover Administration promulgated it as a model act in the 1920s, the Standard State Zoning Enabling Act (SZEAs) has served as the basic backbone of local zoning procedure in almost all states and has been applied, at least until recently, remarkably consistently across the country.<sup>128</sup> While the details of zoning procedure are famously complex, I will deal only with the very basics of the subject, encompassing both the SZEAs and modifications to it like New York City's Uniform Land Use Review Procedure (ULURP), as the

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128. DEP'T OF COMMERCE, A STANDARD STATE ZONING ENABLING ACT UNDER WHICH MUNICIPALITIES MAY ADOPT ZONING REGULATIONS (rev. ed. 1926). The general history of the Standard State Zoning Enabling Act has been told in many locations. See, e.g., BABCOCK, *supra* note 25, at 6-7; ELLICKSON & BEEN, *supra* note 13, at 74-76; Michael Lewyn, *Twenty-First Century Planning and the Constitution*, 74 U. COLO. L. REV. 651, 655-57 (2003); Stuart Meck, *The Legislative Requirement That Zoning and Land Use Controls Be Consistent with an Independently Adopted Local Comprehensive Plan: A Model Statute*, 3 WASH. U. J.L. & POL'Y 295, 296-306 (2000).

political economy issues in which I am interested should become apparent even without delving too deeply into land-use arcana. This ten-thousand-foot perspective will obviously miss some institutional detail, but it should capture the basic structure of how zoning procedure shapes outcomes in unorganized urban legislatures.

The SZEA and the related but less widely adopted Standard City Planning Enabling Act create a land-use procedure with four basic components: plans, maps, map amendments, and variances.<sup>129</sup> The process proceeds in stages of generality. A master plan contains a basic direction for all land uses in a city, containing a statement of goals, the location of existing and proposed public facilities, and designated areas for different types of private land use.<sup>130</sup> Zoning maps are just that: maps that specify for each lot allowable land uses and the maximum height and density to which property owners can build as of right.<sup>131</sup> Although there is nothing that stops cities from regularly revising their comprehensive plans or zoning maps, neither are changed in their entirety particularly often. (New York City last did so in 1961.<sup>132</sup>)

Changes to zoning maps short of complete revisions can only be made in a few different ways. Substantial changes are effected through map amendments.<sup>133</sup> These go through an appointed board—the planning commission—for a recommendation before proceeding through the ordinary legislative process. There are some restrictions on this process, particularly the limits imposed by courts on spot zoning and contract zoning and the *Fasano-Baker* doctrine of treating some zoning changes as reviewable, “quasi-judicial” decisions rather than presumptively valid “legislative” ones and rejecting zoning changes inconsistent with the master plan.<sup>134</sup> But these are

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129. ELLICKSON & BEEN, *supra* note 13, at 86-92.

130. Charles M. Haar, “*In Accordance with a Comprehensive Plan*,” 68 HARV. L. REV. 1154, 1154-55 (1955); Charles M. Haar, *The Master Plan: An Impermanent Constitution*, 20 LAW & CONTEMP. PROBS. 353, 362-66 (1955).

131. ELLICKSON & BEEN, *supra* note 13, at 86, 90-92.

132. Norman Marcus, *New York City Zoning—1961-1991: Turning Back the Clock—but with an Up-to-the-Minute Social Agenda*, 19 FORDHAM URB. L.J. 707, 707 (1992) (noting that the last comprehensive rezoning in New York City happened in 1961). There have been a few recent successes in passing entirely new city plans and zoning maps to accommodate (or require) “Smart Growth.” See *Examples of Codes That Support Smart Growth Development*, U.S. ENVTL. PROTECTION AGENCY, <http://www.epa.gov/dced/codeexamples.htm> (last updated Oct. 30, 2012) (discussing codes that support “Smart Growth,” or development featuring mixed uses, walkable neighborhoods and a “strong sense of place”).

133. ELLICKSON & BEEN, *supra* note 13, at 91, 283.

134. *Fasano v. Bd. of Cnty. Comm’rs*, 507 P.2d 23, 26-29 (Or. 1973); see *Baker v. City of Milwaukee*, 533 P.2d 772, 779 (Or. 1975); Carol M. Rose, *Planning and Dealing: Piecemeal*

exceptions to the general deference that zoning changes receive in court.<sup>135</sup> For our purposes, the key to understanding map amendments is that they are seriatim changes to the map, considered one-by-one and limited to a specific area, without any precedential value for other zoning decisions.<sup>136</sup> The same can be said of variances, which are the other major way that zoning changes. A separate appointed body, the board of zoning appeals, can grant variances or exceptions from zoning rules with respect to a specific plot to relieve hardship or practical difficulties. Modern developments in land use have given city decisionmakers more ability to extract concessions in return for the right to build. Cities increasingly use special exceptions, in which certain uses are allowed in zones only with governmental approval, and planned-unit developments, which condition looser restrictions on the city government's approval of a project.<sup>137</sup>

A number of big cities have added a layer to this process that permits input by advisory neighborhood bodies.<sup>138</sup> New York City's ULURP is the most extensive and well known. Designed to empower local communities, ULURP adds a number of steps to the land-use decisionmaking process.<sup>139</sup> When an amendment or other change in zoning districts is proposed, it is sent to one of fifty-nine community boards, which holds public hearings and issues a nonbinding recommendation. That recommendation is then sent to the borough president, who issues her own recommendation. That goes to the city planning commission, made up of mayoral and borough-presidential appointees, which votes on the proposal (the size of the majority needed turns on whether the borough president approved the change).<sup>140</sup> The city council

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*Land Controls as a Problem of Local Legitimacy*, 71 CALIF. L. REV. 837 (1983) (describing and critiquing these limitations on local legislative authority).

135. The leading casebook describes the treatment of amendments and variances in court as "tempered deference." ELLICKSON & BEEN, *supra* note 13, at 303.

136. *Id.* at 287-94.

137. BABCOCK, *supra* note 25, at 6-11; ELLICKSON & BEEN, *supra* note 13, at 91-92.

138. See Matthew J. Parlow, *Civic Republicanism, Public Choice Theory and Neighborhood Councils: A New Model for Civic Engagement*, 79 U. COLO. L. REV. 137, 166-82 (2008); Peter W. Salsich, Jr., *Grassroots Consensus Building and Collaborative Planning*, 3 WASH. U. J.L. & POL'Y 709, 716-26 (2000).

139. N.Y.C. CHARTER & ADMIN. CODE ANN. § 197-c (N.Y. Legal Publ'g Corp. 1990); see *The Uniform Land Use Review Procedure (ULURP)*, N.Y.C. DEP'T OF CITY PLAN., <http://www.nyc.gov/html/dcp/html/luproc/ulpro.shtml> (last visited Oct. 30, 2012).

140. Seven members are appointed by the mayor, one by each of the five borough presidents, and one by the public advocate (an official elected citywide). N.Y.C. CHARTER & ADMIN. CODE ANN. § 192(a) (N.Y.C. Publ'g Corp. 1990). When a borough president rejects a proposal, the city planning commission must have nine out of thirteen votes for the project to go

must then vote on the proposal. The mayor can veto the council's decision, but the veto can be overruled by a two-thirds council supermajority. The process takes eight months on average from the time of an official proposal.<sup>141</sup>

There are other limits on building that raise the expense and complexity of getting approval to build. Several states—particularly New York and California—condition approval of private development projects on the preparation of environmental impact statements, adding substantially to the cost and time it takes for projects to be approved.<sup>142</sup> Further, historical preservation and the designation of landmarks have increasingly limited building. For instance, sixteen percent of Manhattan south of 96th Street is in historic districts, making it off limits for development unless approval is granted by the Landmarks Preservation Commission, something that virtually never happens.<sup>143</sup>

It is important to consider how interest groups interact with these procedures. The participants in the battles over land use are well known: developers and consumers (those looking to buy and those who rent) on one side; risk-averse, development-shy neighbors on the other. Absent involvement by developers, the fight between consumers of housing and neighbors is a classic Olsonian mismatch.<sup>144</sup> Consumers of housing each face a small harm when a project is rejected, as each denial only increases the cost of housing by a little bit. Further, as consumers exist throughout a city (and even outside of one), they are hard to organize. Other interest groups, like employers who might want cheap housing as a means of driving down labor costs, similarly are not particularly affected by any one map amendment.<sup>145</sup> In

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forward. This means the mayor cannot push through a project rejected by all borough presidents. *The Uniform Land Use Review Procedure (ULURP)*, *supra* note 139.

141. Michael A. Cardozo, *The Use of ADR Involving Local Governments: The Perspective of the New York City Corporation Counsel*, 34 *FORDHAM URB. L.J.* 797, 802-03 (2007).

142. See ELLICKSON & BEEN, *supra* note 13, at 368-78; Cyane Gresham, Note, *Improving Public Trust Protections of Municipal Parkland in New York*, 13 *FORDHAM ENVTL. L.J.* 259, 285-90 (2002).

143. Edward L. Glaeser, *Preservation Follies*, *CITY J.*, Spring 2010, at 62, 64 (2010). Once land falls into a historic preservation zone, it becomes effectively impossible to build housing. Only five residential buildings of more than fifteen stories have been built in historic preservation zones in southern Manhattan since 1970, and the housing growth is close to zero. (Increases caused by new buildings are offset by reductions due to conversions of apartment buildings into single-family units.) *Id.* at 65.

144. See OLSON, *supra* note 19, at 1-18 (discussing the advantage small groups facing concentrated harms from some change have in political conflicts with large groups where the benefit to each from the change is small).

145. One interesting finding in the empirical research on zoning is that local protectionism has a real but smaller effect on the cost of office space. See Glaeser et al., *Why Is Manhattan So*

contrast, neighbors each face comparatively heavy harms from new development, both from actual spillovers like increased traffic and blocked views, and from an increased supply of housing in the neighborhood, which drives down the value of their largest asset. Further, neighbors are physically proximate to one another by definition, and they are often already organized and ready to do political battle.

Moreover, disaggregated consumers have no protection in generalist political parties or majoritarian politics in urban legislatures. Unlike, say, taxpayers in Congress, who can rely at least to some degree on the interests of the major political parties in creating brands that appeal to a majority of the population, consumers of housing cannot rely on the incentives of political parties to appeal to residents citywide.<sup>146</sup>

The mayor potentially stands as a partial exception to this, as the mayor has to appeal to a broad constituency and sometimes has a profile large enough for voters to develop ideological or retrospective evaluations even without party labels to aid them.<sup>147</sup> As a result, mayors are generally thought to support development to a greater degree than city legislatures.<sup>148</sup> But strong and

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*Expensive?*, *supra* note 7, at 353-55. One explanation might be that big employers have a specific interest in getting office space in specific locations through the local approval process. A clear empirical prediction of my claim is that the more concentrated employers are—that is, the fewer of them there are—the fewer land-use controls we should see.

146. While logrolling can take place even where there are political parties, there is strong evidence that political competition leads to less pork. See Gamm & Kousser, *supra* note 120, at 1-2; *supra* note 126 and accompanying text.

147. See Schleicher, *supra* note 14, at 420, 445, 467-68.

148. See James C. Clingermayer, *Electoral Representation, Zoning Politics, and the Exclusion of Group Homes*, 47 POL. RES. Q. 969, 978 (1994) (“[S]trong mayors are inclined to be very pro-development, and the fact that mayors are generally elected at-large might reenforce that tendency.”); Richard C. Feiock & James C. Clingermayer, *Institutional Power and the Art of the Deal: An Analysis of Municipal Development Policy Adoptions*, in ECONOMIC DEVELOPMENT STRATEGIES FOR STATE AND LOCAL GOVERNMENTS 93, 102 (Robert P. McGowan & Edward J. Ottensmeyer eds., 1993). It should be noted that, however widespread this belief, it has not been tested empirically. It would be difficult to do so as changes in the strength of mayoral power are rarely adopted without other changes. For instance, the biggest change in mayoral power in American history—the move from elected mayors to the “council-manager” systems that are now used in the majority of mid-size cities—was part of a package of Progressive Era reforms including nonpartisan and at-large elections. See Richard Briffault, *Home Rule and Local Political Innovation*, 22 J.L. & POL. 1, 4-6 (2006); Schleicher, *supra* note 14, at 476 n.167. Sorting out the causal links (and endogeneity problems) would be difficult. More recently, a number of cities enhanced mayoral power, but the effect of these changes on land-use policy has not been studied. It should be said, however, that urban business interests who are usually associated with faster growth generally support strengthening mayoral power. See Richard C. Schragger, *Can Strong Mayors Empower Weak Cities? On the Power of Local Executives in a Federal System*, 115 YALE L.J. 2542, 2551-53 (2006).

high-profile mayors are the exception rather than the rule in American cities. Many cities have council-manager systems with powerless mayors.<sup>149</sup> In other cities, mayors must share their executive role and local prominence with figures ranging from county executives to school board chairs.<sup>150</sup> Even where mayors are high profile, the absence of consistent ideological coalitions that exist across elections and the lack of clear labels for largely unknown challengers means that voters in these elections still have less information than voters in national partisan elections. The type of generalist sympathies generated by mass political parties are absent in most big cities, and the existence of a high-profile executive officer only provides some mitigating majoritarian influence on local politics.

The saving grace for consumers of housing, in ordinary understandings of zoning politics, is their “alliance” with big developers—the Dursts, Ratners, and Trumps of the world—who build housing for consumers and are repeat players with strong incentives to be involved in local politics.<sup>151</sup> These developers can use their influence on local politicians to get new housing built, serving the goals of housing consumers who have insufficient individual incentives to lobby for themselves. Developers do not substitute for consumer lobbying perfectly—developers do not care about consumer surplus and rarely build on a scale that will capture the range of agglomeration benefits—but do so significantly.

However, the influence of developers does not necessarily translate into easy expansion in housing supply for two reasons, both of which are products of the types of legislative breakdown discussed in Section II.A. First, no matter their political influence, developers cannot easily solve the problem of forming binding agreements in the city council. To the extent that new development creates citywide benefits but localized harms, no one legislator is going to be willing to accept development in her district in order to achieve general goals

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149. See Schleicher, *supra* note 14, at 467.

150. Schragger, *supra* note 148, at 2547-50 (discussing limits on mayoral authority).

151. Stefan C. Friedman, *Real-Estate Bigs Spread the Wealth in Mayor Race*, N.Y. POST, Jan. 23, 2005, [http://www.nypost.com/p/news/item\\_ciFqn6QI1sInAEYEonRh4O](http://www.nypost.com/p/news/item_ciFqn6QI1sInAEYEonRh4O) (stating that developers give to all local candidates for mayor because, as noted by political consultant Norman Adler, “[o]n the whole, city government is the most important government for real-estate developers”); Frank Lombardi & Erin Einhorn, *Big Businesses and Unions Are Major Players in City Council Races*, DAILY NEWS (N.Y.C.), Apr. 19, 2009, <http://www.nydailynews.com/new-york/big-businesses-unions-major-players-city-council-races-article-1.361749> (noting that developers and municipal labor unions are among the biggest contributors in New York City Council races); David Samuels, *The Real-Estate Royals. End of the Line?*, N.Y. TIMES MAG., Aug. 10, 1997, <http://www.nytimes.com/1997/08/10/magazine/the-real-estate-royals-end-of-the-line.html> (describing the immense political power of old-line New York real estate families).



like increases in the housing supply unless there is some institutional mechanism for ensuring that new development is spread throughout the city.<sup>152</sup> Local legislatures lack the institutions we generally rely on to deal with these issues: competitive political parties.<sup>153</sup> Absent some institution that can credibly solve this prisoner's dilemma, local legislators form universal logrolling coalitions that give local officials the ability to defeat individual projects.<sup>154</sup> This has been institutionalized in legislative practice on land-use issues. As Ellickson notes, "In some large cities land-use decisions are determined by a system of 'councilmanic courtesy': all members of the elected governing body informally agree to follow the decision of the member from the district where the land-use problem has arisen."<sup>155</sup> A journalist describes this as an "ironclad principle of aldermanic privilege . . . that no member of the board would interfere in matters affecting another member's ward."<sup>156</sup> What empirical research exists

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152. This is somewhat sensitive to levels of trust between legislators or neighborhoods, as legislators in some places may be more willing to take one for the (citywide interest) team than in others. This may help explain some of the differences between cities in the degree to which this problem limits development. Thanks to Ian Ayres for suggesting this point.
153. There are some existing local institutions designed to alleviate siting problems, particularly for LULUs like unwanted public facilities such as garbage plants. For instance, the New York City Council has ordered the city planning commission to adopt criteria "to further the fair distribution among communities of the burdens and benefits associated with city facilities." N.Y.C. CHARTER & ADMIN. CODE ANN. § 203(a) (N.Y. Legal Publ'g Corp. 1989).
154. There are good reasons to believe that tit-for-tat prisoner's dilemma solutions would not work in this context because there are not enough iterations during a legislative term. A legislator who plays tit-for-tat and gets burned while not defecting would end up with an unwanted permanent new structure in her district, and will have few plays in a legislative session to punish the other player during a legislative term. For instance, between 2002 and 2009, the Bloomberg Administration in New York City enacted more than one hundred zoning changes. See Russ Buettner & Ray Rivera, *A Stalled Vision: Big Development as City's Future*, N.Y. TIMES, Oct. 29, 2009, <http://www.nytimes.com/2009/10/29/nyregion/29develop.html>. But this is an average of less than one per New York City Council district per four-year term.
155. Ellickson, *Suburban Growth Controls*, *supra* note 5, at 408 n.60.
156. Rob Gurwitt, *Are City Councils a Relic of the Past?*, GOVERNING MAG., Apr. 2003, <http://www.governing.com/topics/politics/Are-City-Councils-Relic-Past.html>; see also *In Lawsuit by Congress Plaza Hotel, Chicago Has a Striking Take on Aldermanic Privilege*, CHI. TRIB., July 27, 2009, [http://articles.chicagotribune.com/2009-07-27/news/0907260248\\_1\\_alderman-congress-plaza-hotel-sidewalk-cafe](http://articles.chicagotribune.com/2009-07-27/news/0907260248_1_alderman-congress-plaza-hotel-sidewalk-cafe) (describing aldermanic privilege in Chicago); Alison Knezevich, *Oliver Wants Baltimore County Council To Block Solo Cup Rezoning: Councilman Says Traffic Around Proposed Owings Mills Development Is His Main Concern*, BALT. SUN, June 20, 2012, [http://articles.baltimoresun.com/2012-06-20/news/bs-md-co-oliver-rezoning-20120620\\_1\\_solo-cup-zoning-review-traffic-issues](http://articles.baltimoresun.com/2012-06-20/news/bs-md-co-oliver-rezoning-20120620_1_solo-cup-zoning-review-traffic-issues) ("In making zoning decisions, the council has followed a tradition called 'councilmanic courtesy,' by which all seven members support the position of the councilperson who represents the district where changes are proposed."); Ruth Marcus, *P.G. Proceeds with Caution on*

backs this up: ward-based city councils oppose LULUs like group homes at higher rates than those with at-large elections.<sup>157</sup>

In such a world, a developer has to get the local councilmember to agree to allow new building, usually by buying off local opposition using a CBA or some other tool. This obstacle, however, substantially increases the cost of development. Absent a decision to buy off local opposition, a developer seeking to get a project approved plays a very different role than an ordinary group lobbying a legislature. Instead of merely having to push an existing coalition to take a stance, the developer has to create a coalition inside the city council across a number of projects. Because, by law, each map amendment is decided independently, developers can find building such coalitions difficult.

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*Development*, WASH. POST, Oct. 29, 1984, at A1 (describing councilmanic privilege in Prince George's County, Maryland); Dave Umhoefer, *Food Mart Owner Seeking Beer License Feels Sting of Aldermanic Privilege*, MILWAUKEE J. SENTINEL, Mar. 22, 2009, <http://www.jsonline.com/news/milwaukee/41660647.html> (describing aldermanic privilege in licensing decisions in Milwaukee). A recent and telling example of the effect of aldermanic privilege came from Philadelphia. In 2012, the city passed a whole new zoning map (after years of trying to replace its 1962 code) because its old code had gotten too restrictive and the only way to build was to get a variance from the Zoning Board of Adjustment, which had empowered local potentates, particularly councilmembers, to sign off on local changes. Inga Saffron, *Changing Skyline: New Zoning Code: Toward a More Competitive, Livable City*, PHILA. INQUIRER: CHANGING SKYLINE (Aug. 25, 2012), [http://articles.philly.com/2012-08-25/news/33367899\\_1\\_new-code-variances-livable-city](http://articles.philly.com/2012-08-25/news/33367899_1_new-code-variances-livable-city) ("It often seemed you only needed to make a campaign contribution to obtain a variance in Philadelphia."); see also Inga Saffron, *Zoning by Fiat May Be on the Way Out in Philadelphia*, PHILA. INQUIRER: CHANGING SKYLINE (Dec. 30, 2011), [http://articles.philly.com/2011-12-30/news/30573153\\_1\\_new-zoning-code-rezonings-original-zoning-classification](http://articles.philly.com/2011-12-30/news/30573153_1_new-zoning-code-rezonings-original-zoning-classification) (describing the reduction in aldermanic privilege in Philadelphia as a cause and major benefit of the new zoning code).

157. Clingermyer, *supra* note 148, at 978-80; see also Laura I. Langbein, Philip Crewson & Charles Niel Brasher, *Rethinking Ward and At-Large Elections in Cities: Total Spending, the Number of Locations of Selected City Services, and Policy Types*, 88 PUB. CHOICE 275, 290 (1996) (finding ward-based systems provide fewer services if those services must be provided through locally unwanted land uses). There is less empirical evidence of this than one might like, unfortunately, as there is very little thinking about legislative procedure in the land-use literature. There is substantial research on a related point, with several researchers finding that having districted (as opposed to at-large) councilmembers leads to more spending because of distributive politics norms. See Gary W. Cox & Timothy N. Tutt, *Universalism and Allocative Decision Making in the Los Angeles County Board of Supervisors*, 46 J. POL. 546, 549 (1984) (finding that the local budgeting process in Los Angeles County is governed by distributive politics); Douglas R. Dalenberg & Kevin T. Duffy-Deno, *At-Large Versus Ward Elections: Implications for Public Infrastructure*, 70 PUB. CHOICE 335, 338-41 (1991) (finding ward-based systems spend more on capital investment than at-large systems); Andrew F. Haughwout & Robert P. Inman, *Should Suburbs Help Their Central City?*, BROOKINGS-WHARTON PAPERS ON URB. AFF., 2002, at 45, 53 n.22 (noting that districted systems result in more spending). *But see* Paul G. Farnham, *The Impact of Citizen Influence on Local Government Expenditure*, 64 PUB. CHOICE 201, 211 (1990) (finding no such effect).

New laws have institutionalized local groups' advantages in politics. Policies like ULURP serve to reduce the cost of organizing local opposition to new development. One of the great difficulties in getting groups involved in politics is that each individual wants to free ride on the efforts of others. Although neighbors have all sorts of ways to monitor free riding (they are *neighbors*, after all), institutions like the advisory community boards created by ULURP reduce the costs of developing coalitions and locking them into place.<sup>158</sup> Community board hearings give neighbors a forum for deciding which issues to fight and provide a venue for imposing social sanctions on free riders. As a result, even though their recommendations are not binding, community boards are important loci for opposition to development. It is unsurprising that projects opposed by community boards rarely succeed in getting through the rest of the land-use process.<sup>159</sup>

The second reason that developer influence does not necessarily translate into lower housing costs is that not all development is done by big players, nor is it all done in big projects. Instead, much new housing development comes from small, new buildings or just from homeowners building up their existing properties.<sup>160</sup> This provides incremental housing growth rather than larger, one-time changes. It is often extremely difficult to collect a sufficient number

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158. That ULURP mandatory reviews, and particularly community board meetings, have served as focal points for organizing opposition to new projects has been discussed on a number of occasions by scholars. See, e.g., Sheila R. Foster & Brian Glick, *Integrative Lawyering: Navigating the Political Economy of Urban Redevelopment*, 95 CALIF. L. REV. 1999, 2035-53 (2007) (describing how opposition to Columbia University's proposed expansion used community board and other ULURP-mandated meetings as locations for opposition to slow down the project, gain political support, and negotiate for a community benefits agreement); Amy Widman, *Replacing Politics with Democracy: A Proposal for Community Planning in New York City and Beyond*, 11 J.L. & POL'Y 135, 151-73 (2002) (describing how community boards in two Brooklyn neighborhoods served as organizers and hubs for opposition with differing levels of efficacy); cf. Richard Briffault, *The New York City Charter and the Question of Scale*, 42 N.Y.L. SCH. L. REV. 1059, 1064 (1998) (noting that the power of community boards turns on their ability to organize local political resources).

159. See Robert F. Pecorella, *Community Governance: A Decade of Experience*, 37 PROC. ACAD. POL. SCI. 97, 104 (1989).

160. To get some idea of the scale, we can turn to the Furman Center's study of underdeveloped lots in New York City. In 2003, there were about 200,000 lots in New York in residential areas that were not built up to fifty percent of the space under the zoning envelope. Most of these are in areas with low maximum height and density limits. Over the next four years, fifteen thousand, or eight percent, were redeveloped, which in the terminology of the study means a new structure of greater density, and not merely an add-on, was built. Unsurprisingly, higher prices nearby spurred redevelopment. Vicki Been, Josiah Madar & Simon McDonnell, *Underused Lots in New York City* 25 (Furman Ctr. for Real Estate & Urban Policy Working Paper, 2009), [http://furmancenter.org/files/publications/Underused\\_Lots\\_in\\_New\\_York\\_City\\_Small.pdf](http://furmancenter.org/files/publications/Underused_Lots_in_New_York_City_Small.pdf).

of lots to develop a big new project in many existing neighborhoods, ruling out larger projects.<sup>161</sup> Many consumers simply like living in neighborhoods that are not likely to see high-rises or new housing blocks. As a result, housing in big new developments is only an imperfect substitute for this type of incremental growth.

Land-use procedure severs the alliance between consumers and big developers with respect to this type of incremental growth in the housing stock. Map amendments are by definition seriatim decisions – they address one change to the zoning map at a time. Where the change is a rezoning involving a project backed by a major developer, neighbors and the developer face off in a classic local political war. But where the change is a downzoning, or a reduction in the size of the zoning envelope, there is no such conflict. Big developers have no interest in getting involved in fights over downzonings, as they usually predate any investment by developers (and in fact, these downzonings provide a barrier to entry for a class of competitors).<sup>162</sup> As a result, developers' lobbying influence does not matter. Of course there are local landowners who may want to build additions to their houses or small new developments, but they lack the incentives, repeated interactions with the planning process, and sheer political power of big developers.

The result is that even cities committed to increasing the housing stock often offset new projects with reductions in the size of the zoning envelope.<sup>163</sup> Cities devote an ever-increasing amount of property to “holding zones,” or zoning classifications equal to current uses with the anticipation that landowners will negotiate their way out when they want to build.<sup>164</sup> Even when politicians are in favor of building and support rezonings to allow for new construction, they still approve downzonings that reduce potential building under the zoning envelope.<sup>165</sup>

However, if it were easy to negotiate map amendments or variances, downzonings – which reduce the ability to build as of right – would constitute transfers of wealth from current landowners to the city, but would not stop

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161. See Michael Heller & Rick Hills, *Land Assembly Districts*, 121 HARV. L. REV. 1465, 1472-74 (2008).

162. Moreover, as such developers are often also major landowners, they have reason to support downzoning (or denying rezoning amendments for others) as a way of restricting competition.

163. See Hills & Schleicher, *supra* note 21, at 83-86 (discussing how downzonings in New York City have offset gains in housing stock due to new projects, despite the mayor's open declaration that housing stock needs to expand).

164. ELLICKSON & BEEN, *supra* note 13, at 90.

165. For a discussion of this dynamic in New York City under Mayor Michael Bloomberg, see *supra* notes 102-105 and accompanying text.

development from proceeding to the efficient point (at least to the extent the city constitutes the relevant market).<sup>166</sup> This is Fischel's and Nelson's basic Coasean point. Absent excessive transaction costs, the allocation of the right to develop to the city or the developer should not matter. Big developers and small developers alike would simply pay the city for the right to build.<sup>167</sup>

But zoning procedure sets up all sorts of hurdles limiting the ability of small developers to buy zoning approval. Getting a project through the City Planning Commission (or the multiple steps in places with ULURP-like processes) takes a lot of time and requires hiring lots of lawyers, environmental specialists, and city planners. Further, because of the limits state law places on local impact fees and the Supreme Court's exactions doctrine, developers frequently cannot simply "buy" the right to build, so they must engage in second-best forms of development.<sup>168</sup> A way to characterize this development process is that it generates both fixed and variable taxes for getting a zoning change of any sort. Whatever the content of your proposed change, you have to pay a "tax"—in time, actual outlays, revised plans, and risk—to get it through the city planning apparatus.<sup>169</sup>

The combination of seriatim decisionmaking and these political "taxes" generates the dynamics of the politics of downzoning. If the tax is a fixed cost, it will not deter big projects with large profit margins from moving forward.<sup>170</sup> But it will deter small or more marginal developers from applying for changes

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166. Of course, cities are almost never the whole relevant market. See *supra* notes 35-38, 68-70, and accompanying text.

167. To the extent that a developer has to pay off the neighbors rather than the city (the way they do through CBAs), the second reason why procedural rules limit growth (interest group mismatch) runs into the problems posed by the first (very local control of the land-use process).

168. Impact fees are the fees local governments charge developers for the cost of providing additional public services. See Mark Fenster, *Regulating Land Use in a Constitutional Shadow: The Institutional Contexts of Exactions*, 58 HASTINGS L.J. 729, 749-64 (2007) (discussing limitations that state laws and the Supreme Court have placed on conditional building approvals).

169. Alexander Garvin, the Yale architecture professor and former head of the New York City Planning Commission, notes that even when a city is attempting to encourage growth in an area by providing bonus development rights, the expense associated with the land-use process in terms of the time (and associated debt-service costs) and compliance costs regularly causes developers to turn down attractive opportunities. ALEXANDER GARVIN, *THE AMERICAN CITY: WHAT WORKS, WHAT DOESN'T* 450-51 (2d ed. 2002).

170. See Ronald H. Silverman, *Toward Charter Change for Better Land Governance*, 37 PROC. ACAD. POL. SCI. 187, 196 (1989) (noting, while discussing land-use review in New York City, that "information, processing, and delay-related costs may be particularly significant for smaller private developers and with respect to certain public or publicly assisted projects having only minimal or no profit margins available to absorb administrative costs").

to allow granny flats or small new buildings in a neighborhood.<sup>171</sup> Downzonings matter because they stop landowners from engaging in small-bore redevelopment that they would have engaged in if their building was as of right or if they could easily buy the right to build. Notably, this bias should be bigger in big cities, as the fixed cost of achieving zoning changes likely grows with the size of a city's bureaucracy. And, because the decisions are made seriatim, large landowners' lobbying efforts on behalf of their own projects provide no benefits for these smaller developers.<sup>172</sup> Further, because small development and big projects are only imperfect substitutes, increased big development cannot fully replace forgone granny flats and small new buildings.

This dynamic means that where zoning regimes bind, they will get increasingly strict. To the extent that there is space under the zoning envelope for any landowner to build as of right, each landowner faces split motives in considering how to get involved in politics. Each landowner is both a neighbor—and thus an opponent—of new development and a potential developer herself. Blocking someone else's development may redound negatively on the landowner's own ability to build, tit-for-tat. When the zoning envelope shrinks by virtue of downzonings, landowners can no longer build as of right and understand that they will not be able to pay the fixed cost for approval of small new developments. Landowners go from being potential developers into being purely NIMBY neighbors, exclusively interested in maintaining the fixity of supply of housing and in protecting their interest in common-pool assets in a neighborhood like spots in school catchment areas and seats in good local restaurants.<sup>173</sup> One might describe the effect of land-use

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171. See Bernard H. Siegan, *Non-Zoning Is the Best Zoning*, 31 CAL. W. L. REV. 127, 128-35 (1994) (discussing disadvantages faced by small-time developers in getting projects through zoning boards).

172. The long debate over whether rezonings are legislative decisions or quasi-judicial ones should be understood in this light as well. See generally Rose, *supra* note 134, at 841-48 (summarizing this debate). Judicial systems have all sorts of tools for either allowing small players to piggyback on big ones or aggregating the interests of small players. The reliance on precedent in judicial decisionmaking gives politically weaker groups the ability to take advantage of decisions in favor of similarly placed but more invested players. Further, tools like class actions allow disaggregated interests to behave like concentrated ones even when they are not. Court review of zoning decisions provides small developers with some weak forms of these tools.

173. This can also help explain why some cities have such strict zoning rules while others do not. The extreme differences among cities in the restrictiveness of their zoning regimes are difficult to explain with ordinary public-choice tools, as the laws governing land use and underlying interests are roughly the same everywhere. While ideological and taste differences may explain these differences, the above suggests that, even where the rules and the interests are the same, the starting position matters a great deal. Cities in the South and

rules on the preferences of the electorate as a “Curley Effect.”<sup>174</sup> Strict land-use decisions change who buys homes and how homeowners behave, which in turn shapes the relevant electorate in a way that supports the decisions. Recent empirical research supports this theory: Christian Hilber and Frédéric Robert-Nicoud find that the ratio of developed property to undeveloped property in a region predicts the future stringency of land-use regulation in that region.<sup>175</sup> Although I do not attempt here to provide a full explanation of why cities differ in their restrictiveness, this points to one possible story. The existence of space under the zoning envelope affects voters’ preferences. Where cities have the power to expand their boundaries easily (and hence expand the amount of space under the envelope), we should see less restrictive land-use rules going forward. The fact that the cities of the Southern and Western United States have both extensive powers to annex new territory and relatively lax zoning laws is no accident.<sup>176</sup>

Land-use procedure thus both helps and harms big developers. It increases their costs but also serves as a barrier to entry against smaller development. How big developers feel about it likely depends on how the issue is posed. Big developers surely prefer the status quo to a world in which there are political costs to getting big projects done but no limits on small-scale development. However, if votes were organized differently, big developers might join with small developers to promote fewer limits on building in general. In other words, there may be cycling, with the seriatim nature of local land-use politics

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West were generally less developed forty years ago. Thus, progressively stricter zoning may not have yet emerged in those cities.

174. Edward Glaeser and Andrei Shleifer argued that Mayor Curley of Boston raised taxes on the rich in order to drive out rich Boston Brahmin voters who opposed his largely Irish political machine. Edward L. Glaeser & Andrei Shleifer, *The Curley Effect: The Economics of Shaping the Electorate*, 21 J.L. ECON. & ORG. 1, 1-2, 9-12 (2005). The “Curley Effect” is when tax policy changes the makeup of a local electorate and in so doing entrenches the policy and its authors. It makes sense to understand the combination of restrictive zoning and an expensive amendment process the same way. The people willing to buy into neighborhoods when building is difficult are likely going to be different in their political preferences and to behave differently than those who buy into neighborhoods where building is possible.
175. See Christian A.L. Hilber & Frédéric Robert-Nicoud, *On the Origins of Land Use Regulations: Theory and Evidence from US Metro Areas* (London Sch. of Econ. & Political Sci. Spatial Econ. Research Ctr., Discussion Paper No. 38, 2010), <http://www.spatial-economics.ac.uk/textonly/SERC/publications/download/sercdp0038.pdf> (finding that the amount of undeveloped property in a region predicts future zoning policy).
176. See Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 79-81 (1990) (noting that the cities of the South and West have greater powers to annex nearby territory); Glaeser & Gyourko, *Impact*, *supra* note 7, at 29-33 (showing that high zoning-tax cities are largely in the Northeast and California).

locking in the status quo rather than an alternative.<sup>177</sup>

It may seem inevitable that land-use decisions will be seriatim deviations from zoning maps. After all, most legislation is considered settled law until changed by the legislature. This perception would be a mistake. On issues with similar interest group dynamics, we have seen legislatures adopt very different procedures. For instance, budgeting also exhibits Olsonian dynamics.<sup>178</sup> The recipients of government spending are concentrated and are often heavily affected by a single appropriation, while each taxpayer only bears a small cost from any given spending decision. However, in almost all legislatures, this year's budget is not simply last year's budget until changes are made: it has to be passed anew each year, limiting the degree to which individual decisions can become entrenched. Further, legislatures and state constitutions adopt rules ranging from pay-as-you-go requirements to debt limits to ensure that the interests of taxpayers are taken into account (and that the interests of recipients of spending are pitted against one another).<sup>179</sup>

Perhaps the best comparison at the national level for local land-use politics is international trade. And there, the substance of tariff policy was changed radically when Congress reformed voting procedure in the 1930s.

### III. LAND-USE LAW AND THE POLITICAL ECONOMY OF CITY UNPLANNING

This Part translates the previous theoretical analysis of the law and politics of land use into policy proposals. Even if one agrees that city planning has

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177. Surely a third result is possible as well. One can pretty easily imagine coalitions of small-time developers and neighbors seeking to impose differentially large costs on bigger developments.

178. See Robert P. Inman & Michael A. Fitts, *Political Institutions and Fiscal Policy: Evidence from the U.S. Historical Record*, 6 J.L. ECON. & ORG. 79, 87-89 (1990).

179. See Richard Briffault, *Foreword: The Disfavored Constitution: State Fiscal Limits and State Constitutional Law*, 34 RUTGERS L.J. 907, 947-49 (2003) (arguing that debt limits may be justified on the ground of political process failure); W. Mark Crain & Timothy J. Muris, *Legislative Organization of Fiscal Policy*, 38 J.L. & ECON. 311, 326-30 (1995) (finding at the state level that legislatures with multiple committees with spending authority spend more than those with a single committee controlling spending); Elizabeth Garrett, *Harnessing Politics: The Dynamics of Offset Requirements in the Tax Legislative Process*, 65 U. CHI. L. REV. 501, 503-05 (1998) (providing interest group justifications for pay-as-you-go requirements (PAYGO)); Clayton P. Gillette, *Direct Democracy and Debt*, 13 J. CONTEMP. LEGAL ISSUES 365, 380-83 (2004) (discussing requirements that bond issuance be accompanied by a public referendum in these terms); Charles Stewart III, *Budget Reform as Strategic Legislative Action: An Exploration*, 50 J. POL. 292, 293-99 (1988) (arguing that reforms of the budget process have been aimed at limiting the effect of free-spending members of Congress).



become excessively costly in cities, as argued in Part I, it is hard to see what can be done about it. After all, as Part II sought to explain, excessive city planning is both very common and very sticky.

However, politics includes shocks. As Matthew Stephenson argues, election results are best understood as having stochastic properties.<sup>180</sup> Even if the expected value of, say, the President's preferences equals that of the median voter, the actual preferences of any President almost certainly do not. This Part takes up the question of what a reform-inclined mayor or city council—elected, perhaps, due to random variation—should do in response to the effects of land-use procedure on land-use outcomes. Unsurprisingly, the suggestion is to change the procedure.

Before proceeding, it is worth noting that using the stochastic properties of elections to change legislative procedure is a common strategy in American public life. When a shock occurs for whatever reason, reform groups can take advantage to adopt procedural reforms that affect the payoff structures in politics. While the reforms I discuss below are not likely to pass through an ordinary city council in an ordinary time, if passed due to some shock, they would change the structure of local politics in ways that would make the ordinary city councils of the future more hospitable to beneficial development. The best example of such an event—a shock largely unrelated to the issue at hand, but that gives reform groups the ability to pass procedural changes that have an important and lasting effect on policy results—comes in the area of international trade.

The politics of land use are similar to the politics of trade in important respects. Like zoning, import tariffs impose diffuse harms on consumers but provide concentrated benefits to easily organized groups, specifically import-competing firms. Both trade and land use also feature powerful groups (importers and developers, respectively) who only selectively involve themselves in policymaking. Frequently, parties do not divide the legislature on trade issues, leaving the area without clear partisan organization.<sup>181</sup> Free

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180. Matthew C. Stephenson, *Optimal Political Control of the Bureaucracy*, 107 MICH. L. REV. 53, 66-68 (2008).

181. It is not always the case that trade does not have partisan organization. Before the Great Depression, Republicans were largely protectionist, while Democrats were more pro-free trade, although they had a protectionist wing. See Michael A. Bailey, Judith Goldstein & Barry R. Weingast, *The Institutional Roots of American Trade Policy: Politics, Coalitions and International Trade*, 49 WORLD POL. 309, 316-18 (1997); Douglas A. Irwin, *From Smoot-Hawley to Reciprocal Trade Agreements: Changing the Course of U.S. Trade Policy in the 1930s*, in THE DEFINING MOMENT: THE GREAT DEPRESSION AND THE AMERICAN ECONOMY IN THE TWENTIETH CENTURY 325 (Michael D. Bordo, Claudia Goldin & Eugene N. White eds., 1998). By 1948, however, trade had largely ceased to be a partisan issue, with Republicans becoming largely pro-free trade following the introduction of the procedural changes

trade should be equally as unlikely as free building. From roughly the end of the Civil War to 1934, trade policy protected import-competing firms as extensively as land-use policy today protects NIMBY homeowners, with the infamous Smoot-Hawley tariff being only the last in a long series of significant tariff increases.<sup>182</sup> Several pro-free trade Presidents were elected in this period and, with substantial effort, they were occasionally able to achieve tariff reductions.<sup>183</sup> But ordinary trade politics would return and eat away these reductions, a result of the seemingly inexorable nature of tariff policy's Olsonian dynamics.

However, the stochastic nature of elections, combined with the savvy use of procedural reform, changed the underlying politics of trade. When elected in 1932, President Franklin Roosevelt took a different course than previous pro-free trade administrations by proposing the Reciprocal Trade Agreements Act (RTAA).<sup>184</sup> The RTAA did not reduce tariffs on its own, but instead gave

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discussed below. See Bailey et al., *supra*, at 336-37 (noting that trade policy innovations lead to greater political support for trade liberalization among Republicans); Irwin, *supra*, at 350 (stating that trade policy became bipartisan). Although the Democratic Party became the more trade-skeptical party by the 1970s and 1980s, there were protectionist impulses in both parties through the end of the twentieth century. See Eric M. Uslaner, *Let the Chits Fall Where They May? Executive and Constituency Influences on Congressional Voting on NAFTA*, 23 LEGIS. STUD. Q. 347, 351 (1998) ("There remained pockets of protectionism in the Republican party and strands of free trade among the Democrats."). For instance, in the debate over the North American Free Trade Agreement (NAFTA) in the House, Democrats made up a bulk of the opposition, providing 157 of the 200 votes against, but also providing 102 votes in favor (thirty-nine percent), and the Agreement was supported by President Clinton, a Democrat. Republicans largely supported NAFTA but not uniformly – more than twenty-five percent of House Republicans voted against the Agreement. Kedron Bardwell, *The Puzzling Decline in House Support for Free Trade: Was Fast Track a Referendum on NAFTA?*, 25 LEGIS. STUD. Q. 591, 593 (2000). By the very end of the 1990s, support for trade initiatives had fallen in both parties, as seen through the failure of the renewal of fast track authority in 1997. *Id.* By 2002, when fast track, renamed trade promotion authority, was renewed, the parties had polarized on the issue. See Hal Shapiro & Lael Brainard, *Trade Promotion Authority Formally Known as Fast Track: Building Common Ground on Trade Demands More than a Name Change*, 35 GEO. WASH. INT'L L. REV. 1, 19-28 (2003). To the extent trade has a stronger partisan dimension, we might imagine procedural rules are less important, particularly those relating to vote order and timing, like fast track. (As discussed *infra* note 199-200 and accompanying text, rules involving side payoffs like trade adjustment assistance have continued to be crucial to the passage of trade deals as recently as this past year.)

182. See MICHAEL J. GILLIGAN, EMPOWERING EXPORTERS: RECIPROCITY, DELEGATION, AND COLLECTIVE ACTION IN AMERICAN TRADE POLICY 72-77 (1997); Hills & Schleicher, *supra* note 21, at 112-18.

183. See Irwin, *supra* note 181, at 328; Hills & Schleicher, *supra* note 21, at 113-14.

184. Act of June 12, 1934, ch. 474, 48 Stat. 943 (codified as amended at 19 U.S.C. § 1351 (2006)); see GILLIGAN, *supra* note 182, at 70-73; Irwin, *supra* note 181, at 337-42.

the President the power to enter into trade deals that linked tariff decreases with reduced tariffs overseas. This reform gave exporters an incentive to fight import tariffs and, in time, resulted in the dismantling of tariffs as a limitation on trade. Later reforms included Trade Adjustment Assistance, payments for job training for workers who were harmed by trade deals, and “safeguards,” the ability to impose temporary tariff increases when domestic firms faced unexpectedly tough import competition.<sup>185</sup> These innovations further broadened the pro-trade coalition by paying off those most harmed by trade deals and providing insurance to firms that worried that they might be harmed by import competition in the future. Trade policy in the United States is now quite open, even if still much debated.

What I have in mind are the land-use equivalents of the procedural changes that shifted trade policy from an Olsonian nightmare to a broadly shared policy success.

One caveat is necessary before continuing. The analogies I draw between the politics of land use and trade are, like all analogies, only good as far as they go. There are, of course, many differences between trade and land use—e.g., the level of government at which the decision is made, the existence of other countries as negotiating partners, and the degree to which trade issues overlap with other foreign policy concerns—and I do not mean to minimize these. The analogy is useful for two purposes. The first is to provide an example of the theoretical point discussed above, that in the context of certain interest group alignments and political party dynamics, procedural rules can affect substantive outcomes by creating new focal points among cycling alternatives and by solving collective action problems among legislatures. The second is to generate policy ideas by deriving them from successful procedural changes in the area of trade. While I argue that trade policy and land use are similar in ways that make the success of trade policy reforms relevant to consideration of whether these proposed land-use reforms will work, the quality and merits of the reforms proposed can be considered on their own, even if one is skeptical of the comparison.

*A. Using Land-Use Law To Change the Shape of Interest Group  
Competition: Balancing the “Zoning Budget”*

As discussed above, one of the ways land-use procedure shapes outcomes is by insisting on seriatim decisions. Developers do not care about downzonings,

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<sup>185</sup> See Michael Borrus & Judith Goldstein, *United States Trade Protectionism: Institutions, Norms, and Practices*, 8 NW. J. INT'L L. & BUS. 328, 354-56 (1987); Alan O. Sykes, *Protectionism as a “Safeguard”*: A Positive Analysis of the GATT “Escape Clause” with Normative Speculations, 58 U. CHI. L. REV. 255, 273, 281-89 (1991).

which predate any investment decision. As a result, local protectionist interests dominate and get the legislature to enact downzonings that substantially limit incremental increases in the housing stock. This is quite similar to trade politics before the RTAA. Because import tariffs were considered on their own, exporters did not care particularly about fighting for their reduction. Import-competing firms were able to push through high tariffs, as the import-consuming public faced severe collective action problems and put up little fight in Congress.<sup>186</sup> As Michael Gilligan argues, the genius of the RTAA was to tie the desires of exporters for access to new markets to the interests of import consumers, turning powerful exporters into a counterweight against import-competing firms interested in protectionism.<sup>187</sup> Gilligan shows that the export-dependence of a state strongly predicts its representatives' votes on trade deals post-RTAA, offering powerful evidence of the influence of exporters on trade. The RTAA gave the power to design trade deals to the President, who, by virtue of his national constituency, is more likely to favor free trade than Congress is. But it did so on the understanding that the President would only push as far as Congress would let him, as his power could be withdrawn. When Congress later insisted on reviewing individual trade deals, it agreed to do so using "fast track," or a closed voting rule, ensuring that protectionist members of Congress could not offer amendments that would upset the deals struck by the President, immunizing trade deals against Arrovian cycling in the legislature.

Rick Hills and I have called for doing something similar in zoning.<sup>188</sup> Have the city planning commission propose an annual "zoning budget," or targeted growth (or shrinkage) in the number of available housing units, and make the council vote on it up or down under a closed voting procedure. Until the city rezoned enough property to meet the annual growth target, no downzonings would be allowed.<sup>189</sup> After the target was met, downzonings would be scored for the number of potential housing units lost, and would have to be offset with upzonings elsewhere that kept the budget in balance.<sup>190</sup>

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<sup>186.</sup> See GILLIGAN, *supra* note 182, at 3-4.

<sup>187.</sup> *Id.*

<sup>188.</sup> Hills & Schleicher, *supra* note 21, at 112-31.

<sup>189.</sup> Something similar could be achieved through designating a ratio based on the size of the planned increase and allowing downzonings to be traded for upzonings at the ratio until the planned increase is met, e.g., allowing two units of upzoning for one unit of downzoning.

<sup>190.</sup> As Hills and I argue, some protective steps would be necessary to make sure that the tradeoffs did not take the form of building housing in unattractive or politically weak districts in return for shutting off building in desirable areas or politically powerful ones. Hills & Schleicher, *supra* note 21, at 126 n.132. This could be accomplished through a variety of means, including setting separate budgets for different types of housing, or only allowing

While we explored the details of this proposal in more depth in previous work, the concept is that it forces competing lobbies to wage their battles at the beginning of the year, in advance of any specific project proposal. Just as with the RTAA, a diffuse group (consumers of imports in that case and consumers of housing in this one) would be given an ally in a concentrated group (exporters or big developers). Developers would lobby for a big budget for housing growth, as it would make their battles with neighbors easier. A high budget, after all, would mean that many groups wanting downzonings would be encouraged to lobby for upzonings. Developers' surplus lobbying would aid small developers; the extra work developers do to ensure their valued projects are permitted would, under this regime, expand the zoning budget, and could be used by smaller developers.<sup>191</sup> The organizational advantages of neighborhood groups, like the ability to use community boards as a hub through which to coordinate opposition to new projects, would not exist in the ex ante legislative debates.

The mayor, as the most pro-development figure in the local political firmament, would have the power to set the terms of the zoning budget in ways that appeal to a majority of the council, and a closed-rule legislative procedure would ensure that amendments could not upset the balance she strikes.<sup>192</sup> Just as the President shapes trade deals with passage through Congress in mind, so too would mayors design the annual zoning-budget request, setting the level and cutting side deals in a way that makes it likely that the final product would approximate the type of generally beneficial deal that the legislature would design for itself if it did not face severe collective action and contracting problems.<sup>193</sup> The result would be a stable policy equilibrium,

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"like-for-like" tradeoffs in terms of housing values. *Id.* Otherwise the gains from expanding the zoning envelope may be illusory or may result in distorting the location of development. *Id.*

191. This, of course, assumes that local opposition would have less "surplus" lobbying, but I think this is a pretty safe assumption. Developers know in advance what they are going to propose, but are less clear about the extent of local opposition. Local opposition to new, huge projects does not exist in the ether; it relies on knowledge of the project to move local elites into action. By being forced to lobby at the beginning of the year, developers – not yet knowing whether local opposition to their projects will be big or small – will have an incentive to lobby strongly to increase the size of the budget, but local opposition groups will not yet be active (unless they know in advance what's coming).

192. Hills & Schleicher, *supra* note 21, at 124-26.

193. An example from the Carter Administration nicely illustrates that Presidents engage in trade negotiations with other countries with Congress in mind. While negotiating the Tokyo Round of multilateral tariff reductions, the lead American negotiator, Robert Strauss, realized that in order to get Congress to sign on, he would need support from senators from Kentucky and that the reduction being negotiated on alcohol tariffs endangered that

but one that is more in favor of building.<sup>194</sup>

“Zoning budgets” are not the only tool for changing the incentives facing interest groups.<sup>195</sup> Frequently, cities rely on zoning policy to provide in-kind

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support. To solve this problem, Strauss asked for and received concessions on tobacco products, a powerful export lobby in Kentucky. GILLIGAN, *supra* note 182, at 78.

194. There are, of course, a good number of differences between the RTAA and the zoning budgets proposal. As with actual budgeting tools such as PAYGO, but unlike with trade deals, there is no one outside of the legislature to make sure deals stick. In the trade context, there are other countries with whom trade deals have been struck to ensure that exporters stay interested in import tariffs. In the budgeting context, there is no such enforcer, and legislative deals to follow some process can be undone by later legislation. Hills and I have proposed that this problem could be solved, or at least mitigated, by having the city planning commission issue a “housing impact statement” alongside packages of up- and downzonings that would be substantial evidence toward a claim in court that a downzoning or denial of an upzoning done in breach of the zoning budget violated the city’s master plan. Courts would play the role of enforcer of legislative deals. Hills & Schleicher, *supra* note 21, at 127-31.

195. Similarly, zoning budgets are not the only tools that employ a budgeting-like concept to reform zoning. The proposals here differ from some existing proposals in that they are entirely within the reach of local governments themselves and do not rely on the wisdom of higher levels of government. Here are a few others:

Ed Glaeser and Joe Gyourko have called for Congress to change federal tax law to impose limits on the availability of the homeowner tax deduction in high land-value localities that restrict housing by more than a certain amount. See EDWARD L. GLAESER & JOSEPH GYOURKO, *RETHINKING FEDERAL HOUSING POLICY: HOW TO MAKE HOUSING PLENTIFUL AND AFFORDABLE* 88-99 (2008). A cap tied to the availability of federal tax subsidies will make it more likely that local governments impose only those zoning restrictions that are really worth it. Elsewhere, Glaeser has supported enacting hard budgets for landmarking and historical preservation, but has been unspecific about which institution should impose the cap. GLAESER, *TRIUMPH OF THE CITY*, *supra* note 6, at 161-62. To the extent he thinks that local governments should do it themselves on a semi-regular basis, his proposal is a more limited version of the one outlined in Hills & Schleicher, *supra* note 21, at 124-31.

States can and have imposed “budgets” on local zoning authorities as well. The most well known of these is New Jersey’s Fair Housing Act, N.J. STAT. ANN. § 52:27D-301 to 329.19 (West 2012), which requires each locality to bear some degree of the statewide need for affordable housing as determined by the state’s Council on Affordable Housing (COAH), but permits trades among localities. In *Balancing the Zoning Budget*, Hills and I suggest that the COAH requirements are a form of the type of extralegisative procedure we argue for using in the context of land use. See Hills & Schleicher, *supra* note 21, at 119-24.

Finally, on some level one could describe any local zoning system that includes tradable development rights (TDRs) as a system of budgeting. Zoning systems that employ TDRs establish for each property two limits—the ordinary zoning envelope and a higher amount that a developer can reach if he purchases from other property owners their space under the zoning envelope. One might characterize the envelope as a “budget,” an overall allowable amount of building. TDRs are frequently used as a way to subsidize some socially beneficial low-lying land use and as a way to justify increased building on certain lots. See ELLICKSON

subsidies to favored groups. For instance, “noncumulative” zoning, in which certain areas are marked exclusively for industrial use, exists mostly for the purpose of subsidizing manufacturing firms by providing them with cheap land. As Hills and I have argued elsewhere, noncumulative zoning is a terrible idea.<sup>196</sup> The argument for subsidizing urban manufacturing firms is weak, and the argument for doing it through noncumulative zoning is even weaker, as cheap land is less useful to such firms than cash because it forces them to overuse land and locate in odd and inefficient places.<sup>197</sup> Noncumulative zoning, however, is attractive to city politicians because its costs are hidden, barely felt by each of the large number of people paying slightly higher rents.

This problem could be remedied by a simple change in budgeting procedure. A city’s annual budget should have to include the predicted forgone taxes that would be collected on property that was turned noncumulative. As most cities have balanced-budget requirements, the city would have to offset that money with cuts in spending or increases in taxes. Bringing the in-kind subsidy of noncumulative zoning into the budgeting process would create interest group competition over scarce dollars. Advocates for education or police spending would become interested in downzoning decisions, as it would make visible what is now invisible: the cost of zoning decisions to the city fisc.

Using procedure to change the composition of interest group competition is important in urban legislatures because they lack partisan competition and hence lack institutions that need to appeal to more diffuse beneficiaries of certain policies. Introducing another stage in land-use decisions—either through zoning budgets or actual budgeting rules—can align the interests of organized interest groups like developers or public employee unions with those of housing consumers. Furthermore, over time, cities that required zoning budgets would see a decrease in the “Curley Effect” discussed above. If cities began setting positive housing growth targets, people who bought into cities would not necessarily view their property as impossible to build on. The preferences of such people would be different from those of current homebuyers (or individuals might change their preferences in the face of different opportunities). Thus, adopting a budgeting procedure for land use might not only change the behavior of city officials, but also might actually

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& BEEN, *supra* note 13, at 167. TDRs thus provide some of the benefits—e.g., creating coalitions to support building—that the zoning budgets proposal does. See James T.B. Tripp & Daniel J. Dudek, *Institutional Guidelines for Designing Successful Transferable Rights Programs*, 6 YALE J. ON REG. 369, 373 n.9 (1989) (justifying TDRs on the ground that they “can encourage a process of cooperation and agreement between environmentalists and developers”).

196. Hills & Schleicher, *supra* note 51, at 251–57.

197. *Id.* at 267–72.

move the preferences of the local electorate.

*B. Using Land-Use Law To Bring Consumer Interests to the Table:  
Standing on TILTs*

Perhaps the central political-process failure in this area is that consumers of new housing lack any individual incentive to become involved in land-use disputes. Ideally, land-use procedure would provide a forum in which representatives of the citywide interest in more affordable housing would be able to negotiate directly with local protectionist interests and, if necessary, strike deals with them. This Section proposes a procedural innovation that would make such deals automatic.

One of the key innovations in passing trade deals has been Trade Adjustment Assistance. While new free-trade deals benefit most citizens, they can cause substantial harm to workers and firms in import-competing industries. That is, trade deals are Kaldor-Hicks efficient, but are not Pareto efficient.<sup>198</sup> TAA transfers some of the surplus created by trade deals to groups that are harmed, thereby blunting political opposition. It has generally consisted of payments—usually in the form of job retraining or increased unemployment benefits—to those put out of work by trade deals.<sup>199</sup> Although there are claims that these payments are necessary as a matter of justice or policy, critics of TAA respond forcefully that people who lose their jobs because of trade deals are not more deserving of aid than those who lose their jobs for other reasons and should not receive special benefits. Regardless of the merits of these arguments, TAA has been very politically effective at promoting trade deals.<sup>200</sup> TAA has mitigated opposition, allowing a generally beneficial policy of tariff reductions to win out over the loud cries of those facing concentrated

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198. Meredith Kolsky Lewis, *WTO Winners and Losers: The Trade and Development Disconnect*, 39 *GEO. J. INT'L L.* 165, 176-77 (2007).

199. Ross Koppel & Alice Hoffman, *Dislocation Policies in the USA: What Should We Be Doing?*, 544 *ANNALS AM. ACAD. POL. & SOC. SCI.* 111, 116 (1996) (explaining that TAA consists of increased unemployment benefits and training).

200. The recent debates over free trade deals with South Korea, Colombia, and Panama show the importance of TAA in garnering bipartisan support for such deals. Zachary A. Goldfarb & Lori Montgomery, *Obama Gets Win as Congress Passes Free-Trade Agreements*, *WASH. POST.*, Oct. 12, 2011, [http://www.washingtonpost.com/business/economy/obama-gets-win-as-congress-passes-free-trade-agreements/2011/10/12/gIQAGHeFgL\\_story.html](http://www.washingtonpost.com/business/economy/obama-gets-win-as-congress-passes-free-trade-agreements/2011/10/12/gIQAGHeFgL_story.html) (stating that the renewal of TAA “cleared the way for ratification of the agreements”). There is some question about the importance of TAA in passing new trade deals, at least with respect to the deals in the 1980s and 1990s. DOUGLAS A. IRWIN, *FREE TRADE UNDER FIRE* 132-33 (3d ed. 2009).



harms. The basics of this approach can be applied to land use.<sup>201</sup>

Tax increment financing (TIF) has become a very commonly used tool for financing redevelopment of blighted areas.<sup>202</sup> A newly created public entity issues bonds and invests the proceeds in projects designed to increase property values in some defined area. The bonds are backed exclusively by the increased tax revenue (the “tax increment”) created by increasing property values in the area.<sup>203</sup> TIF is supposed to make redevelopment pay for itself.

The structure of TIFs could be used to implement a TAA-style transfer scheme.<sup>204</sup> In some cities, the first level of review for a new project requiring a

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201. And not only in the way I propose here. Donald Shoup, the nation’s leading expert on the economics of parking, has proposed something similar to deal with parking requirements. DONALD SHOUP, *THE HIGH COST OF FREE PARKING* (2004). Shoup shows that having a limited amount of free or low-priced street parking causes drivers to cruise around looking for a space, creating traffic, and results in the misallocation of spaces, as the highest value users are often unable to get parking spaces. *Id.* at 275-303. More importantly for my purposes here, the existence of free parking means that developing a private property without providing sufficient parking creates costs for nearby residents and businesses. *Id.* at 21. If a new store opens without a parking lot, its customers will compete with everyone else for the scarce asset of free public parking. *Id.* at 251. This is an externality to property development that local governments have themselves created, and they have responded to it by regulating the amount of parking that each new development must include. This drives up the cost of building and creates lots of waste in the form of a huge number of barely used parking spaces. *Id.* at 75, 185-200.

The answer to these problems, Shoup argues, is simply to stop providing free parking. Cities should set tolls at variable prices sufficient to ensure that no more than eighty-five percent of parking spaces are in use at any given time. *Id.* at 298. But drivers hate parking meters, making reform difficult. Shoup suggests a procedural change to harness the most powerful force in development politics—neighborhood reaction—in favor of parking reform. *Id.* at 397-428. Neighborhoods in which demand-sensitive pricing parking is used should get to keep the extra revenue from the tolls in the form of better services or property tax rebates. This would not only give voters an incentive to push for, rather than against, parking reform in their neighborhood, but would change the politics of parking requirements as part of the zoning process. If neighborhood residents knew they would get a bonus check as a result of increased parking demand, they would be less bothered by, and may even actively support, new developments that do not include parking. After all, it would be cash in their pockets. This is similar to the idea I suggest in this Section.

202. See Briffault, *supra* note 18, at 71-72.

203. The tax increment equals the increase in property values times the property tax rate. *Id.* at 67-69.

204. The use of TIF technology should not bring with it any of the problems associated with TIFs. TIFs face both legal and policy-related challenges. The legal challenges to TIF have come for violating debt-limit requirements and for encouraging unconstitutional takings, which clearly are not implicated by the TILT proposal. See *id.* at 76-77. There are also challenges occasionally for violating state public-purpose and tax-uniformity rules. While one can imagine such challenges to a TILT program, challenges to TIF programs on these grounds have been notably unsuccessful. See *id.* at 74-75.

map amendment is the community board.<sup>205</sup> Whenever a community board endorsed a map amendment to allow new building, some percentage (say twenty-five percent) of the tax increment created by the new development could be given to property holders inside the community board's district in the form of property tax rebates for a span of time (e.g., ten years). Instead of TIFs, call these TILTs, or Tax Increment Local Transfers.

Effectively, TILTs would be automatic “trades” between citywide interests and local opposition groups. Like TAA, TILTs would transfer some of the social gain from a project that increases overall welfare to those parties that will be harmed when the project is built. Just as with TAA, it is unclear that this makes sense in the abstract—people who live near proposed zoning changes generally do not have a property right in nearby land uses, and the moral case for paying them off for their intransigence with general tax revenues may seem weak. But, like opposition to new trade deals from import-competing firms and workers, NIMBY politics is not going anywhere.<sup>206</sup> And TILTs would reduce local opposition to generally beneficial development projects in a way that would not increase housing prices. While TILT payments probably would not be sufficient to quell opposition among the most affected residents—a tax rebate is not likely to change the mind of someone who owns property right next to a proposed skyscraper that would ruin her view—they would limit the ability of those residents to garner broader support in the neighborhood.

TILTs would improve a city's land-use process in other ways as well. They would provide information to citywide officials, who are currently forced to make decisions despite not being well placed to determine how costly new development projects are for local neighborhoods.<sup>207</sup> Presently, there is no incentive for local residents to support new development if they are harmed at all, and thus city officials can infer little information from the fact of local opposition. Under a TILT system, local opposition would become more meaningful, as officials would know that local residents valued defeating the new project more than their TILT payments.

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The policy-based criticisms of TIF programs simply do not apply. TIF programs are frequently criticized for merely moving development around rather than generating new development. *Id.* at 81-83. TILTs would have the opposite effect, creating incentives for new development that would otherwise be blocked.

205. See *supra* notes 139-140 and accompanying text (discussing ULURP). Where there are no community boards, TILT tax rebates could be given to everyone in a city council member's district if she votes yes. The resulting pressure from residents would play the same role in encouraging support from councilmembers as it would for members of a community board.

206. As Richard Babcock noted, “No one is enthusiastic about zoning except the people.” BABCOCK, *supra* note 25, at 17.

207. For a discussion of this, see Hills & Schleicher, *supra* note 21, at 104.

The policy could also be designed to address a secondary cost of land-use procedure for developers: delay. TILT payments to residents should continue for a fixed number of days from the moment a proposal is sent to the community board. The tax increment would only start rising after the development is approved, giving locals an incentive not only to approve developments, but to do so quickly and to oppose efforts to slow down projects with litigation.<sup>208</sup>

The cost to citywide taxpayers is ambiguous. If TILTs help projects get built that would not have otherwise been approved, the city will have more revenue, not less.<sup>209</sup> However, the city would lose out on some tax revenue from projects that would be approved anyway. TILT legislation could be written to not apply under certain conditions when ordinary passage is extremely likely.<sup>210</sup>

It is worth comparing TILTs to existing tools for buying off local opposition to zoning changes. There are several tools to allow neighborhoods or cities to effectively “sell” the right to develop, as suggested in the work of Fischel and Nelson<sup>211</sup>—most notably impact fees and CBAs. The central problem with these tools is that they constitute deals with the relevant neighborhood but do not consider the full range of benefits and costs to the city or to society at large. The result of negotiations between neighbors and developers, even if it is mutually advantageous, is therefore not necessarily efficient at the regional or citywide level. Homeowners close to a project just do not care about consumers outside the neighborhood, and developers do not care about consumer surplus. TILTs attempt to bring people far away from a current project to the negotiating table by transferring some of the surplus created by a new project from non-neighborhood-based users of development

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208. The land will remain unimproved and the value will not increase, meaning there would be no tax increment to be had.

209. We need not worry that TILT payments would result in neighbors accepting deals that would diminish the overall property tax take by reducing the value of neighboring properties. Residents getting only some percentage of the tax increment on a new project for a limited period of time would never accept any new project that diminished their own property values by more than the new project increased in value.

210. For instance, it could be written into the legislation that TILT payments are not available in areas with little residential population. Another method would be to permit a supermajority vote of the city council to override payments before the community board votes, giving the city an effective option on whether to use the program. However, the system could not work if the council could easily override payments that have already been approved, as community boards would no longer see the system as credible. Further, adding an option would, in any circumstance, be a step backward as it would remove some of the automaticity from the system.

211. See *supra* notes 28-33 and accompanying text.

to affected neighbors. Instead of requiring developers to buy off local opposition, TILTs would transfer some tax payments that would have gone to the city treasury to neighbors in return for supporting a proposal. As a result, housing would get cheaper under a TILT system. Impact fees and CBAs make it more expensive.

Further, TILT payments likely would be more effective at getting projects past local opposition. Developers negotiate CBAs with local community groups, sometimes at the urging of local officials, in which they promise a range of benefits in return for support during the land-use approval process.<sup>212</sup> The best way to characterize CBAs is that they are effectively a form of private logrolling between developers and neighbors with the intent of presenting a settled deal to legislators that will be enforced by contract.<sup>213</sup> However, as Vicki Been has argued, the enforceability of these contracts and their legal status under the Supreme Court's exactions doctrine is in some doubt.<sup>214</sup> Further, the availability of CBAs actually creates an incentive to protest development, rather than head it off. After all, only a squeaky wheel gets CBA grease.<sup>215</sup>

Impact fees allow a local government to demand payments to offset the increased need for additional public services created by a development.<sup>216</sup> Under most state laws governing impact fees, the size of the fees must bear a reasonable relationship to the need for public services.<sup>217</sup> And the Supreme Court's exaction cases undergird this statutory requirement with two other requirements: any exaction must have an "essential nexus" to a legitimate state interest that could have served as a reason for rejecting a proposed

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212. For the best discussion of how CBAs work, see Been, *supra* note 3, at 5-6.

213. The degree to which CBAs represent community concerns about land use is questionable. A CBA will only prove effective if it heads off political and legal opposition, and the groups who can organize to provide such opposition do not necessarily have much to do with the community or parties specifically affected by a new development, but instead track the underlying influence of interest groups in a city. In fact, CBAs have become loaded down with all sorts of requirements that have nothing to do with the direct effect of development on neighbors, but serve the goals of local power players. See, e.g., Raymond H. Brescia, *Line in the Sand: Progressive Lawyering, "Master Communities," and a Battle for Affordable Housing in New York City*, 73 ALB. L. REV. 715, 727-28 (2010) (discussing the success of the labor movement in using litigation threats against developers to achieve policy ends).

214. Been, *supra* note 3, at 27-29.

215. This is a downside as well as an upside for TILTs—they cannot pay off the angriest local opponents of projects if they are to maintain their equal treatment of residents. This would mean that they would be less effective than CBAs at dealing with extreme harms to politically involved actors.

216. See Been, *supra* note 31, at 480.

217. See Mark Fenster, *Takings Formalism and Regulatory Formulas: Exactions and the Consequences of Clarity*, 92 CALIF. L. REV. 609, 622-25 (2004).

development, and the size of the concession must be “rough[ly] proportional[.]” to the effect the development would have on the community.<sup>218</sup> The combined effect of these limits is that, while impact fees can be used to offset public costs, they cannot go to the heart of the complaints locals have about new development—that new building reduces their property values by introducing nuisances, new supply, and new residents who compete for common-pool resources.

In contrast, TILT payments would be paid regardless of the fact of local opposition. Because receiving such payments is a lure (and because delay will reduce their size), TILT payments should reduce the incentives to oppose beneficial new development. They are aimed at local homeowners’ basic worry: the effect of new development on their housing values (and hence their wealth). And there is no particular constitutional exactions problem, as they impose no extra cost on a developer. Moreover, because TILTs are paid out of the future tax value of a development, they give neighbors a stake in the development’s success. This is in stark contrast to the difficult politics of CBAs, the enforcement of which often results in fights that last years and destroy value for both neighbors and developers.<sup>219</sup>

One can imagine circumstances in which CBAs are more effective than TILTs at getting new development approved. But TILTs could be combined with CBAs, transferring some consumer surplus and some producer surplus to those harmed by new projects. This may be particularly important when opposition comes in the form of renters’ groups, who are notoriously insensitive to property tax increases (or in this case, the potential for property tax decreases) because they do not believe they will be passed along to consumers of housing.<sup>220</sup>

Using TILTs to mitigate local opposition would not mean that builders would always win local political fights. People from all over a city oppose building for all sorts of reasons, good and bad, from anti-cosmopolitanism to a strong preference for sunlight. However, the holders of these preferences are

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218. *Dolan v. City of Tigard*, 512 U.S. 374, 391, 397-98 (1994); see *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 837 (1987).

219. Consider the fight over Atlantic Yards in Brooklyn, New York. Although there was a CBA, it did not buy off local opposition sufficiently to stop lengthy litigation over the development. See Christine A. Fazio & Judith Wallace, *Legal and Policy Issues Related to Community Benefits Agreements*, 21 *FORDHAM ENVTL. L. REV.* 543, 548 (2010).

220. See Wallace E. Oates, *Property Taxation and Local Public Spending: The Renter Effect*, 57 *J. URB. ECON.* 419, 422-24 (2005) (finding that if renters had the same attitudes as homeowners, local public spending would be at least ten percent lower). Perhaps publicizing the existence of TILTs would have some effect on this population, as it would publicize the benefits for which they should be negotiating.

different in kind from neighborhood opposition. To the extent that opposition to new construction is not rooted in the specifics of NIMBYism—that is, homeowners near proposed new developments worried about their heavy investment in their homes and easy to organize due to geographic proximity—there is no reason to believe such opposition has any Olsonian advantage in political organizing. Those people in Washington, D.C. who prize the low-rise feel of the city and therefore support height limits on all building are a powerful interest, but only because they are so numerous.<sup>221</sup> Even in the presence of a well-functioning TILT program, cities would still see political conflict over development, and developers would frequently lose to interests like the D.C. height-limit crowd. But the key is that the conflict would not be slanted by the presence of groups like nearby homeowners who form a heavily invested and easily organized local opposition to new projects.

None of this is to say that implementing a TILT program would be without substantial challenges. Clearly, it would be difficult to figure out the percentage of the tax increment to give local residents, and the length of time to give it, as the payments would need to be enough to reduce opposition but not so large as to burden the public fisc.<sup>222</sup> Cities would also need to adopt rules that limited the chances that TILT payments would be given in cases where they were not needed, as doing so would reduce general tax revenue.<sup>223</sup> Cities without community boards would need to figure out the proper geographic scope for TILT payments, and all cities would need to determine whether the money should be given on a graduated or even basis to all locals.<sup>224</sup> However,

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221. For a discussion of the costs of the D.C. height limit, see Rodriguez & Schleicher, *supra* note 51, at 651-53. Of course, it is impossible to determine how popular the D.C. height limit is democratically (i.e., whether its local supporters would be able to limit heights throughout D.C.), as it was passed by Congress, not by a locally elected body. Height of Building Act of 1910, Pub. L. 61-196, 36 Stat. 452 (codified as amended at D.C. CODE § 6-601.05 (2012)).

222. In the presence of risk aversion among city residents, this may become particularly hard, as it would take more cash to buy off extremely risk-averse residents. TILTs might usefully be paired with a type of the “political insurance” discussed *infra* Section III.C, with TILT payments tied to negative local effects, to help avoid this outcome.

223. Notably, this same conflict pervades the application of TAA: Congress must balance the desire to reduce political opposition by not making compensation turn on the vociferousness of the opposition against the goal of making sure that the taxpayer does not overpay by compensating losers when a trade bill would have gone through without the deal.

224. Considered this way, TILTs end up looking a bit like Ellickson’s nuisance boards proposal. See *supra* note 44 and accompanying text. TILT payments would be based on the distance from a new project and—to the extent this approximates actual nuisance damages—TILT payments would serve as a rule-like alternative to Ellickson’s administrative and standard-based approach. One might consider the argument above, then, an argument for how a modified version of nuisance boards may be politically effective as well as fair or efficient.

compared with existing approaches, TILTs would be a substantial improvement, providing an automatic method for addressing local opposition without raising the cost of development by bringing the interests of housing consumers to the fore. TILTs could thus break the logjam created by aldermanic privilege over zoning decisions by making upzonings attractive to neighborhoods and local officials.

*C. Using Land-Use Law To Insure Against Developers' Broken Promises:  
Political "Safeguards"*

As Bill Fischel argues, the reason many "homevoters" care so much about zoning is that they are extremely undiversified. For most of them, their house is their largest asset by far, and allowing new development creates risk for that asset.<sup>225</sup> When homevoters dominate development land-use politics, decisions are in the hands of a city's most risk-averse lobby. But blocking development is an inefficient form of insurance against reductions in housing values. Karl Case, Robert Shiller, and Allan Weiss proposed a better one, creating an options market for home-value insurance based on what is now known as the Case-Shiller Home Price Index.<sup>226</sup> The idea is that homeowners could buy options that would protect them against falling home prices in their towns, protecting their largest assets against factors outside of their control. For our purposes here, the widespread adoption of such tools would make voters less worried about the local negative effects of new development, as they would be insured against changes in their local housing market.<sup>227</sup>

While Case-Shiller Index-linked futures have had their successes, they have not been used much by individual households because the markets are not deep enough in individual neighborhoods.<sup>228</sup> Homeowners can only get protection against region-wide decreases in property values, which provides

225. FISCHEL, HOMEVOTER HYPOTHESIS, *supra* note 4, at 8-10.

226. See ROBERT J. SHILLER, THE NEW FINANCIAL ORDER: RISK IN THE 21ST CENTURY 118-36 (2003); Karl E. Case, Robert J. Shiller & Allan N. Weiss, *Index-Based Futures and Options Markets in Real Estate*, J. PORTFOLIO MGMT., Winter 1993, at 83, 86-91.

227. FISCHEL, HOMEVOTER HYPOTHESIS, *supra* note 4, at 268-70 (discussing limiting NIMBY sentiment as a benefit of homeowner insurance); William A. Fischel, *Voting, Risk Aversion, and the NIMBY Syndrome: A Comment on Robert Nelson's "Privatizing the Neighborhood,"* 7 GEO. MASON L. REV. 881, 886-89 (1999) (same).

228. Mary Ellen Slayter, *Housing Futures Let Investors, or Homeowners, Hedge Their Bets, but They Attract Little Action*, WASH. POST, Nov. 22, 2008, <http://www.washingtonpost.com/wp-dyn/content/article/2008/11/21/AR2008112101388.html> ("Another issue is the extremely localized nature of real estate if you are trying to hedge for a single house. 'We don't have a Zip-code-level market,' [Fritz] Siebel pointed out. 'When you trade the futures, you're trading the metro area,' he said. 'That's like buying Xerox and selling the S&P 500.'").

little reason to stop worrying about new construction in their neighborhood. A few localities have tried to create their own insurance policies, but the idea has not caught on.<sup>229</sup> Other tools are needed.

Lee Fennell has suggested several ideas to reform land-use policy that would provide risk-averse incumbent homeowners with some insurance.<sup>230</sup> Impact fees require developers to pay for the need for public services created by development. At the moment of approval, however, it is not always clear what effect a new development will have. Risk-averse homeowners sometimes oppose projects because they think the developer is understating the impact the project will have on public services. But there is no reason why the impact fees need to be decided *ex ante*. The government could create a fee schedule, wherein the developer is on the hook for providing the city with fees that depend on the project's actual effect over time according to some set fee schedule. This would provide cities with flexibility, but perhaps more importantly, it would provide neighbors with insurance against the possibility that the developer is lying.<sup>231</sup>

Fennell has also suggested a more complicated tool, which she calls "entitlements subject to a self-made option," or ESSMOs.<sup>232</sup> A property owner would have to pay a fee to engage in some type of land use, but the community

229. Lee Anne Fennell & Julie A. Roin, *Controlling Residential Stakes*, 77 U. CHI. L. REV. 143, 157 & n.61 (2010). Fennell and Roin suggest that policies try to deal with "overstaking" – where residents have too much invested in their homes and as a result behave like NIMBYs – and "understaking" – where residents have too little invested in their homes and as a result do not invest in the quality of their neighborhood, leading to neglect of local commons. *Id.* at 143-47. While I will not spend too much time discussing this problem here, it is worth noting that overstaking has costs not commonly discussed, but that are directly related to agglomeration gains. Home ownership reduces residential mobility, and thus the mobility of the labor force. As a result, high incidence of home ownership is linked to unemployment. See Andrew J. Oswald, *A Conjecture on the Explanation for High Unemployment in the Industrial Nations: Part I* (Warwick Econ. Research Papers, No. 475, 1996), [http://wrap.warwick.ac.uk/1664/1/WRAP\\_Oswald\\_475\\_twerp\\_475.pdf](http://wrap.warwick.ac.uk/1664/1/WRAP_Oswald_475_twerp_475.pdf) (arguing that homeownership reduces mobility and as a result increases unemployment as workers refuse to move to take jobs); Andrew J. Oswald, *The Housing Market and Europe's Unemployment: A Non-Technical Paper* (1999) (unpublished manuscript), <http://www2.warwick.ac.uk/fac/soc/economics/staff/academic/oswald/homesnt.pdf> (same); see also Tim Harford, *The Renter's Manifesto: Why Home Ownership Causes Unemployment*, SLATE (Mar. 17, 2007, 12:09 AM), [http://www.slate.com/articles/arts/the\\_undercover\\_economist/2007/03/the\\_renters\\_manifesto.html](http://www.slate.com/articles/arts/the_undercover_economist/2007/03/the_renters_manifesto.html) (same).

230. See LEE ANNE FENNEL, *THE UNBOUNDED HOME: PROPERTY VALUES BEYOND PROPERTY LINES* 99-101 (2009). Fennell suggests that fee schedules would be good for local disamenities like ugly lawn furniture, but the idea can be extended relatively easily. *Id.*

231. It would also give developers incentives to reduce whatever neighboring residents find objectionable, not just in the project's plans, but also prospectively.

232. FENNEL, *supra* note 230, at 103-19.



could then buy her out if it found that it no longer liked her activity. The “self-made” part comes from giving the developer the right to set the initial price at whatever level she chooses, but the policy conditions the “buyout” price on the initial purchase price. ESSMOs give the developer an incentive to value a particular land use accurately, and allows the community to withdraw permission if changed conditions make the cash-for-use deal no longer worth it.

While these tools are both interesting and potentially useful, they would be difficult to implement in a big city. The reason is that it is extremely difficult to keep taxes and spending tied to a neighborhood. If a neighborhood wants the city to call an ESSMO, it will be difficult for the city to make the neighborhood itself pay for it.<sup>233</sup> If the proceeds from conditional impact fees go up, it is hard to provide residents with any assurance that the money will stay in the neighborhood.

A way around this problem is to take advantage of the centrality of procedure to land-use politics. Consider section 201 of the Trade Act of 1974.<sup>234</sup> Section 201 allows an industry to petition for temporary relief from import competition if it can meet a strict set of conditions related to the harm created by unanticipated import competition.<sup>235</sup> If the International Trade Commission (ITC) determines that the conditions are met, it suggests a remedy, which can include across-the-board tariff increases in the industry. The President then has the power to impose the remedy.

One way of characterizing section 201 is that it gives an industry facing severe import competition temporary control over the trade agenda to devise an exception to trade deals. In its submission to the ITC, the industry gets to suggest a remedy, and, importantly, these remedies exist outside of the reciprocal world of negotiated trade deals. The United States does not have to give anything up to impose a section 201 temporary restriction—the occasional use of safeguards is considered part of the ordinary working of the international trade system.<sup>236</sup> Control over the agenda is a powerful tool. Even

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233. It could, perhaps, be done through a special assessment, but this would be procedurally complicated.

234. Trade Act of 1974, Pub. L. No. 93-618, §§ 201-203, 88 Stat. 1978 (codified as amended at 19 U.S.C. §§ 2251-2254 (2006)).

235. *Id.*; see Chad P. Bown & Rachel McCulloch, *U.S. Trade Policy and the Adjustment Process*, 52 IMF STAFF PAPERS 107, 111-15 (2005). The United States has, since 1947, maintained some version of an escape clause from its international trade obligations, and backed the inclusion of Article XIX in the General Agreement on Tariffs and Trade, which permits the use of escape provisions. See Borrus & Goldstein, *supra* note 185, at 338-41.

236. This may be more theoretical than real, however. A relatively recent study found that every actual section 201 remedy that has been challenged in the World Trade Organization has been ruled improper. See Daniel B. Pickard & Tina Potuto Kimble, *Can U.S. Safeguard*

an avowedly pro-free trade President like George W. Bush approved massive safeguard measures for the steel industry.<sup>237</sup> Section 201 provides firms and industries with some insurance when they are considering whether to support a new trade deal. They know that if things go really sideways, they can get a temporary reprieve from foreign competition. By including safeguards, countries can pass more wide-ranging trade deals.<sup>238</sup>

Something similar could be done in land use. We could give potential opponents to new development a form of *political* insurance. When considering an upzoning, the city council could pass an ordinance that states that, if there are greater-than-expected spillovers, the local community board or city council member has the right to design a mitigation plan that the city council must vote up or down under a closed rule. If, say, the city planning commission or a court determines that more parking spaces were used than anticipated, neighbors would have the power to suggest a change in land-use policy to offset this increased harm. And because the mitigation proposal would not require any changes elsewhere in the city, the support of the local councilmember would likely result in its passing for reasons discussed *supra*, in Section II.A. Such an ordinance would thus provide neighbors with insurance that, if they allow new building, they can recover if there are excessive locally negative effects.

Designing political insurance of this type in a way that is effective would be challenging. Such political insurance would result in *ex post* policies that, on their own, may be less than attractive in order to get reluctant parties to agree to *ex ante* efficient policies. If one fails to limit the range of available remedies, then the overall system may be inefficient, as the costs of mitigation may be higher than the benefits of increased acceptance of new development.<sup>239</sup> However, if the remedies are too hard to obtain, the scheme would provide

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*Actions Survive WTO Review?: Section 201 Investigations in International Trade Law*, 29 LOY. L.A. INT'L & COMP. L. REV. 43, 44 (2007).

237. *Id.* at 49-50; Jennifer Rivett Schick, Note, *Agreement on Safeguards: Realistic Tools for Protecting Domestic Industry or Protectionist Measures?*, 27 SUFFOLK TRANSNAT'L L. REV. 153, 184 (2003) (noting the political benefits of imposing section 201 remedies for President Bush).

238. See Sykes, *supra* note 185, at 256-60.

239. This may be particularly true for new development that has less predictable effects. If, for instance, someone proposes building a new apartment building in an urban neighborhood that had previously only had single-family homes, the range of potential effects on local amenities like parking, school slots, and the like will be difficult to predict. After all, the new building could be filled with empty-nesters moving back to the city or with families seeking to stay. Providing a neighborhood with the power to set the land-use agenda when effects are so variable, and therefore the likelihood of the insurance kicking in is high, may be too much.

little insurance for residents nervous about new construction in their neighborhoods.

The difficulty in administering such a program suggests that any effort to do so should be provisional and limited. One can imagine limiting safeguards to policy areas like parking, where the effects are easily determinable and the potential remedies are not hard to design (for instance, a requirement that any future expansion include more parking spaces for a time). However, this would be costly too, as taking up the time of the city council with small issues may distract from other, more valuable legislation.

Although they would be complicated to design, policy moves of this type may yet be attractive. Political insurance might outperform pure financial insurance in greasing approval for new projects because it would be targeted at the bodies with direct influence on the decision to approve or reject projects: the community boards or councilmembers themselves. To the extent that there are agency costs between community boards or councilmembers and residents, “safeguards” might be more effective than financial insurance because political figures could take credit for proposing and achieving mitigation, while financial insurance works automatically for residents and therefore does not provide any potential for individual political benefits.

## CONCLUSION

I want to end this Article by discussing the work that is still to be done. This Article certainly has left a great deal out of its analysis of the law and politics of local land use. It has not considered, for instance, the role of state and federal institutions in structuring land-use decisions, has only considered a subset of the relevant political players, and has provided a relatively barebones view of how local politics works.<sup>240</sup> And there are surely many ways, both theoretical and empirical, to expand and extend the analysis. Similarly, the policy proposals are not fully formed, although I hope they are interesting and provide promising starting points for reform.

However, what I hope this Article has done is provide a different way of thinking about debates over city planning and zoning. Prior approaches, be they inspired by public choice or regime theory or whatever else, treat our current land-use policies either as the inevitable result of social forces that

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240. For instance, I did not discuss the effect of referenda on zoning politics. For an interesting paper discussing referenda and their relation to ordinary zoning politics, albeit from a somewhat different perspective than the one offered here, see Kenneth A. Stahl, *The Artifice of Local Growth Politics: At-Large Elections, Ballot-Box Zoning, and Judicial Review*, 94 MARQ. L. REV. 1 (2010).

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cannot be influenced by political decisions or as the result of voter preferences that can be changed if reformers castigate homeowners for being NIMBYs enough times. In contrast, what this Article has argued is that the limits we place on the development of our built environment are contingent and path dependent. Furthermore, even taking the interests of homeowners and others as given, changing how we make land-use decisions can affect the content of those decisions. Our cities are our own, and the process through which we plan them determines how they look and how we live.