



School of Law

# **CITY UNPLANNING**

**David Schleicher,  
George Mason University School of Law**

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## City Unplanning

David Schleicher<sup>1</sup>

### Abstract:

Generations of scholarship on the political economy of zoning have 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. Further, this literature has assumed that, while zoning restrictions can cause "micro-misallocations" inside a metropolitan region, they cannot increase housing prices throughout a region because some of the many local governments in a region will allow development. But these theories have been overtaken by events. Over the past few decades, land use restrictions have driven up housing prices in the nation's richest and most productive regions, resulting in massive changes in where in America people live and reducing the growth rate of the economy. Further, as demand to live in them has increased, many of the nation's biggest cities have become responsible for substantial limits on development. Although developers are, in fact, among the most important players in city politics, we have not seen enough growth in the housing supply in many cities to keep prices from skyrocketing.

This paper seeks to explain these changes with a story about big city land use that places the legal regime governing land use decisions at its center. Using the tools of positive political theory, I argue that, in the absence of strong local political parties, land use law sets the voting order in local legislatures, determining policy from potentially cycling preferences. Specifically, these laws create a peculiar procedure, a form of *seriatim* decision-making in which the intense preferences of local residents opposed to re-zonings are privileged against more weakly-held citywide preferences for an increased housing supply. Without a party leadership to organize deals and whip votes, legislatures cannot easily make deals for generally-beneficial legislation stick. Legislators, who may have preferences for building everywhere to not building anywhere, but stronger preferences for stopping construction in their districts, "defect" as a matter of course and building is restricted everywhere. Further, the *seriatim* nature of local land use procedure results in a large number of "downzonings," or reductions in the ability of landowners to build "as of right", as big developers do not have an incentive to fight these changes. The cost of moving amendments through the land use process means that small developers cannot overcome the burdens imposed by downzonings, thus limiting incremental growth in the housing stock.

Finally, the paper argues that, as land use procedure is the problem, procedural reform may provide a solution. Land use and international trade have similarly situated interest groups. Trade policy was radically changed, from a highly protectionist regime to a largely free trade one, by the introduction of procedural reforms like the Reciprocal Trade Agreements Act, adjustment assistance, and "safeguards" measures. The paper proposes changes to land use procedures that mimic these reforms. These changes would structure voting order and deal-making in local legislatures in a way that would create support for increases in the urban housing supply.

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<sup>1</sup> Visiting Professor, New York University School of Law; Associate Professor, George Mason University School of Law. This piece builds upon work done with my frequent co-author Rick Hills, from whom I have learned much. Thanks to Vicki Been, Richard Briffault, Chris Elmendorf, Clay Gillette, Daryl Levinson, Rich Schragger, Frank Upham and participants at the NYU law faculty workshop for their comments. All mistakes are my own.

## I. Introduction: Planning and Unplanning

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 creating 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. -- reminds all involved that this year's controversy is not much different from last year's.<sup>2</sup> While there have been new movements among city planners, like "new urbanism,"<sup>3</sup> and some new tools for getting political approval of new projects, like community benefits agreements (CBAs),<sup>4</sup> the rhetoric in debates about zoning today differs little from similar fights decades earlier.

Law and economics scholarship about the efficiency of zoning regimes has been pretty consistent as well, the basic shape of the debate having taken its modern form around thirty years ago. Supporters of the community property rights theory of zoning, like Robert Nelson and William Fischel, argue that granting local governments the right to prevent building but allowing

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<sup>2</sup> 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 (1993) (providing definitions). See also Rick Stephens, *From NIMBYs To DUDEs: The Wacky World Of Plannerese*, PLANETIZEN, July 26, 2005, available at <http://www.planetizen.com/node/152> (providing definitions for the above acronyms and many more, including CAVEmen or Citizens Against Virtually Everything, and DUDEs, or Developers Under Delusions of Entitlement).

<sup>3</sup> New Urbanism is a popular intellectual movement aimed at replacing suburban style development with mixed-use neighborhoods, pedestrian and mass transit friendly transportation policies, form-based zoning focused on regulating the aesthetics and shapes of building more than on land uses, and regional planning based on a concept called the "urban-to-rural" transect, which suggests that building forms be consistent with the level of density in the area. The classic new urbanist critique of modern zoning is ANDRES DUANY, ELIZABETH PLATER-ZYBERK AND JEFF SPECK, *SUBURBAN NATION: THE RISE OF SPRAWL AND THE DECLINE OF THE AMERICAN DREAM* (2000). The leading model for applying new urbanist theories to city development is provided in ANDRES DUANY AND JEFF SPECK, WITH MIKE LYDON, *THE SMART GROWTH MANUAL* (2010). For a comparison between the new urbanist critique of modern zoning regimes and those based on agglomeration economics, see note \_.

<sup>4</sup> For a discussion of community benefits agreements, see Vicki Been, *Community Benefits Agreements: A New Local Government Tool or Another Variation on the Exactions Theme*, 77 U. CHI. L. REV. 5 (2010). See also notes \_ and accompanying text *infra*.

landowners to negotiate for permission to build ensures an efficient level of development, as it leads to low transaction cost negotiations between builders and incumbent residents over the harm new projects cause to property values in a jurisdiction.<sup>5</sup> On the other hand, the classic critique of zoning, laid out by Robert Ellickson and Bernard Siegan among others, maintains that planning regimes are a costly restriction on the supply of housing and office space, pushing property prices upward and artificially separating land uses, and do not do much better than the market, courts, and/or private contracts at minimizing nuisances.<sup>6</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 co-locating.<sup>7</sup> This research, largely unincorporated into legal scholarship until quite recently, has shown that urban density provides individuals with

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<sup>5</sup> See ROBERT NELSON, ZONING AND PROPERTY RIGHTS 22-51 (1977); Robert Nelson, *A Property Right Theory of Zoning*, 11 URB. LAW. 713 (1979); WILLIAM A. FISCHEL, THE ECONOMICS OF ZONING LAWS 74-149 (1985); WILLIAM A. FISCHEL, THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE AND LAND-USE POLITICS 39-71 (2001); William Fischel, *Zoning and Land Use Reform: A Property Rights Perspective*, 1 VA. J. NAT. RESOURCE L. 69 (1980); William Fischel, *A Property Rights Approach to Municipal Zoning*, 54 LAND ECON. 64 (1978). See also Vicki Been, "Exit" as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine, 91 Colum. L. Rev. 473 (1991) (arguing that exactions and impact fees by cities should not be limited by the Supreme Court, as cities are competing in a market for residents and their ability to condition fees upon entry thus face market pressures).

<sup>6</sup> See BERNARD H. SIEGAN, LAND USE WITHOUT ZONING (1972); Bernard H. Siegan, *Non-Zoning in Houston*, 13 J.L. & ECON. 71, 75 (1970); Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385, 400 (1973) ("Antigrowth measures have one premier class of beneficiaries: those who already own residential structures in the municipality doing the excluding."); Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681 (1977); Robert C. Ellickson, *The Irony of "Inclusionary" Zoning*, 54 S. CAL. L. REV. 1167, 1184-85 (1981) (arguing that inclusionary zoning will reduce the supply of affordable housing).

<sup>7</sup> For a full survey of this research, see David Schleicher, *The City as a Law and Economic Subject*, 2010 U. Ill. L. Rev. 1507 (2010). For classic reviews of the subject, see MASAHISA FUJITA ET AL., THE SPATIAL ECONOMY: CITIES, REGIONS, AND INTERNATIONAL Trade 1-6 (1999); EDWARD L. GLAESER, CITIES, AGGLOMERATION AND SPATIAL EQUILIBRIUM 1-12 (2008); EDWARD GLAESER, TRIUMPH OF THE CITY: HOW OUR GREATEST INVENTION MAKES US RICHER, SMARTER, GREENER, HEALTHIER, AND HAPPIER (2011); Robert E. Lucas, Jr., *On the Mechanics of Economic Development*, 22 J. MONETARY ECON. 3, 39 (1988).

reduced shipping costs, the benefits of market depth, and information spillovers.<sup>8</sup> 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 another, the increasing empirical validation of the importance of agglomeration economics 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 gotten much, much stricter over the last 30 or so years, and 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 U.S. in which land use policy had a significant effect on housing prices region-wide, as judged by the

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<sup>8</sup> It was only in the last few years that this work has been incorporated into the local government law literature at all. But it has become pretty central to the work of at least a part of the field since then, particularly in work by Clay Gillette, Steven Eagle, Rick Hills, Daniel Rodriguez, Richard Schragger and me. See Clayton P. Gillette, *Regionalization and Interlocal Bargains*, 76 N.Y.U. L. REV. 190, 192–209 (2001); Clayton P. Gillette, *The Conditions of Interlocal Cooperation*, 21 J. L. & POL. 365, 367–69 (2005); Clayton P. Gillette, *Local Redistribution, Living Wage Ordinances, and Judicial Intervention*, 101 N.W. U. L. REV. 1057, 1064–66 (2007) (discussing how agglomeration economies permit local governments to engage in redistribution); CLAYTON P. GILLETTE, LOCAL REDISTRIBUTION AND LOCAL DEMOCRACY: INTEREST GROUPS AND THE COURTS 74-105 (2011) (same); Steven J. Eagle, *Public Use in the Dirigiste Tradition: Private and Public Benefit in an Era of Agglomeration*, 38 FORDHAM URB. L.J. 1023 (2011) (using agglomeration economics to discuss issues in government takings); Roderick M. Hills and David Schleicher, *The Steep Costs of Using Non-Cumulative Zoning to Preserve Land for Urban Manufacturing*, 77 U. CHI. L. REV. 249 (2010) (discussing the costs and benefits of non-cumulative zoning in terms of its effect on agglomeration economies); Schleicher, *The City*, supra note 7, at 1525-35 (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 (2011) (exploring how agglomeration economies explain greater degree of corruption in big city local governments); Daniel B. Rodriguez and David Schleicher, *The Location Market*, 45 GEO. MASON L. REV. (forthcoming 2012) (arguing that zoning rules frequently move development around inside a city to the detriment of agglomerative efficiency); Richard C. Schragger, *Rethinking the Theory and Practice of Local Economic Development*, 77 U. CHI. L. REV. 311 (2010) (using agglomeration economics to argue that city policies will not induce economic growth at the local governmental level); Richard C. Schragger, *Decentralization and Development*, 96 VA. L. REV. 1837 (2010) (using agglomeration economics to argue that decentralization of political power matters little to development);

existence of a gap between the cost of housing and the cost of building housing (absent supply restrictions, they should be roughly equal).<sup>9</sup> Now, such gaps have emerged in virtually every metropolitan area on both coasts of the United States and a large number of inland regions as well. And where such gaps have emerged, they have grown substantially. In the most regulated regions, legal restrictions on the supply of housing are responsible for as much as half of the cost of any given housing unit.

These changes in the strictness of land use policy have caused massive shifts in population across the country.<sup>10</sup> Rich, restrictive regions like San Francisco and Boston have seen massive 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>11</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 domestic population from 2000-10, as housing prices increased faster than wages.<sup>12</sup> Strict zoning rules in productive regions do not only cause static efficiency losses, but can reduce economic growth. Artificially high housing prices limit employment in the fast-growing industries that are prevalent in what Krugman calls

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<sup>9</sup> Edward L. Glaeser, Joseph Gyourko, Raven E. Saks, *What Have Housing Prices Gone Up?* (2005); Edward L. Glaeser, Joseph Gyourko and Raven Saks, *Why Is Manhattan So Expensive? Regulation and the Rise in Housing Prices*, 48 J. L. & ECON. 331 (2005); Edward L. Glaeser and Joseph Gyourko, *The Impact of Zoning on Housing Affordability* (2002); Edward L. Glaeser and Joseph Gyourko, *Zoning's Steep Price*, 25 REGULATION 24 (Fall 2002). This research leaves some questions unanswered, like whether zoning regimes have gotten stricter in an absolute sense (i.e a lower total amount of space under local zoning envelopes), or merely whether demand has increased and zoning regimes merely did not allow growth to match that demand.

<sup>10</sup> GLAESER, THE TRIUMPH OF THE CITY, *supra* note \_\_, at 180-88.

<sup>11</sup> This pattern was consistent through the 2000s housing boom, with the exception of several less restrictive cities (e.g. Phoenix, Las Vegas) that saw both price increases and population booms. But the busting 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 Edward Glaeser, Joseph Gyourko and Albert Saiz, *Housing Supply and Housing Bubbles*, 64 J. URB. ECON. 198 (2008).

<sup>12</sup> See RYAN AVENT, THE GATED CITY 799-914 (Kindle Single, 2011)

the “zoned zone” of the country, and reduce the number of people who can capture the human-capital enhancing information spillovers available in these areas.<sup>13</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.<sup>14</sup> 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.<sup>15</sup> Fixing supply in the face of heavy demand, unsurprisingly, has led to skyrocketing prices. Although developers are, in fact, among the biggest 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.

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 works. That's what this paper aims to provide.

Section II 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 20 years have come at a substantial cost to the

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<sup>13</sup> Edward L. Glaeser, *Houston, New York Has a Problem*, 18 CITY J. 72 (2008).

<sup>14</sup> See notes \_ and accompanying text. Of course, these traditions differ in how they assess this fact normatively.

<sup>15</sup> See Amy Armstrong, Vicki Been, Josiah Madar, Simon McDonnell, *How Have Recent Rezonings Affected the City's Ability to Grow*, March 2010, available at [http://furmancenter.org/files/publications/Rezonings\\_Furman\\_Center\\_Policy\\_Brief\\_March\\_2010.pdf](http://furmancenter.org/files/publications/Rezonings_Furman_Center_Policy_Brief_March_2010.pdf) (finding that gains in housing capacity in the New York from rezonings have been eroded by substantial number of downzonings) (henceforth Armstrong et al, *Affected*) See also notes \_ and accompanying text.

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 literature on the political economy of zoning.

Section III 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 understandings have 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 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>16</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 in what contexts fights over development take place. Importantly, most cities do not have competitive party politics – they either have formally non-partisan elections and/or are entirely dominated by one party that rarely takes local-issue specific stances.<sup>17</sup> Absent partisan competition, there is little debate over citywide issues in local

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<sup>16</sup> See generally VICKI L. BEEN AND ROBERT C. ELLICKSON, *LAND USE CONTROLS: CASES AND MATERIALS* 304-08 (2005) (summarizing literature).

<sup>17</sup> See notes \_ and accompanying text; 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 election laws that ensure national parties appear on local ballots and limit party switching between elections can result in uncompetitive local elections if voters know little about individual local candidates and care more about national politics than local politics. *Id.* at 448-60. Christopher Elmendorf and I argue that voter difficulties with 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 and David Schleicher, *Informing Consent: On Voter Ignorance and Election Law* (draft 2012, on file with author)



legislative races and there is no party leadership to organize the legislature, making the procedural rules governing the manner in which the legislature considers land use issues far more important.<sup>18</sup> The content of the land use procedure generates what one might call “localist” policy-making: *seriatim* decisions about individual developments or rezonings in which the preferences of the most affected local residents are privileged against 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 results in individual representatives having outsized control over policies that have a predominant effect on their districts. Legislatures without competitive parties have difficulty making and keeping agreements to overcome strategic difficulties. 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>19</sup> Without a party leadership that can organize deals and whip votes into line, legislatures cannot easily make deals for generally-beneficial legislation stick. Legislators “defect” as a matter of course and building is restricted everywhere. This limits the influence of developers, as they 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.

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<sup>18</sup> The model of legislative parties here is the classic positive political theory model developed by Gary Cox, Roderick Kiewiet and Mathew McCubbins. *See generally* GARY COX AND MATHEW D. MCCUBBINS, LEGISLATIVE LEVIATHAN: PARTY GOVERNMENT IN THE HOUSE (2d ed 2007); GARY COX AND MATHEW D. MCCUBBINS, SETTING THE AGENDA: RESPONSIBLE PARTY GOVERNMENT IN THE U.S. HOUSE OF REPRESENTATIVES (2005); D. RODERICK KIEWIET AND MATHEW D. MCCUBBINS, THE LOGIC OF DELEGATION: CONGRESSIONAL PARTIES AND THE APPROPRIATION PROCESS (1991)

<sup>19</sup> *Cf.* Barry Weingast, *A Rational Choice Perspective on Congressional Norms*, 23 Am. J. Pol. Sci. 245 (1988) (suggesting universal log rolls can be maintained in Congress through the development of norms).

Second, the specifics of land use law and procedure serve to divide the 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 to which changes, either map amendments or variances, are made *seriatim*. Further, a variety of land use rules and institutions – like New York City's Uniform Land Use Review Procedure, state environmental review laws and landmark commissions – 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” under which current landowners are allowed to develop as-of-right. This leaves the field to neighbors' anti-development sentiment, as big developers' lobbying muscle only goes as far as achieving success on their own projects, and has no bearing on downzonings in areas with no prospect of large-scale development. The high and fixed costs of achieving zoning changes makes downzonings relevant, as the cost of getting a zoning change through the local policy-making 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 but are consistent with a large number of observed facts about land use policy in big cities, particularly its tendency to get stricter over time. They also suggest that the traditional policy prescription among critics of exclusionary zoning – regional planning bodies – would not be successful absent other types of political reform.<sup>20</sup> Other common approaches to reforming zoning amount to little more than

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<sup>20</sup> See, e.g., ANTHONY DOWNS, *NEW VISIONS FOR METROPOLITAN AMERICA* (1994); Richard Briffault, *Our Localism: Part II - Localism and Legal Theory*, 90 *Colum. L. Rev.* 346, 426-27 (1990); Richard Briffault, *Localism and Regionalism*, 48 *BUFF. L. REV.* 1 (2000); MYRON ORFIELD, *METROPOLITICS: A REGIONAL AGENDA FOR COMMUNITY AND STABILITY* 75 (rev. ed. 1998);

extorting homeowners to accept changes in land use that harm the value of their most important asset, their home. If the analysis in this paper 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.

Section IV 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 face small harms individually, concentrated and heavily-invested protectionist groups (neighbors, import-competing firms) and potential allies for consumers that, depending on how issues are posed, may sit out certain fights (developers, 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 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 do 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 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 ensure 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, making automatic the type of log-rolling we see when competitive political parties pay more attention to generalist interests.<sup>21</sup>

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 did in enlisting exporters to fight import tariffs.<sup>22</sup> Each year, a city would adopt a planned increase (or decrease) in the housing stock. Until new projects met the 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, providing developers an incentive to fight for generalized increases in supply rather than simply for their own projects, bringing 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, mostly notably the creation of the Case-Shiller housing futures market.<sup>23</sup> However, 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

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<sup>21</sup> See MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* 1-18 (1965).

<sup>22</sup> Act of June 12, 1934, ch. 474, 48 Stat. 943 (codified as amended at 19 U.S.C. § 1351 (2006)). For such a comparison, see Roderick J. Hills Jr. and David Schleicher, *Balancing the “Zoning Budget,”* 42 CASE WEST L. REV. (forthcoming 2011). See also notes \_ and accompanying text.

<sup>23</sup> See notes and accompanying text

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 deals 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. 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.

## **II. A Much Too Brief Summary of the Law and Economics of City Planning**

What are the economic justifications for zoning as currently practiced? This section summarizes the arguments for and against our system of zoning, but does so without the aim of comprehensiveness. Instead, it will try to establish the three following propositions: (1) 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; (2) as the case for comprehensive zoning weakened, the actual strictness of modern zoning regimes has gotten far more severe, with substantial implications for regional and even national economic growth and population flows around the country; and (3) despite widespread beliefs 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.

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>24</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. Amber Realty*, which upheld the constitutionality of zoning.<sup>25</sup>

Whatever the merits of this view, it became clear that zoning regimes did far more than reduce traditionally-adjudicable nuisances.<sup>26</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 conditions set by the city and more ways to restrict building, including non-cumulative zoning rules that specifically assigned uses to specific areas.<sup>27</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 grounds that cities would evolve better if they followed a predetermined plan for the places and sizes for all things in a community, from public services like roads to private land uses.<sup>28</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.

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<sup>24</sup> R.H. Coase, *The Problem of Social Cost*, 3 J. L. & ECON 1, 2 (1960).

<sup>25</sup> 272 U.S. 365 (1926).

<sup>26</sup> RICHARD F. BABCOCK, *THE ZONING GAME: MUNICIPAL PRACTICES AND POLICIES* 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."

<sup>27</sup> *Id.* at 7-16, 127-29;

<sup>28</sup> *Id.* at 121-37.

Robert Nelson and William Fischel developed a theory of zoning to justify such comprehensive planning built around a government's ability to negotiate on behalf of all property owners in the jurisdiction.<sup>29</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. 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> Because there would be low transaction costs, Coasean bargaining should ensure that we get to the optimal amount and type of development.<sup>31</sup> While the Supreme Court's

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<sup>29</sup> FISCHEL, *THE ECONOMICS*, *supra* note \_\_, at 72-149; Nelson, *Zoning and Property Rights*, *supra* note \_\_, at 22-51. 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, *THE ZONING GAME*, *supra* note \_\_, at 115-20.

<sup>30</sup> This 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. Jeremy R. Groves and Eric Helland, *Zoning and the Distribution of Location Rents: An Empirical Analysis of Harris County, Texas*, 78 *LAND ECON.* 28 (2002).

<sup>31</sup> Bradley Karkkainian added to this by arguing zoning is necessary because protecting landowners with a liability rule from nuisances would not take into account the consumer surplus residents get from their neighborhoods and homes that is not necessarily reflected in market prices (or in changes to market prices caused by inconsistent nearby uses of land). Bradley C. Karkkainen, *Zoning: A Reply to The Critics*, 10 *J. LAND USE & ENVTL. L.* 45, 64-78 (1994). Oddly Karkkainian rejects the Nelson-Fischel concept of protecting this community and individual consumer surplus with a (collective) property rule, arguing that although it may be welfare maximizing to allow a community to sell the right to build, "it is deeply contrary to our most cherished democratic and legal traditions." *Id.* at 77. Instead, he argues that zoning is best understood as a "peculiar kind of property rule" held by town residents, effectively one where developers can offer town officials public-service style in-kind donations, but not cash. *Id.* at 78.

Karkkainian's argument has two steps. First, he asserts that there is a large consumer surplus in community values without calculating it (indeed, rejecting the possibility of calculating it) or comparing it to the consumer surplus associated with new combinations of uses of land. *Id.* at 75-76. It is a cost/benefit analysis that only considers benefits, and does not bother to calculate them. He then argues that the holders of this consumer surplus -- that is the community -- should only be able to trade their rights in this surplus for some other asset that enhances the source of the surplus. Stepping back, this is an odd justification for current zoning practices. After all, we do not protect any other form of consumer surplus in this way, even where we think it may exist, as it requires assuming policies can be justified not by their effect on observable facts about the world but rather on our assumptions about what people like or don't like. And if we were to, we would surely let the holders of that consumer surplus tell us if the right is being excessively protected by allowing them to sell it off.

Karkkainian's response to criticisms of zoning is, repeatedly, that they "confus[e] the zoning power itself with the application of that power to achieve as goal they find objectionable," and that zoning can be used to enhance welfare. *Id.* at 58. But zoning must not be justified on its theoretical benefits, but on its actual ones. And

takings 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 only let in those developers they find appealing.<sup>32</sup>

This view has been criticized on a number of practical, ethical and legal grounds, but stands as the basic economic justification for the type of comprehensive zoning regimes we have in most local governments.<sup>33</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. Fischel argues that this pretty accurately describes most small town and suburban politics.<sup>34</sup> Local elections in such places are extremely responsive to the views of "home voters," or residents who vote and own homes and have a high incentive to care about local politics because almost all of their assets are tied up in the value of their home and they want to reduce the risk that public policy will harm the value of that asset. Fischel, however, argues that big cities couldn't be understood the same way, because the interests of home voters are diluted.<sup>35</sup> This fit with the general assumptions in the field about under what conditions zoning had a substantial effect on housing supply. Richard F. Babcock's classic work on the politics of zoning, *The Zoning Game*, notes that "the primary emphasis" in

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Karkainian does not provide any evidence that his imagined demand curve, full of community consumer surplus, actually exists or, by protecting it through zoning, we actually enhance welfare.

<sup>32</sup> 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 limits on exactions). However, it appears that cities are too zealous in denying new building even for the purpose of maximizing property values in their town. Glaeser and Bryce Ward find that increases in density in towns in the Boston region are associated with increases in property values. Edward L. Glaeser and Bryce A. Ward, *The Causes and Consequences of Land Use Regulation: Evidence From Greater Boston*, 65 J. URB. ECON. 265 (2009). This may be due to restrictions on exchange - things like the exactions doctrine -- or because cities are substantially risk averse.

<sup>33</sup> See generally Richard Schragger, *Consuming Government*, 101 MICH. L. REV. 1824, 1834 (2003) (reviewing FISCHEL, THE HOMEVOTER HYPOTHESIS, *supra* note \_) (surveying and making criticisms of property rights theory of zoning).

<sup>34</sup> FISCHEL, THE HOMEVOTER HYPOTHESIS, *supra* note \_, at 5-14

<sup>35</sup> *Id.* at 12-14, 92-94



his work, "is upon suburban, not urban activity. One hunts where the ducks are believed to be..."<sup>36</sup>

Placing the defense of zoning in a suburban milieu raised the stakes on 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>37</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 inter-local economic inequality and sprawl.

Locating the defense of zoning in the logic of suburban politics and development, however, made it easier to integrate with the central theory of the economics of local government law: the Tiebout Model. As famously argued by Charles Tiebout, local governmental 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>38</sup> So too with capital, the story goes: there will be some local government in a region that wants new projects, and so we needn't worry about exclusion. 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>39</sup> Any time a city establishes a high level of services and taxes, it gives property owners an incentive to subdivide their property, allowing more residents

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<sup>36</sup> BABCOCK, *THE ZONING GAME*, *supra* note \_\_, at xvi

<sup>37</sup> See Richard Briffault, *The Local Government Boundary Problem in Metropolitan Areas*, 48 STAN. L. REV. 1115, 1133-43 (1996) (pointing to external effect of city policies on sprawl and interlocal fiscal disparities) Schragger, *Consuming Government*, *supra* note \_\_, at 1834.

<sup>38</sup> Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956).

<sup>39</sup> 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 property tax powers); FISCHEL, *HOMEVOTER HYPOTHESIS*, *supra* note \_\_, at 65-66.

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. Even scholars who are skeptical of the efficiency of zoning regimes, like Nicole Garnett, have rejected regionally or state-imposed limits on local zoning rules because they would limit Tiebout sorting and exit-based pressure on local governments.<sup>40</sup>

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, it allows rich localities to avoid any responsibility to engage in redistributionary policy-making.<sup>41</sup> Much of the regulation of local zoning power by states and courts -- most notably the *Mt. Laurel* decisions in New Jersey and Massachusetts's "anti-snob" zoning laws -- was meant to limit the ability of localities to exclude poor residents.<sup>42</sup>

This stripped-down version of the basic economic case *for* zoning, and common criticisms of that model, should 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>43</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

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<sup>40</sup> Nicole Stelle Garnett, *Suburbs as Exit, Suburbs as Entrance*, 106 MICH. L. REV. 277, 297-98 (2007); Nicole Stelle Garnett, *Unbundling Homeownership: Regional Reforms from the Inside Out*, 119 YALE L.J. 1904, 1924-25 (2010)

<sup>41</sup> Notably, this is not a problem in a Tiebout world because redistribution is, by assumption, impossible. Clay Gillette has shown quite conclusively that this is simply false -- cities do redistribute income and can do largely because of the existence of agglomeration economies. GILLETTE, LOCAL REDISTRIBUTION AND LOCAL DEMOCRACY, *supra* note \_\_, at 74-105.

<sup>42</sup> See 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)

<sup>43</sup> Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385, 400 (1973) ("Antigrowth measures have one premier class of beneficiaries: those who already own residential structures in the municipality doing the excluding."); Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681 (1977); Robert C. Ellickson, *The Irony of "Inclusionary" Zoning*, 54 S. CAL. L. REV. 1167, 1184-85 (1981) (arguing that inclusionary zoning will reduce the supply of affordable housing);

to buy into communities and holders of developable land.<sup>44</sup> Local governments can be thought of as monopolists, and their success in increasing the value of existing houses will turn on their degree of market power (how much people value their specific location or public services) and the behavior of other similar towns. Ellickson also argued that positive effects of zoning were substantially overstated. Although zoning regimes reduce nuisances, individuals operating in an unregulated land market have the ability and the incentives to address problems of negative externalities,<sup>45</sup> and the “prevention costs,” or the foregone gains from using property as landowners intended could be quite large.<sup>46</sup> Notably, he also argued that inclusionary zoning, or policies that required the building of low income housing near high income housing, had similar negative effects as ordinary growth controls, functioning like a tax on development and providing benefits only to a fortunate few.<sup>47</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>48</sup> Alternatively, the takings clause could be used to restrict excessive uses of the zoning power.<sup>49</sup> Richard Epstein, writing in a similar vein, argues that many zoning regimes, particularly those that bar development in currently undeveloped property, should be considered violations of the takings clause.<sup>50</sup>

Bernard Siegan's roughly contemporaneous critique was built around his in-depth analysis of Houston, a city without a zoning map and more limited land use regulations than

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<sup>44</sup> Ellickson, *Suburban Growth Controls*, supra note \_\_, at 394-403

<sup>45</sup> 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).

<sup>46</sup> Ellickson, *Alternatives*, supra note \_\_, at 694-97

<sup>47</sup> Ellickson, *The Irony*, supra note \_\_, at 1184-1204.

<sup>48</sup> Ellickson, *Suburban Growth Controls*, supra note \_\_, at \_\_. In a similar vein, Michelle White proposed taxing zoning. Michelle J. White, *Suburban Growth Controls: Liability Rules and Pigovian Taxes*, 8 J. Legal Stud. 207, 209 (1979).

<sup>49</sup> Ellickson, *Suburban Growth Controls*, supra note \_\_, at 419-22

<sup>50</sup> EPSTEIN, *TAKINGS*, supra note \_\_.

other cities.<sup>51</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, and the basic goals of reducing nuisances could be achieved by ordinary nuisance suits, contractual covenants, and other private solutions.

The critiques of zoning are unclear on one key issue. The analyses made clear that zoning created costs in the aggregate -- on say, by reducing the supply of housing across a region -- but they also maintained that it prevented landowners from forming mutual gains from locating specific uses close together.<sup>52</sup> While identifying nuisances is not difficult, it was a bit unclear what form the gains from co-location took; in his prescient discussion of them, Ellickson noted that our knowledge of the benefits of density were "still fragmentary."<sup>53</sup> Similarly, critiques of the Tiebout model frequently focus on the "externalities" of local governmental decisions when making zoning policy, or what cities failed to include in their consideration when making zoning decisions. These criticisms, however, are not particularly clear about exactly what 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>54</sup> Claims that such development led to "sprawl" are similarly common, but lack a clear definition of what sprawl is. But the development of modern "agglomeration" economics, which only blossomed as a field in the 1980s, stepped into this void.

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<sup>51</sup> Houston does not have a zoning code, but -- contrary to common belief -- does have some substantial land use regulations, including minimum lot size requirements for single-family dwellings, restrictions on building townhouses, minimum parking requirements. Michael Lewyn, *How Overregulation Creates Sprawl (Even in a City Without Zoning)*, 50 WAYNE L. REV. 1172, 1199-1204 (2005).

<sup>52</sup> See Ellickson, *Alternatives to Zoning*, *supra* note \_\_, at 694-97;

<sup>53</sup> Ellickson, *Suburban Growth Controls*, *supra* note \_\_, at 443

<sup>54</sup> Schleicher, *The City*, *supra* note \_\_, at 1544-45.

Agglomeration economists aim at a somewhat different and larger question: why do cities form in the first place?<sup>55</sup> After all, there have to be benefits to residents and business from crowding into cities that match the costs of congestion – higher land costs, increased crime, general frustration – or else no one would live in cities.<sup>56</sup> The answer that agglomeration economists give is that there are several types of gains that are caused by close physical proximity between individuals and firms. 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>57</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>58</sup> Factories that supply one another with goods co-locate, with auto parts suppliers moving to Detroit to be near car manufacturers, creating a positive feedback loop. Krugman won his Nobel Prize in part for explaining how “forward and backward linkages” between producers of goods could lead to regional success or failure and patterns of trade.<sup>59</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. But this has lost much explanatory for explaining why individuals and

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<sup>55</sup> For a fuller summary of this work, see Schleicher, *The City*, *supra* note \_\_, at 1515-29.

<sup>56</sup> Usually agglomeration economists refer to the negative side of density as congestion costs, but this elides two different types of bads. See Schleicher, *The City*, *supra* note \_\_, at 1528-29. The first are true congestion costs, the increased expense 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 perhaps less of this in cities than in the densest agglomeration of criminals, jails.)

<sup>57</sup> Lucas, *On the Mechanics*, *supra* note \_\_, at 39.

<sup>58</sup> Schleicher, *The City*, *supra* note \_\_, at 1516.

<sup>59</sup> 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, [http://nobelprize.org/nobel\\_prizes/economics/laureates/2\\_008/index.html](http://nobelprize.org/nobel_prizes/economics/laureates/2_008/index.html). For the clearest explanation of this work, see FUJITA ET AL, SPATIAL, *supra* note \_\_.

businesses continue to locate cities, as domestic shipping costs have become “rounding errors” due to innovations ranging from the combustion engine and the shipping container.<sup>60</sup>

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 market size effects in retail markets; people like to shop in collections of stores rather than dispersed ones, leading to extreme concentrations like the thousands of diamond merchants that work on one block of 47th Street in Manhattan.<sup>61</sup> There are market size effects that drive urbanization even in non-transactional “markets,” like dating markets, which provide young singles with easier sorting among potential mates and insurance against a single breakup shutting down the local dating market. Notably, and importantly, some market size effects matter at the regional level – labor markets are largely regional<sup>62</sup> --- but some are extremely local, like the diamond merchants of 47<sup>th</sup> 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 they provide individuals with a rich learning environment that promotes the development of human capital.<sup>63</sup> Patent applications cite other patents from the same region at a higher than expected rate, suggesting learning across

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<sup>60</sup> See Schleicher, *The City*, *supra* note \_\_, at 1549-54; Edward L. Glaeser & Janet E. Kohlhase, *Cities, Regions and the Decline of Transport Costs*, 83 *Papers Regional Sci.* 197, 198 (2004); 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).

<sup>61</sup> Lauren Weber, *The Diamond Game, Shedding Its Mystery*, *N.Y. Times*, Apr. 8, 2001, at BU1.

<sup>62</sup> We define metropolitan statistical areas – the Census’s term for regions -- in terms of commuting. See U.S. Census Bureau, *Metropolitan and Micropolitan Statistical Areas*, available at <http://www.census.gov/population/metro/>

<sup>63</sup> See Edward L. Glaeser and David C. Mare, *Cities and Skills*, 19 *J. LABOR ECON.* 316 (2001) (finding 33% urban wage premium 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).

inventors.<sup>64</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 generated by interactions among the densely packed.<sup>65</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>66</sup> As Lucas argued, “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.”<sup>67</sup>

Agglomeration economics gives content to the question of what is lost when city planners move development around.<sup>68</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>69</sup> When development is forced to move, we see Ellickson referred to as the “micromisallocation in the location of activities.”<sup>70</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

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<sup>64</sup> 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. A.B. Jaffe, Adam M. Trajtenberg, Vernon R. Henderson, *Geographic Location of Knowledge Spillovers as Evidenced by Patent Citations*, 108 Q. J. Econ. 577 (1993) (finding patent applications are more likely to cite other patents from nearby inventors); Gerald Carlino, Satyajit Chatterjee and Robert Hunt, *Urban Density and the Rate of Invention*, Philadelphia Federal Reserve Bank Working Paper 06-14 (2006) at 3, available at <http://www.philadelphiafed.org/research-and-data/publications/working-papers/2006/wp06-14.pdf> (finding that density is positively correlated with patents per person)

<sup>65</sup> See JANE JACOBS, *THE ECONOMY OF CITIES* 50-51, 122 (1970). 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 -- are significantly more likely to appear in cities dense with college graduates and with a wide variety of firms. Jeffrey Lin, *Techonological Adaption, Cities and New Work*, 93 REV. ECON & STAT 554, 555 (2011).

<sup>66</sup> 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 ...”)

<sup>67</sup> Lucas, *supra* note \_\_, at 38.

<sup>68</sup> Daniel Rodriguez and I address this issue directly in our forthcoming piece, *The Location Market*, \_ GEO. MASON. L. REV. (2012)

<sup>69</sup> JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* 44 (1961)

<sup>70</sup> Ellickson, *Suburban Growth Controls*, *supra* note \_\_, at 409

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 and, 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>71</sup> In an economy that relies heavily on free flow of ideas, say, among co-locating software engineers in Silicon Valley, zoning decisions can be particularly costly, as they restrict entry into human-capital-enriching urban areas and separate types of uses and thereby reduce potential spillovers.<sup>72</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>73</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>74</sup> (Agglomeration also reduces the value of sorting,

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<sup>71</sup> See Glaeser and Ponzetto, *Death of Distance*, *supra* note \_\_, at 305; Glaeser and Kohlhase, *Decline of Transport Costs*, *supra* note \_\_, at 198; Edward L. Glaeser and Albert Saiz, *The Rise of the Skilled City*, 5 *Brookings-Wharton Papers on Urban Affairs* 47 (2004) (human capital externalities have grown in importance in determining urban success).

<sup>72</sup> This is Ryan Avent’s central argument. See notes \_\_ and accompanying text.

<sup>73</sup> Schleicher, *The City*, *supra* note \_\_.

<sup>74</sup> It is worth taking a moment to compare the similarities and differences between line of critique and criticisms of modern zoning coming from the architects, city planners and theorists associated with "new urbanism." See note \_\_. 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 inhibit density and interaction in ways that are costly to the economy and life generally. Compare AVENT, *THE GATED CITY*, *supra* note \_\_, with Duany et al., *Suburban Nation*.



as people who would prefer a different level of government services do not leave a city because of their desire to live among the other people and businesses in town. One result of this is that Tiebout sorting and the threat of exit impose a weaker constraint on big city local governments than on suburban ones.<sup>75)</sup>

Further, reductions in the efficiency of agglomeration do merely entail the type static costs that the classic case against zoning focused on, but also matter to economic growth.<sup>76</sup> Modern theories of economic growth put information externalities at the center of the question of why we see the development of new technologies.<sup>77</sup> Lucas famously linked his model of endogenous growth to Jacobs' work on how human capital develops in cities through information spillovers across industries.<sup>78</sup> Wages are higher in cities – about 35% higher – and research shows that this

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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 city and smaller in rural areas along a principle called the urban-rural transect), mixed use development and particularly forms of private development, like houses with front porches and short setbacks to encourage socializing . See DUANY ET AL, *THE SMART GROWTH MANUAL*, *supra* note \_\_. From an agglomerative perspective, this is excessively proscriptive. There is no reason to favor density over spread-out-development if people prefer the latter, aside for environmental externalities that could more easily be responded to with other policies (e.g. carbon taxes, congestion charges.) Nor is there any reason to be particularly specific about building form -- if someone wants to build a tower in the woods, or a visually discordant building downtown, there is no particular reason to stop them aside from ordinary concerns about nuisances. But this opposition should not be taken too far. For instance, the commitment among new urbanists to proscriptive uses of form-based zoning codes is mixed – frequently they argue that projects that take new urbanist form should not be barred by zoning codes, which other critics of modern zoning should have no problem with. Further, the restrictiveness of form-based proposals should be judged against the restrictiveness of modern use-based zoning regimes. Whatever limits its places on form, reducing limits on uses would encourage easier formation of agglomeration economies, as it would reduce limitations on economically-integrated land uses.

<sup>75</sup> See Schleicher, *The City*, *supra* note \_\_, at 1530-45; Schleicher, *I Would But I Need the Eggs*, *supra* note \_\_, at 279-84. A recent nice bit of evidence came from press coverage of Occupy Wall Street. It turns out the top 3 zip codes and 7 of the top 20 containing residents who make over \$200K (the top 3% of the income distribution) are in New York City, which is one of the few cities that has an income tax on top of state income taxes, resulting in the highest combined rate. Howard Wial, *Where the 1% Live*, *THE ATLANTIC -- CITIES: PLACE MATTERS*, October 31, 2011, available at <http://www.theatlanticcities.com/jobs-and-economy/2011/10/where-one-percent-live/393/>; E.J. McMahon, Testimony Before the Joint Legislative Fiscal Committees, February 14, 2011, available at <http://www.empirecenter.org/testimony/2011/02/testimony021411.cfm>.

<sup>76</sup> Recent work has suggested that the effect of information spillovers is increasing in density: the closer together high human capital workers are, the greater the increases in productivity. Jaison R. Abel, Ishita Dey and Todd M. Gabe, *Productivity and The Density of Human Capital*, Federal Reserve Bank of New York Staff Reports 440, March 2010.

<sup>77</sup> See Schleicher, *The City*, *supra* note \_\_, at \_\_.

<sup>78</sup> Lucas, *On The Mechanics*, *supra* note \_\_, at 39.

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 for closely situated others.<sup>79</sup> Estimates of the effect doubling density on productivity have been all positive but wildly mixed in amount, from 4% to 28%. A number of scholars have argued that more than half of the variation in productivity across states can be explained by density.<sup>80</sup> Leading contemporary writers on economic growth point to the effect of zoning 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 U.S. could use to achieve the type of high growth rates seen in the middle of the Twentieth Century.<sup>81</sup>

However, all of the criticism of zoning has not slowed its progress. Over the last forty, and particularly over the last twenty years, zoning regimes 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 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 regions where the cost of housing was substantially higher than the cost of building housing -- San Francisco, Los Angeles and San Diego.<sup>82</sup> In the 1980s, gaps

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<sup>79</sup> See, e.g., Edward L. Glaeser & Matthew G. Resseger, *The Complementarity Between Cities and Skills* (2009)

<sup>80</sup> AVENT, THE GATED CITY, *supra* note \_\_, at 613-14

<sup>81</sup> Tyler Cowen (in dialogue with Matt Yglesias), *The Great Stagnation*, Blogging Heads TV, available at <http://bloggingheads.tv/diavlogs/34219> at 21:09 through 23:05 (February 14, 2011).

<sup>82</sup> Edward L. Glaeser, Joseph Gyourko, and Raven E. Saks, *Why Have Housing Prices Gone Up?*, 95 *Am. Econ. Rev.* 329 (2005); Edward L. Glaeser, Joseph Gyourko and Raven E. Saks, *Why is Manhattan So Expensive? Regulation and the Rise in House Prices*, 48 *J. L. & Econ.* 331 (2005); Glaeser and Gyourko, *Zoning's Steep Price*, *supra* note \_\_, at \_\_. 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 easy to build, they are equal. But in areas with lots of restrictions, they find huge “regulatory taxes,” They also find that high cost

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>83</sup> Notably, where we have seen such gaps emerge, they have become increasingly large. In the most extremely regulated markets, supply restrictions -- or as Glaeser and his co-authors call it, the "regulatory tax" -- are responsible for a third to a half the price of home.<sup>84</sup>

Notably, the result of this has been to shift population across the country. That is, land use regulations do more than create "micro-misallocations" of development, but also creates macro ones.<sup>85</sup> 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.<sup>86</sup> Krugman calls these two areas: "flatland" and the "zoned zone."<sup>87</sup> This harms the national economy, as Glaeser notes: "It's a bad thing for the country that so much growth is heading to Houston and Sunbelt sister cities Dallas and Atlanta. These places aren't as economically vibrant or as nourishing of human

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areas have similar average lot sizes as lower cost areas, suggesting severe limitations on subdividing property. *See also* Fischel, *The Evolution*, *supra* note \_\_, at 1515-16 ("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.")

<sup>83</sup> These same cities score high on surveys aiming at discovering which regions are most restrictive of new building, providing a clear test of the robustness of these findings. *See* Joseph Gyourko, Albert Saiz, and Anita Summers, *A New Measure of the Local Regulatory Environment for Housing Markets*, 45 *Urb. Studies* 693 (2008).

<sup>84</sup> Glaeser et al., *Housing Prices*, *supra* note \_\_, at 330; Glaeser et al., *Manhattan*, *supra* note \_\_, at 332.

<sup>85</sup> Notably and 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. For instance, Ellickson wrote: "[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." (italics in original). When this was written in 1977, it was almost certainly true. The increased levels of restriction in modern zoning regimes have made this unlikely fact so.

<sup>86</sup> *See* note \_\_ *infra*.

<sup>87</sup> Paul Krugman, *That Hissing Sound*, N.Y. TIMES, August 8, 2005 at A23.

capital as New York or Silicon Valley. When Americans move from New York to Houston, the national economy simply becomes less productive."<sup>88</sup>

In his new book *The Gated City*, Ryan Avent has shown that the most of the growth in productivity and wages in the United States has come from the “zoned zone,” but contrary to expectations (and historical patterns), people have moved away from these flourishing areas.<sup>89</sup> Further, contrary to historical patterns, the most productive and highest-paying sectors (e.g. technology, finance) of the economy, 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 U.S. The best explanation for this, he 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 as they would have to pay to offset the increasing cost of living.<sup>90</sup> For instance, during the late 1990s, Silicon Valley actually *lost* residents, as the housing prices appreciated at a higher rate than even the fast growth of wages among residents and profits from firms in the area.<sup>91</sup> Zoning, Avent claims with substantial empirical backing, has limited employment, wages, and wage growth across the economy by limiting access to the nation’s most productive sectors.

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 the increase

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<sup>88</sup> See Edward L. Glaeser, *Houston, New York Has a Problem*, 18 City J. 72 (2008).

<sup>89</sup> AVENT, GATED CITY, *supra* note \_\_.

<sup>90</sup> AVENT, *supra* note \_\_, at 883-968. See also Raven E. Saks, *Job Creation and Housing Construction: Constraints on Employment Growth in Metropolitan Areas*, Joint Center for Housing Studies, Harvard University, (2005) available at [http://www.jchs.harvard.edu/publications/markets/w04-10\\_saks.pdf](http://www.jchs.harvard.edu/publications/markets/w04-10_saks.pdf) (finding land use restrictions reduce employment gains).

<sup>91</sup> AVENT, *supra* note \_\_, at 799-850. Avent notes that from 2000-09, the Valley only gained 100,000 residents and actually lost 250,000 domestic residents (immigrants made up the balance). Phoenix grew by 1M during the same period. *Id.* at 913-14

prices of neighboring properties.<sup>92</sup> However, some economic consensus is forming that at least for the nation's largest and richest metropolitan areas, land use restrictions have gotten much too strict. 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>93</sup> That we have seen a huge run-up in housing prices in regions on the East and West Coasts where zoning restrictions are known to be strict without any population inflows is a stark fact, strongly consistent with a story that zoning serves as a major supply restriction, and largely inconsistent with other, more benign stories about the effects of zoning.<sup>94</sup> Similarly, market behavior during the housing boom and crash is consistent with zoning rules having major effects on the housing market.<sup>95</sup> Heavily zoned areas saw huge price rises, as the increase in demand was not matched by increases in supply; less zoned areas either saw little increase in price during the boom because supply followed demand; a few notable less-regulated areas like Las Vegas and Phoenix 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 housing in line with construction costs.

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<sup>92</sup> The effect of zoning will in almost all cases – good or bad – be to increase the value of nearby housing, because 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, so that all effects on property markets are captured, but that is too diffuse to measure.

<sup>93</sup> William A. Fischel, *The Evolution of Homeownership*, 77 U. CHI. L. REV. 1503 (2010). In his defense, Fischel has been consistent in warning about the agglomeration-based costs of zoning regimes. Fischel, *The Economics*, *supra* note \_\_, at 269-70.

<sup>94</sup> It is inconsistent with stories related to nuisance minimization unless either nuisances have gotten far worse recently or they were insufficiently protected against in the past. It is inconsistent with a "zoning does not matter" story -- prices going up suggests increased demand, which should also produce increased output or residents.

<sup>95</sup> See Edward Glaeser, Joseph Gyourko and Albert Saiz, *Housing Supply and Housing Bubbles*, 64 J. URB. ECON. 198 (2008).

The other major trend has been an expansion in central city zoning restrictions, from increased use of historical preservation to increased limits on the height 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 and 60s (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 90s, 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 50%, much higher than it is for the rest of the region.<sup>99</sup> The average price of an apartment in Manhattan today is \$1.43M, and the average rental cost is over \$3300 a month.<sup>100</sup>

The same thing happened in Washington D.C. the first decade of the 2000s. A spike in demand

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<sup>96</sup> Glaeser, Gyourko, and Saks, *Manhattan*, supra note \_\_, at 335-51.

<sup>97</sup> *Id.* at 335.

<sup>98</sup> This is not due to 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. Christine Haughney, *Vanishing Treasure: The Rent-Regulated Apartment*, May 24, 2010; Dennis Hevesi, *The Slow Fadeout of Rent Regulated Apartments*, N.Y.TIMES, April 10, 2005 at 11(1); David W. Chen, *Bit by Bit, Government Eases Its Grip on Rents in New York*, N.Y.TIMES, November 19, 2003 at B1; 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 (2004) (numbers of rent controlled and rent stabilized apartments falling since 1970s). One move towards 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 20% of apartments are rented at rates affordable to lower-and-middle income families. The remaining 80% are rented at market rates but move into rent stabilization. Building an 80/20 building also gives developers in the most developed part of Manhattan access to state tax breaks that they otherwise would not be able to access. Marc Santora, *Across the Hall, Diversity of Incomes*, N.Y.TIMES, September 2, 2011 (describing increasing reliance on 80/20 in New York development); Josh Barnabel, *Subsidy Program Makes Its Way to Brooklyn*, N.Y.TIMES, December 26, 2003 at B11 (explaining expansion of use of 80/20 program outside of Manhattan).

<sup>99</sup> And this is Manhattan, an island so devoted to growth and dynamism that Rem Koolhaas, in his brilliant "retroactive manifesto" for Manhattan, 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 KOOLHAS, 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 relentless increased restrictiveness of modern planning.

<sup>100</sup> Vivian S. Toy, *Rise in High-End Sales Buys Manhattan Housing Market*, N.Y.TIMES, July 1, 2011 at A18 (average apartment price is \$1.4M); Marc Santora, *The Lease Is Up, and Now, So Is the Rent*, October 14, 2011 (average rental price in Manhattan is \$3,331)

drove prices up, but instead of this sparking new construction, there was actually a large *decrease* in the number of new housing permits granted.<sup>101</sup>

Vicki Been, along with others, have shown how the process of “shrink wrapping” a big city can take place.<sup>102</sup> Mayor Michael Bloomberg made a 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 allowed 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,” or without seeking an amendment or a variance from the zoning laws.<sup>104</sup> These downzonings were made with no reference 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

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<sup>101</sup> Matt Yglesias, *In Defense of Chart-Reading*, Yglesias Blog, July 21, 2011 at 1:45pm, available at <http://thinkprogress.org/yglesias/2011/07/21/275454/in-defense-of-chart-reading/>

<sup>102</sup> Armstrong, et al. *Affected*; Simon T. McDonnell, Josiah Madar, and Vicki Been, *How do New York City's Recent Rezoning Align With its Goals for Park Accessibility?*, 3 *Cities and the Environment* (2010) (showing that downzoning have substantially eroded gains to housing that is close to city parks from upzonings); Kareem Fahim, *Despite Much Rezoning, Scant Change in Residential Capacity*, N.Y. TIMES, March 21, 2010 at B1 (quoting Been as saying, ““There are an awful lot of downzonings and contextual-only zonings that may limit the city’s ability to” meet Bloomberg’s goal of housing 1M new residents. The term shrink-wrapping was coined by Rick Hills. Rick Hills, *Shrinking-Wrapping NYC: How Neighborhood Activists Are Strangling a City*, Prawfsblawg, Sunday, November 29, 2009, available at <http://prawfsblawg.blogs.com/prawfsblawg/2009/11/shrinkingwrapping-nyc-how-neighborhood-activists-strangle-a-city.html> (summarizing Been’s work on the subject); Rick Hills, *The Big City as Gated Community: Is an unholy and unwitting alliance between big developers and neighborhood activists strangling our cities?*, Monday, September 05, 2011, available at <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 Been, Avent and Hills and Schleicher).

<sup>103</sup> Armstrong et al, *Affected*, *supra* note \_\_, at 1.

<sup>104</sup> *Id.* at 8; Hills and Schleicher, *Zoning Budget*, *supra* note \_\_, at \_

between 2003 and 2007, it did so during a time when demand for housing in the City was exploding.<sup>105</sup>

Notably, center 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 elite suburbs are governed by a majoritarian politics in the interest of landowners, while central city politics are best described by an "influence" model, where developers' political muscles can overrun local opposition.<sup>107</sup> Writing from a very different tradition, scholars like Harvey Molotch argue that central 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 Frug make similar claims.<sup>109</sup>

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<sup>105</sup> Armstrong et al, *Affected*, *supra* note \_\_, at 8-10

<sup>106</sup> FISCHEL, HOMEVOTER HYPOTHESIS, *supra* note \_\_, at 82.

<sup>107</sup> Ellickson, *Suburban Growth Controls*, *supra* note \_\_, at 404-09; BEEN AND ELLICKSON, *supra* note \_\_, at 306-08

<sup>108</sup> "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 provide the key operative motivation towards 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 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 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..." Harvey Molotch, *The City as Growth Machine: Towards a Political Economy of Place*, 82 *Amer. J. Soc.* 309, 310 (1976). 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). See also Schleicher, *The City*, *supra* note \_\_, at 1556-58 (critiquing Barron's conception of home rule).

<sup>109</sup> 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 both are forms of exclusion. GERALD E. FRUG, *CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS* 143-49 (1999).



While each of these stories explain some places at some times, none of them fit 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 section aims to provide one.

### **III. Land Use Law and the Political Economy of City Planning**

The ordinary place to start analyses of the political economy of land use is 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 towards 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 non-partisan, 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 ensure that voters see national parties on local ballots and that the membership of these parties does not change substantially between

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<sup>110</sup> See Schleicher, City Council Elections, *supra* note \_\_, at 419 David Schleicher, *What if Europe Held an Election and No One Cared?*, 52 Harv. Int'l L. J. 109, 141 (2011); David Schleicher, *I Would But I Need the Eggs: Why Political Corruption Does Not Cause Exit From Big American Cities and Why Political Competition Fails to Check Local Corruption*, 42 LOY. U. CHI. L. REV. 277, 279-84 (2010); Elmendorf and Schleicher, *Informing Consent*, *supra* note \_\_.

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.<sup>112</sup> Laws requiring primaries in local elections when voters largely make party affiliation decisions based on national issues and limiting 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 Kewiet and Mathew McCubbins have shown, parties provide legislatures with their basic organizing principles.<sup>113</sup> Without a clear organization, 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>114</sup> Under Arrow's Impossibility Theorem, there is no way using ordinary democratic principles to produce a unique outcome and the order in which issues are presented will determine the policy result.<sup>115</sup> Further,

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<sup>111</sup> COX & MCCUBBINS, *SETTING THE AGENDA*, *supra* note \_\_, at 1-34; COX & MCCUBBINS, *LEGISLATIVE LEVIATHAN*, *supra* note \_\_, at 85-134; KIEWIET & MCCUBBINS, *THE LOGIC OF DELEGATION*, *supra* note \_\_, at 21-55.

<sup>112</sup> Very little attention has been paid to how the pathologies of local politics, and not merely the problem of externalities, can be used to explain the structure of local government law. One notable exception is Clayton P. Gillette, *In Partial Praise of Dillon's Rule, or Can Public Choice Theory Justify Local Government Law*, 67 CHI.-KENT L. REV. 959 (1991) (arguing that susceptibility of local governments to interest group takeover provides a partial justification for Dillon's Rule).

<sup>113</sup> See COX & MCCUBBINS, *LEGISLATIVE LEVIATHAN*, *supra* note \_\_, at 84-97; COX & MCCUBBINS, *SETTING THE AGENDA*, *supra* note \_\_, at 18-20.

<sup>114</sup> 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, 2122 (1990). However, these criticisms do not particularly matter to the invocation of the theory here. Our common democratic institutions – most notably political parties -- developed to help deal with instability in preferences (of which cycling is one but, as the paper argues, not the only relevant one here). Where we lack such institutions, we will see more instability in legislative outcomes and the development of other institutions – embodied in procedural rules – that help structure outcomes.

<sup>115</sup> Arrow, *supra* note \_\_; Michael E. Levine and Charles R. Plott, *Agenda Influence and Its Implications*, 63 Va. L. Rev. 561 (1977) (discussing how laws determine outcomes in the context of cycling preferences).

a legislature without a clear organization will frequently feature what one might call game-theoretical breakdowns. For instance, a legislature may prefer low taxes and low spending 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 policy equilibrium.<sup>116</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 co-partisans.<sup>117</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 ability to offer winning amendments? The answer lies in the nature of the delegation.<sup>118</sup> Party leaders have strong incentives to stay 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. Leaders do this by organizing votes in such a way to enhance the value of the party brand, or public perceptions of the party caucus as a

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<sup>116</sup> Weingast, *supra* note \_\_, at 245; JOHN FEREOHNS, PORK BARREL POLITICS: RIVERS AND HARBORS LEGISLATION, 1947-1968 (1974).

<sup>117</sup> COX & MCCUBBINS, LEVIATHAN, *supra* note \_\_, at 115-23, 135048; COX & MCCUBBINS, SETTING THE AGENDA, *supra* note \_\_, at 25-31

<sup>118</sup> COX & MCCUBBINS, LEVIATHAN, *supra* note \_\_, at 87-100; KIEWIET & MCCUBBINS, *supra* note \_\_, at 43-55.

whole. Party members are willing to give up the freedom to make amendments as they see fit because the leaders will have every incentive to promote a collective image that voters will like.<sup>119</sup> On almost all issues, today's Congress votes in party line fashion for this reason.<sup>120</sup> Notably, this constrains the ability of interest groups or other particularistic interests to dominate politics, as a party must use general appeals to voters as a whole.<sup>121</sup>

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>122</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 short hand guide to the policy preferences of politicians.<sup>123</sup> Further, party labels allow voters, as Morris Fiorina famously argued, to develop “running tallies” of preferences about the performance of parties over time. 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.<sup>124</sup> 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,

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<sup>119</sup> COX & MCCUBBINS, *LEVIATHAN*, *supra* note \_\_, at 93-125.

<sup>120</sup> There are issues – e.g. base closing, international trade deals – that split party coalitions or where local demands are sufficiently strong that party line voting is not particularly common. In these areas, we frequently see Congress resort to “extra-Congressional procedure” of the type advocated in Section IV. See LAWRENCE BECKER, *DOING THE RIGHT THING: COLLECTIVE ACTION AND PROCEDURAL CHOICE IN THE NEW LEGISLATIVE PROCESS 2* (2005).

<sup>121</sup> 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* at 22 (draft paper, 2011, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1900816](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1900816)) (polarized parties bias statewide spending towards their constituents.)

<sup>122</sup> For a summary of this literature, Elmendorf & Schleicher, *Informing Consent*, *supra* note \_\_, at 10-25.

<sup>123</sup> See ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* 238-60 (1957); ARTHUR LUPA & MATHEW D. MCCUBBINS, *THE DEMOCRATIC DILEMMA: CAN CITIZENS LEARN WHAT THEY NEED TO KNOW?* 69-77 (1998).

<sup>124</sup> MORRIS P. FIORINA, *RETROSPECTIVE VOTING IN AMERICAN NATIONAL ELECTIONS* 89, 89-106 (1981); Elmendorf and Schleicher, *supra* note \_\_, at 13-16.

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 non-partisan 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’ issue stances, heavy reliance on a candidate’s ethnic, racial and gender status as a guide to voting, and extremely strong incumbency effects.<sup>125</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>126</sup> Local primary elections do not force politicians to be particularly responsive to the electorate’s preferences on citywide issues because ordinary voters just do not have enough information about the candidates.

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, non-competitive legislatures frequently feature universal log-rolls, where each member is given the power to decide issues specific to her district, something shown in a long line of research dating back at least to V.O. Key.<sup>127</sup> City councils generally feature little organized

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<sup>125</sup> Elmendorf and Schleicher, *supra* note \_\_, at 25-27.

<sup>126</sup> 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’ organization in South Los Angeles, are able to take 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 whom to vote for President without looking at a voter guide provided to them by a small political machine.

<sup>127</sup> This insight runs through the political science literature from V.O. Key through the work in the 1970s and 80s on distributive politics. V.O. KEY, *SOUTHERN POLITICS IN STATE AND NATION* (1949) (describing universal logrolls in

competition of any type, and as a result, Members end up with an outsized degree of control over issues in their districts.<sup>128</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, as the absence in primary and non-partisan elections 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 in the absence of party organization are much more important. In a partisan legislature, we can assume that the procedural choices are largely epiphenomenal; the majority party simply chooses a voting order that best fits the goals of its caucus. In a non-partisan legislature, legislative procedure determines the order and the method in which issues are decided. That is, legislative procedure decides when the cycling stops, and 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 rates.

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one-party southern state legislatures); Barry R. Weingast, *Reflections on Distributive Politics and Universalism*, 47 POL. RES. Q. 319, 319-30 (1994) (summarizing literature). 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 and Thad Kousser, *Broad Bills or Particularistic Policy? Historical Patterns in American State Legislatures*, 104 AM. POL. SCI. REV. 151 (2010); Gamm & Kousser, *Parties and Pork*, *supra* note \_\_, at 1 (competitive party states spend more money on general programs and one party states spend more on direct aid to local governments, suggesting universal log-rolling coalitions; polarized parties, however, do bias statewide spending towards their constituents.). See also JESSICA TROUNSTINE, POLITICAL MONOPOLIES IN AMERICAN CITIES 139-71 (2008). (political monopolies – either old-style machine or reformist movements – tend to distribute money among constituents and spend less on generally applicable public goods.)

<sup>128</sup> For a discussion of evidence of this in the land use context, see notes \_\_ and accompanying text.

This section attempts to explain why this might be the case. It argues that the pathologies of legislative decision-making 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.

Ever since Herbert Hoover promulgated it as a model act in the 1920s, the Standard State Zoning Enabling Act (SZEA) 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>129</sup> While the details of zoning procedure are famously complex, I will only deal with the very basics of the subject, both of the SZEA and modifications to it like New York's Uniform Land Use Review Procedure (ULURP), as the political economy issues I'm interested in should become apparent even without delving too deeply into land use arcana. This 10,000 feet 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>130</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

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<sup>129</sup> U.S. Department of Commerce, Standard State Zoning Enabling Act (1926), available at <http://law.wustl.edu/landuselaw/StdZoningEnablingAct1926.pdf>. The general history of the Standard State Zoning Enabling Act has been told in many locations. See, e.g., BEEN AND ELLICKSON, *supra* note \_\_, at 74-76, 91-92, 284-85; BABCOCK, *supra* note \_\_, at 6-11; 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 (2000); Michael Lewyn, *Twenty-First Century Planning and the Constitution*, 74 U. COLO. L. REV. 651, 655 (2003).

<sup>130</sup> BEEN AND ELLICKSON, *supra* note \_\_, at 91-92

proposed public facilities, and designated areas for different types of private land use.<sup>131</sup> Zoning maps are just that, maps that specify for each lot allowable land use uses and the maximum height and density that property owners can build to "as of right," or without further approval.<sup>132</sup> Neither comprehensive plans nor broad maps are changed in their entirety particularly often (New York City last did so in 1961).<sup>133</sup>

Changes to zoning maps short of complete revisions can be made in only a few different ways. Substantial changes are done through map amendments.<sup>134</sup> These go through an appointed board -- the planning commission -- for a recommendation before proceeding through 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>135</sup> But these are exceptions to a generalized deference zoning changes receive in court.<sup>136</sup> For our purposes, the key to understanding map amendments is that they are *seriatim* changes to the map, considered one by one and proposed to address changes in a specific area, without any precedential value for other zoning decisions.<sup>137</sup> The same can be said of the other major way

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<sup>131</sup> Charles Haar, *In Accordance with a Comprehensive Plan*, 68 HARV. L. REV. 1154, 1157 (1955); Charles Haar, *The Master Plan: An Impermanent Constitution*, 20 LAW & CONTEMP. PROBS. 353, 365-66 (1955).

<sup>132</sup> BEEN AND ELLICKSON, *supra* note \_\_, at 86, 90-92

<sup>133</sup> Norman Marcus, *New York City Zoning – 1961-1991: Turning Back The Clock – But With An Up-To-The-Minute Social Agenda*, 19 FORD. URB. L. J. 707 (1991) (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) SmartGrowth. See Environmental Protection Agency, *Examples of Codes That Support Smart Growth Development*, available at <http://www.epa.gov/dced/codeexamples.htm>.

<sup>134</sup> BEEN AND ELLICKSON, *supra* note \_\_, at 283-85.

<sup>135</sup> See Carol Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 CALIF. L. REV. 839 (1983) (describing the rise of, and critiquing, these limitations on local legislative authority); *Fasano v. Board of County Commissioners of Washington County*, 507 P.2d 23 (1973); *Baker v. City of Milwaukee*, 533 P.2d 772 (Or. 1975)

<sup>136</sup> The leading casebook describes the treatment of amendments and variances in court as "tempered deference." BEEN AND ELLICKSON, *supra* note \_\_, at 303. 303-352.

<sup>137</sup> *Id.* at 287-94.



zoning changes, variances. 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 decision-makers 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>138</sup>

A number of big cities have added a layer to this process that permits input by advisory neighborhood bodies.<sup>139</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 decision-making process.<sup>140</sup> When an amendment or other change in zoning districts is proposed, it is sent to one of 59 community boards, which holds public hearings and issues a non-binding recommendation. That recommendation is then sent to the Borough President, who issues her own recommendation. That goes to the City Planning Commission, which is 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>141</sup> The City Council 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 majority. The process takes 7 months on average from the time of an official proposal.

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<sup>138</sup> Id. at 91-92 ; BABCOCK, *supra* note \_\_, at 6-11.

<sup>139</sup> See Peter W. Salsich, Jr., *Neighborhoods: Grassroots Consensus Building and Collaborative Planning*, 3 WASH. U. J.L. & POL'Y 709, 716-25 (2000); 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)

<sup>140</sup> See Dep't of City Planning, *The Uniform Land Use Review Procedure (ULURP)*, New York City, <http://www.nyc.gov/html/dcp/html/luproc/ulpro.shtml>

<sup>141</sup> Seven members are appointed by the Mayor, one each by the five borough Presidents, and one by the Public Advocate (an official elected citywide). When a borough President rejects a proposal, the CPC must have 9 out of 13 votes for the project to go forward. This means the Mayor cannot push through a project rejected by all Borough Presidents.

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.<sup>143</sup> For instance, 16% of Manhattan south of 96<sup>th</sup> street is in historic districts, making it off-limits for development unless approval is granted by the Landmarks Commission, something that virtually never happens.<sup>144</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, 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>145</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.<sup>146</sup> Other related interest groups, particularly employers who might want having cheap housing as a means of

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<sup>142</sup> Cyane Gresham, *Note, Improving Public Trust Protections of Municipal Parkland in New York*, 13 FORDHAM ENVTL. L.J. 259, 285-86 (2002); BEEN AND ELLICKSON, *supra* note \_\_, at 369-78

<sup>143</sup> [http://www.nyc.gov/html/lpc/html/faqs/faq\\_designation.shtml](http://www.nyc.gov/html/lpc/html/faqs/faq_designation.shtml)

<sup>144</sup> Edward L. Glaeser, *Preservation Follies*, 20 CITY J. 62, 63 (2010). Once lands falls into a historic preservation zone, it becomes effectively impossible to build housing. Only five buildings of more than 15 stories have been built in historic preservation zones in New York since 1970, and the housing growth is close to zero (increases caused by new buildings is offset by reductions due to conversions of apartment buildings into single-family units.)

<sup>145</sup> See OLSON, *supra* note \_\_, at 1-18.

<sup>146</sup> This elides a difference in the politics of land use in two different contexts. For projects that have to be located somewhere in a city -- locally unwanted land uses like garbage dumps and the like -- landowners elsewhere are likely to be slightly positive about specific projects in other neighborhoods, as it reduces slightly the likelihood that the project will fall in their neighborhood. Although difficult to organize absent an immediate threat, these homeowners are at least voters and part of urban politics. In contrast, when new projects are simply increases in housing or office supply, landowners elsewhere in the city are likely to be weakly negative on the project, as the new supply competes (to a small degree) with their own fixed asset. The supporters of general increases in housing supply – current renters and people who plan to move into a city – are even harder to organize. See Hills and Schleicher, *Zoning Budget*, *supra* note \_\_, at 25.

driving down labor costs, are similarly not particularly affected by any one map amendment.<sup>147</sup>

In contrast, neighbors each face comparatively heavy harms from new development -- both from actual spillovers like increased traffic and lost views and from an increased supply of housing in the neighborhood, which drives down the value of their largest asset. Further, neighbors are, by definition, physically proximate to one another and are often already organized into organizations 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>148</sup> There is also no mechanism to make deals between local legislators stick, and the prisoner's dilemma inherent in generally beneficial policy-making usually ends without agreement, and instead with individual legislators making the call on zoning decisions in their district.

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>149</sup> As a result, Mayors are generally thought to support development to a greater degree than city legislatures.<sup>150</sup> But strong

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<sup>147</sup> 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, Gyourko and Saks, *Manhattan*, *supra* note \_\_. 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 less land use controls we should see.

<sup>148</sup> Even if voters are generally informed, the absence of party competition on local issues makes realizing those preferences at the ballot box incredibly difficult absent specific knowledge about candidates.

<sup>149</sup> See Schleicher, *Why?*, *supra* note \_\_ at \_\_

<sup>150</sup> See Richard C Feiock and 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* (Robert McGowan and Edward Ottensmeyer, eds. 1993); James C. Clingermayer, *Electoral*

and high-profile Mayors are the exception rather than the rule in American cities. Many cities have council-manager systems with powerless Mayors.<sup>151</sup> In others, Mayors must share their executive role and local prominence with figures ranging from county executives to school board chairs.<sup>152</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>153</sup> These developers can use their influence on local politicians to get new housing built, serving the goals of housing consumers even if they are not around to lobby for themselves. Not completely – developers do not care about consumer surplus and rarely build on a scale that will capture the range of agglomeration benefits – but significantly.

However, the influence of developers does not translate into easy expansion in housing supply for two reasons, products of each of the types of legislative breakdown discussed in

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*Representation, Zoning Politics, and the Exclusion of Group Homes*, 47 POL. RES. Q. 969, 978 (1994) (“strong mayors are inclined to be very pro-development, and the fact that mayors are generally elected at-large might reinforce that tendency.”)

<sup>151</sup> See Schleicher, *Why?*, *supra* note \_\_.

<sup>152</sup> *Id.* at \_\_

<sup>153</sup> Frank Lombardi and Erin Einhorn, *Fat Cats Fill Pols’ Pockets: Big biz and unions are major players in City Council races*, DAILY NEWS (N.Y.) April 19, 2009 at 6 (developers and municipal labor unions biggest contributors in City Council races); Stefan C. Friedman, *Real-Estate Bigs Spread The Wealth in Mayor Race*, N.Y. POST, January 23, 2005 at 13 (developers give to all local candidates for Mayor because, as noted by political consultant Norman Adler, “On the whole, city government is the most important government for real-estate developers.”); David Samuels, *The Real-Estate Royals. End of the Line?*, N.Y. TIMES MAG., August 10, 1997 at 36 (describing immense political power of old-line New York real estate families).

Section II(a). First, no matter their political influence, developers cannot easily solve the problems of forming binding agreements in the legislature. 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 like increases in the housing supply unless there is some institutional mechanism for ensuring that new development is spread throughout the city. Local legislatures lack the institutions we generally rely on to deal with these issues: competitive political parties.<sup>154</sup> Absent some institution that can credibly solve this prisoner's dilemma, local legislators form universal log-rolling coalitions that give local officials the ability to defeat individual projects.<sup>155</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>156</sup> A journalist describes this as an "ironclad principle of aldermanic privilege – ... no member of the board would interfere in matters affecting another member's ward."<sup>157</sup> What

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<sup>154</sup> There are some existing local institutions designed to alleviate siting problems, particularly for LULUs like unwanted public facilities like garbage plants. For instance, the City Council has ordered the City Planning Commission to to adopt criteria "to further the fair distribution of the burdens and benefits associated with city facilities..." See Section 203 of the 1989 New York City Charter.

<sup>155</sup> There are good reasons to believe that "tit for tat" Prisoner's Dilemma solutions would not work in this context because it does not have 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 their district, and will have few plays in a legislative session punish the other player during a legislative term. For instance, between 2002 and 2009, the Bloomberg administration in New York City enacted a record 100 zoning changes. But this is an average of less than 1 per New York City Council district per 4 year term.

<sup>156</sup> Ellickson, *Suburban Growth Controls*, *supra* note \_\_, at 408, n. 60.

<sup>157</sup> Rob Gurwitt, *Are City Councils a Relic of the Past? One of America's oldest political institutions isn't adapting very well to 21st-century urban life*, *Governing Magazine* (2003). See also Andrew F. Haughwout and Robert P. Inman, *Should Suburbs Help Their Central City?*, *BROOKINGS-WHARTON PAPERS ON URBAN AFFAIRS* 45, 53 n. 22(2002) (districted systems result in more spending); Gary W. Cox and Timothy N. Tutt, *Universalism and Allocative Decision Making in the Los Angeles County Board of Supervisors*, 46 *J. POL.* 546, 549 (1984) (universal logrolls in local budgeting.)

empirical research exists backs this up: ward-based City Councils oppose LULUs like group homes at higher rates than those with at-large elections.<sup>158</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, however, substantially increases the cost of development. Absent that, 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, it 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.

The advantage local groups get from a lack of generalist political parties or institutions has actually been written into land use law. Policies like ULURP serve to reduce the cost of organizing local opposition to new development. One of the great costs of being involved in politics is overcoming the obvious desire to free ride on the efforts of others. Although neighbors have all sorts of ways of monitoring free riding (they are *neighbors* after all), institutions like community boards reduce the costs of developing coalitions and locking them into place. 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.

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 is created through small developments by small-time developers or

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<sup>158</sup> Clingermayer, *supra* note \_\_, at 973.

just homeowners building up their existing properties.<sup>159</sup> This provides incremental housing growth rather than larger one-time changes. It is often extremely difficult to collect a sufficient number of lots to develop a big new project in many existing neighborhoods, ruling out larger projects.<sup>160</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>161</sup> As a result, their lobbying influence does not matter. Of course there are local landowners who may want to build granny flats or small new developments, but they lack the incentives, repeated interactions with the planning process, and sheer political power of big developers.

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<sup>159</sup> 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 50% of the space under zoning envelope. Most of these are in areas with low maximum height and density limits. Over the next 4 years, 15,000 or 8% were redeveloped, which in the terminology of the study a new structure of greater density, and not merely an add-on, was built. Unsurprisingly, higher prices nearby spur redevelopment. Vicki Been, Josiah Madar & Simon McDonnell, *Underused Lots in New York City* (working paper 2009), available at [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).

<sup>160</sup> See Michael Heller & Rick Hills, *Land Assembly Districts*, 121 HARV. L. REV. 1465, 1472-74 (2008) (discussing difficulty of assembling large lots).

<sup>161</sup> Moreover, as such developers are often also major landowners, they are often support downzoning (or denying rezoning amendments for others) in their guise as landowners.

The result is that even cities committed to increasing the housing stock often offset new projects with reductions in the size of zoning envelope. 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>162</sup> This is true even when politicians are in favor of building. As Vicki Been and other scholars at the Furman Center have shown, despite Mayor Bloomberg's strong political commitment to increasing the housing stock of New York City and substantial activity in approving rezonings to allow new building, the city has approved a huge number of downzonings during his tenure, frequently in highly coveted neighborhoods.

However, if it was 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 development from proceeding to the efficient point (at least to the extent the city constitutes the relevant market.)<sup>163</sup> This is Fischel 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>164</sup>

But zoning procedure sets up all sorts of hurdles limiting the ability of small developers to buy zoning approval. Navigating the seven-month process of ULURP (and the other restrictions on building) generates substantial costs for developers.<sup>165</sup> Further, federal and state

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<sup>162</sup> BEEN AND ELLICKSON, *supra* note \_\_, at 90.

<sup>163</sup> Of course, cities are almost never the whole relevant market. See notes \_\_ and accompanying text.

<sup>164</sup> To the extent that a developer has to pay off the neighbors not the city (i.e. the way they do through CBAs), the second reason why procedural rules limits growth (interest group mismatch) runs into the problems posed by the first (very local control of the land use process).

<sup>165</sup> Here's a nice New York example. Building owners in designated historical districts must get Landmarks Preservation Commission approval for any improvement that will have an effect on the exterior of their building (and the inside too, if it is an interior landmark). Further, there is no guarantee that replacing current fixtures with like products will be approved - an owner of a landmarked building with new windows can be required to replace



laws generate limitations on “purchasing” zoning in the community property rights sense, from state limits on impact fees to the Supreme Court's exactions doctrine.<sup>166</sup> Achieving changes in zoning is expensive and frequently requires developers to engage in second-best forms of development because they cannot simply “buy” the right to build. A way to characterize this 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, and risk - - to get it through the city planning apparatus.<sup>167</sup>

The combination of *seriatim* decision-making and these political “taxes” generates the dynamics of the politics of downzoning. To the extent the tax is a fixed cost, it will not deter big projects with large profit margins from moving forward. But it will deter small or more marginal developers from applying for changes to allow granny flats or small new buildings in a neighborhood.<sup>168</sup> Downzonings matter because they stop landowners from engaging in small-bore redevelopment that they would have engaged in if they had 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

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them with windows that fit the historic district better. Even minor improvements (e.g. adding lights to a walkway in front of a house) must be approved. Owners of landmarked/historic district property have a responsibility of keeping the building in good repair. New York City Landmarks Preservation Committee, FAQs: What does Landmark Designation Mean to Property Owners, available at [http://www.nyc.gov/html/lpc/html/faqs/faq\\_meaning.shtml](http://www.nyc.gov/html/lpc/html/faqs/faq_meaning.shtml). Despite claims by the Landmarks Preservation Commission that historic district status does not “freeze” a building or area, the evidence suggests it does effectively stop all new construction. See Edward L. Glaeser, *Preservation Follies*, 20 CITY J. 62, 63 (2010) (explaining how little construction is done in historic districts).

<sup>166</sup> See notes \_ and accompanying text

<sup>167</sup> 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) and compliance costs regularly cause developers to turn down attractive opportunities. ALEXANDER GARVIN, *THE AMERICAN CITY: WHAT WORKS WHAT DOESN’T* 450-51 (2d ed. 2002).

<sup>168</sup> See Bernard H. Siegan, *Non-Zoning is the Best Zoning*, 31 Cal. W. L. Rev. 127 (1994) (discussing disadvantages faced by small-time developers in getting projects through zoning boards).

own projects provide no benefits for these smaller developers.<sup>169</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.

The combination of seriatim decision-making and a fixed cost to changing zoning regimes in a big city also makes it likely 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 (or at least has an option to build). Blocking someone else's development may redound negatively to the landowner's own ability to build, tit for tat. When the zoning envelope shrinks by virtue of down-zonings, landowners can no longer build as-of-right and understand that they will not be able to pay the fixed cost for getting approval for small new developments. This turns landowners from potential developers into purely NIMBY neighbors, exclusively interested in maintaining the fixity of supply of housing and on protecting their interest in common-pool assets in a neighborhood like spots in school catchment areas and seats in good local restaurants.<sup>170</sup> This is a “Curley Effect.”<sup>171</sup> Strict land use decisions change

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<sup>169</sup> The long debate over whether rezonings are legislative decisions or quasi-judicial ones, should be understood in this light as well. 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 decision-making gives politically weaker groups the ability to take advantage of decisions in favor of similarly-placed but more invested concentrated 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. But, as even the more searching forms of judicial review do not overturn the basics of local zoning procedure, they do little to allow smaller players to piggyback on the efforts of bigger ones.

<sup>170</sup> This can also help explain why some cities have such strict zoning rules while other do not. The extreme differences among cities in the restrictiveness of their zoning regimes is 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. The fact that cities in the south and west were generally less built up 30 years ago means that it is likely that the progressive nature of the strictness of zoning simply has not started to climb in these cities.

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: Christain Hilber and Frederic Robert-Nicoud find that the ratio of developed property to undeveloped property in a region predicts the future stringency of land use in that region.<sup>172</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 a city with fewer limits on building in general. In other words, there may be cycling, with the *seriatim* nature of local land use politics locking in the status quo rather than an alternative.<sup>173</sup> We might alternatively consider the status quo a prisoner's dilemma locked in a "defect" result. All developers may prefer a world without a heavy regulatory burden to one in which all projects face costly regulatory scrutiny, but most prefer a world in which their projects go through but others don't.

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 would be a mistake. On issues with similar interest group dynamics, we have seen legislatures

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<sup>171</sup> Edward L. Glaeser and Andrei Schleiffer, *The Curley Effect: The Economics of Shaping the Electorate*, 21 J. L. ECON. & ORG. 1 (2005) (Mayor of Boston raised taxes on rich residents to drive them out so they do not become successful opponents of his).

<sup>172</sup> See Christian Hilber & Frédéric Robert-Nicoud, *On the origins of land use regulations: theory and evidence from US metro areas*, London School of Economics and Political Science Spatial Economics Research Centre Discussion Paper 38 (2010), available at <http://www.spataleconomics.ac.uk/textonly/SERC/publications/download/sercdp0038.pdf> (finding that the amount of undeveloped property in a region predicts future zoning policy). This is a fascinating finding, particularly because the possible enforcement mechanism for this fact at the regional level seems so weak.

<sup>173</sup> Surely the 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.

adopt very different procedures. For instance, budgeting has some of the same Olsonian dynamics as zoning.<sup>174</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 PAYGO to balanced budget amendments to ensure the interests of taxpayers are at least somewhat taken into account (and that the interests of recipients of spending are pitted against one another.)<sup>175</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.

#### **IV. Land Use Law and the Political Economy of City Unplanning**

This section translates the previous theoretical analysis of the law and politics of land use into policy proposals. Even if you agree that city planning has become excessively costly in cities as argued in Section II, it is hard to see what can be done about it. After all, Section III sought to explain why excessive city planning is both so common and so sticky.

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<sup>174</sup> See Robert P. Inman and Michael A. Fitts, *Political Institutions and Fiscal Policy: Evidence from the U.S. Historical Record*, 6 J. L. ECON & ORG. 79, 88 (1990).

<sup>175</sup> See Charles Stewart III, *Budget Reform as Strategic Legislative Action: An Exploration*, 50 J. POL. 292 (1988) (arguing that reforms of budget process have been aimed at limiting effect of free spending Members of Congress); W. Mark Crain and Timothy J. Muris, *Legislative Organization of Fiscal Policy*, 38 J. L. & ECON. 311 (1995) (finding at state level that legislatures with multiple committees with spending authority spend more than single committee controlling spending); Elizabeth Garrett, *Harnessing Politics: The Dynamics of Offset Requirements in the Tax Legislative Process*, 65 U. Chi. L. Rev. 501 (1998) (providing interest group justification for PAYGO); Richard Briffault, *The Disfavored Constitution: State Fiscal Limits and State Constitutional Law*, 34 Rutgers L.J. 907, 956 (2003) (arguing that debt limits can but balanced budget limits cannot be justified on the grounds of political process failure); Clayton P. Gillette, *Direct Democracy and Debt*, 13 J. CONTEMP. LEGAL ISSUES 365, 381-83 (2004) (discussing requirements that bond issuance be accompanied by a public referenda in these terms).

However, politics includes shocks. As Matthew Stephenson argues, election results are best understood as having stochastic properties.<sup>176</sup> Even if the expected value of, say, Presidential preferences equals those of the median voter, the actual preferences of any President almost certainly do not. This section takes up the question of what a reform-inclined Mayor or City Council -- elected, perhaps, by random variation -- should do in response to the effects that land use procedure has 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. The politics of land use are very similar to the politics of international trade. 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) who only selectively get involved in policy-making. Frequently, parties do not divide the legislature on trade issues, leaving the area without clear partisan organization. Free trade should be equally as unlikely as free building. Roughly from the end of the Civil War to 1934, trade policy protected import-competing firms as extensively as land use protects NIMBY homeowners, with the infamous Smoot-Hawley tariff as only the last in a long series of big tariff increases.<sup>177</sup> Several pro-free trade Presidents were elected in this period, and, with substantial effort, they were occasionally able to achieve tariff reductions.<sup>178</sup> But ordinary

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<sup>176</sup> Matthew C. Stephenson, *Optimal Political Control of the Bureaucracy*, 107 MICH. L. REV. 53, 66-68 (2008).

<sup>177</sup> See Hills and Schleicher, *Zoning Budget*, *supra* note \_\_; MICHAEL J. GILLIGAN, EMPOWERING EXPORTERS: RECIPROCITY, DELEGATION AND COLLECTIVE ACTION IN AMERICAN TRADE POLICY 72-77 (1997).

<sup>178</sup> See Hills and Schleicher, *Zoning Budget*, *supra* note \_\_; See Douglas 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 10 (Michael Bordo, Claudia Goldin, and Eugene White eds. 1998).

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, Franklin Roosevelt took a different course than previous pro-free trade administrations by proposing the Reciprocal Trade Agreements Act (RTAA).<sup>179</sup> The RTAA did not reduce tariffs on its own, but instead gave the President the power to enter into trade deals that linked tariff decreases with reduced tariffs overseas. This 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," or the ability to impose temporary tariff increases when domestic firms face unexpectedly rough import competition.<sup>180</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.<sup>181</sup> 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 changed trade policy from Olsonian nightmare to broadly-shared policy success.

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<sup>179</sup> Act of June 12, 1934, ch. 474, 48 Stat. 943 (codified as amended at 19 U.S.C. § 1351 (2006)). See GILLIGAN, *supra* note \_\_, at 70-73; Irwin, *supra* note \_\_, at 19-26.

<sup>180</sup> See generally Michael Borras and Judith Goldstein, *The Political Economy of International Trade Law and Policy: 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, 281-88 (1991)

<sup>181</sup> For what it's worth, I do not advocate any equivalent to anti-dumping or countervailing duty rules, which are often discussed as safeguards and are enshrined in both domestic and WTO law. These policies are much harder to justify in the trade realm, and I can think of no reason to import analogues into land use.

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

As discussed above, one of the ways the land use procedure shapes outcomes is by insisting on *seriatim* decisions. Developers do not care about downzonings, as they predate any investment decision. As a result, local protectionist interests dominate and get the legislature to enact downzonings that substantially limit incremental increases to 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>182</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 counter-weight against import-competing firms interested in protectionism.<sup>183</sup> The RTAA gave the power to design trade deals to the President, who by virtue of his national constituency is the most pro-free trade actor in the system. But he did so knowing only to push as far as Congress would go along, as his power could be withdrawn. When Congress later insisted on reviewing individual trade deals, they 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 Arrovia cycling in the legislature.

Rick Hills and I have called for doing something similar in zoning.<sup>184</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

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<sup>182</sup> GILLIGAN, *supra* note \_\_, at 4.

<sup>183</sup> *Id.*

<sup>184</sup> Hills and Schleicher, *Zoning Budget*, *supra* note \_\_.

closed voting procedure. Until the city rezoned enough property to meet the annual growth target, no downzonings would be allowed.<sup>185</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 rezonings elsewhere that kept the budget in balance.

While we explored the details of this proposal in more depth in previous work, the concept is that it forces lobbying forces 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/consumers of housing in this one) would be given an ally in a concentrated group (exporters/big developers). Developers would lobby for a big budget for housing growth, as it will make their battles with neighbors easier. A higher budget, after all, means that more groups wanting downzonings will be encouraged to lobby for rezonings to meet the budget or as a matched pair with their project. 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>186</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 to appeal to a majority of the Council, and a closed-rule legislative procedure would ensure that amendments could not upset the balance she

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<sup>185</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 2 units of upzoning for 1 unit of downzoning.

<sup>186</sup> 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.)



strikes.<sup>187</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 it 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>188</sup> The result would be a stable policy equilibrium, but one that is more in favor of building.

"Zoning budgets" are not the only tool for changing the incentives facing interest groups.<sup>189</sup> Frequently, cities rely on zoning policy to provide in-kind subsidies to favored groups.

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<sup>187</sup> Hills and Schleicher, *Zoning Budget*, *supra* note \_\_, at 53.

<sup>188</sup> There are, of course, a good number of differences between the RTAA and the zoning budgets proposal. The biggest is the same difference that exists between the RTAA and other budgeting proposals of a similar flavor, things like PAYGO, which is the lack of an external enforcer to keep the deal from coming undone. 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 abide by some process can be undone by later legislation. We 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 towards 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. *Id.* at 57-58.

<sup>189</sup> Nor are they the only tool using a budgeting-like concept to reform zoning. The proposals here differ from many 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 changes in 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 certain amount. See EDWARD L. GLAESER & JOSEPH GYOURKO, *RETHINKING FEDERAL HOUSING POLICY: HOW TO MAKE HOUSING PLENTIFUL AND AFFORDABLE* 88–99 (2008). This use of the federal tax code creates a "budget" for local zoning decisions, in much the same way that the federal tax rule that states can issue bonds that will be tax-exempt despite the fact that they will be used by private parties so long as they fit under a state-specific "volume caps." See I.R.C. 141(e)(1)-(3) (1997). The logic is that this forces interest groups to compete for scarce public benefits, insuring that local governments will only impose those zoning restrictions (or in the case of bonds, fund private development) that are really worth it, and not overly restrict (or subsidize) development. See, e.g., Daniel J. Lathrope, *Federal Tax Policy, Tax Subsidies, and the Financing of Professional Sports Facilities*, 38 S. Tex. L. Rev. 1147, 1150 (1997) (arguing that tax-exempt bonds financing sports stadia should be considered private uses that come under volume caps). This approach is quite attractive – I have endorsed Glaeser's home mortgage interest deduction proposal elsewhere – but it relies on such a rule making it through Congress, something about which we might have some doubts. See Schleicher, *The City*, *supra* note \_\_, at 1562. 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*, *supra* note \_\_, at 161-62 ("My own preference is that in a city like New York, the landmarks commission should have a fixed number of building, perhaps five thousand, that it may protect.") 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 and Schleicher, *Zoning Budget*, *supra* note \_\_.

States can and have imposed "budgets" on local zoning authority as well. The most famous of these is New Jersey's Fair Housing Act, 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

For instance, "non-cumulative" 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.<sup>190</sup> As Hills and I have argued elsewhere, these are pretty silly policies -- the argument for subsidizing urban manufacturing firms is weak, and the argument for doing it through non-cumulative zoning is even weaker, as it is less useful to such firms than cash and forces them to overuse land and locate in odd and inefficient places.<sup>191</sup> It is attractive to city politicians, however, because its costs are hidden, quietly affecting rents throughout the city.

This problem could be remedied by a simple change in budgeting procedure. A city's annual budget should have to include the predicted foregone taxes that would be collected on property that was downzoned that year. As most cities have balanced budget requirements, the

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localities. In *Zoning Budget*, Hills and I suggest that the COAH requirements are a form of the type of extra-legislative procedure I argue for using in the context of land use. See Hills and Schleicher, *Zoning Budget*, *supra* note \_\_, at 46-49. Again, such a strategy relies on some outside entity (in this case, state legislatures, state administrators and/or state courts) to police local zoning authority.

Finally, on some level one could describe any local zoning system that includes tradable development rights (TDRs) as a system of budgeting (they exist in some form or another in 22 states). 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 (in New York City, both buildings of historic importance and theaters have benefited from TDRs) and as a way to justify increased building on certain lots. Norman Marcus, *Air Rights in New York City: TDR, Zoning Lot Merger and the Well-Considered Plan*, 50 BROOKLYN L. REV. 867 (1984) (discussing use of TDRs in New York City); BEEN AND ELLICKSON, *supra* note \_\_, at 167 (“TRD systems typically funnel part of city’s potential proceeds from its land use control system into outlays for the preservation of open space or historical buildings.”) They thus provide some of the benefits – creating coalitions to support building – that the zoning budgets proposal does. James T.B. Tripp and Daniel J. Dudek, *Institutional Guidelines for Designing Successful Transferable Rights Programs*, 6 Yale J. On Reg. 369, 372 n.9 (1989) (justifying TDRs on the ground that they “can encourage a process of cooperation and agreement between environmentalists and developers.”). However, it has been argued on a number of occasions that severe land use restrictions accompanied by TDRs constitute takings under the constitution, and the Supreme Court has never fully addressed the issue. See *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 747-48 (1997) (Scalia, J. concurring) (arguing that TDRs should be considered a form of compensation for takings). TDRs have never been allowed to be traded citywide, as far as I know, but could usefully be combined with budgeting proposals at the citywide level.

<sup>190</sup> Roderick J. Hills and David Schleicher, *The Steep Costs of Using Noncumulative Zoning to Preserve Land for Urban Manufacturing*, 77 U. Chi. L. Rev. 249, 252-57 (2010)

<sup>191</sup> *Id.* at 267-71.

city would have to offset that money with cuts in spending or increases in taxes.<sup>192</sup> Bringing the in-kind subsidy of non-cumulative zoning (or other down-zoning policies) 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 of the lack of partisan competition and hence the absence of institutions that need to appeal to more diffuse beneficiaries of certain policies. By introducing another stage in land use decisions -- either through zoning budgets or actual budgeting rules -- interest groups interested in either in developing big projects or in using city revenue will develop an interest in creating general rules that serve both their interest and the interests of housing consumers.

### **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 (TAA). 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,

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<sup>192</sup> To make the process manageable, the count would have to be restarted every ten years or so, as otherwise the city would have to calculate the full potential property value of development in a totally free housing market.

but are not Pareto efficient.<sup>193</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>194</sup> Although there are claims that these payments are necessary as a matter of justice or policy, critics 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.<sup>195</sup> But regardless of the merits of these arguments, and despite some difficulties in administration, TAA has been very politically effective at promoting trade deals.<sup>196</sup> TAA has mitigated opposition, allowing a generally-beneficial policy of tariff reductions to win out over the loud cries of those facing concentrated harms. The basics of this approach can be applied to land use.<sup>197</sup>

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<sup>193</sup> Meredith Kolsky Lewis, *WTO Winners and Losers: The Trade and Development Disconnect*, 39 GEO. J. INT'L L. 165, 167 (noting Kaldor-Hicks and not Pareto efficient nature of trade deals).

<sup>194</sup> Ross Koppel and Alice Hoffman, *Dislocation Policies in the USA: What Should We Be Doing?*, 544 Annals 111 (1996) (TAA consists of increased unemployment benefits and training)

<sup>195</sup> This was the debate between Democrats and Republicans over including TAA in the most recent series of trade deals involving South Korea, Columbia and Panama.

<sup>196</sup> *Id.* (noting research suggesting retraining has been ineffective). The recent debates over free trade deals with South Korea, Colombia and Panama show the importance of trade adjustment assistance in garnering bipartisan support for such deals. Zachary A. Goldfarb & Lori Montgomery, Congress approves 3 trade accords, Wash. Post, October 13, 2011, at A1 (stating that the renewal of trade adjustment assistance "cleared the way for ratification of the agreements."). There is some question about its importance in passing new trade deals, at least with respect to the deals in the 80s and 90s. DOUGLAS A. IRWIN, FREE TRADE UNDER FIRE 132 (2009).

<sup>197</sup> 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). He argues that free and underpriced public parking spaces create two types of problems. First, they have direct effects. The absence of competitive pricing means lots of people cruising around looking for a space (between 8% and 30% of urban traffic caused by cars looking for parking spaces) and the misallocation of spaces, as the highest value users are often unable to get parking spaces because they can't find and pay current users to leave. More importantly for our purposes, though, are the indirect effects. The existence of free parking means that developing a private property without providing sufficient parking creates costs for nearby residents and businesses. If a new store opens without a parking lot, its customers will compete with everyone else for the scarce asset of free public parking. 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. The extent is amazing. Commercial establishments generally must provide sufficient parking such that it can fully accommodate "peak parking occupancy" for the type of store, often defined as the number of cars that use free parking at that type of store in a suburban area on the 20<sup>th</sup> busiest hour of the year. Office buildings frequently are required to devote more space to parking than they do to offices. Parking requirements for apartment buildings

Tax increment financing (TIF) has become an extremely commonly-used tool for financing redevelopment of blighted areas.<sup>198</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. (The tax increment equals the increase in property values times the property tax rate.) TIF is supposed to make redevelopment pay for itself.

The structure of TIFs could be used to implement a TAA-style transfer scheme.<sup>199</sup> In some cities, the first level of review for a new project requiring a map amendment is the community board.<sup>200</sup> Whenever a community board endorsed a map amendment to allow new

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increase construction costs by 18% and 32%. Even with these requirements, residents living close to proposed new developments frequently base their opposition on the effect it will have on parking.

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 85% of parking spaces are in use at any given time. This would reduce congestion, raise revenues, and ensure that high value users can get a space. However, although a few cities have done this, most have not. Drivers, as you might have guessed, hate parking meters. These are highly salient fees, relative to the relatively low profile taxes-in-kind of traffic or higher building costs. How can this problem be solved?

Shoup suggests a procedural change to harness the most powerful force in development politics -- neighborhood reaction -- in favor of parking reform. He suggests that cities allow neighborhoods to vote on whether to institute market-style tolling. Importantly, he suggests that the residents of these neighborhoods get the extra revenue from the tolls in the form of services or property tax rebates. This would not only give neighborhoods an incentive to adopt market-rate parking, 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 put out by new projects that did not include parking. After all, it would be cash in their pockets. This is exactly the type of move that TILTs represent.

<sup>198</sup> See Richard Briffault, *The Most Popular Tool: Tax Increment Financing and the Political Economy of Local Government*, 77 U. CHI. L. REV 65, 67-69 (2010)

<sup>199</sup> 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 not implicated by the TILT proposal. *See id.* at 74. 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 notably been unsuccessful. *See id.* at 74-75. Perhaps because the TILT proposals send money back to certain tax payers through property tax rebates rather than direct spending, challenges on tax uniformity grounds would be more substantial. But I doubt it - the rules would be analyzed in the same ways as targeted policies that increase local taxes in specific areas for specific purposes, like special assessments or taxes justified under the special fund doctrine exception to debt limits.

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. Briffault, *supra* note \_\_, at 81-83. This would have the opposite effect, creating incentives for new development that would otherwise be blocked.

<sup>200</sup> See discussion of ULURP, *supra* note \_\_ and accompanying text. Where this is not the case, you can imagine a similar purpose being accomplished by giving tax rebates to everyone in a Member of City Council's district if they vote yes.

building, some percentage (say 25%) of the tax increment created by the new development could be given to property holders inside the community board's district in property tax rebates for a span of time (say 10 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 a bit counter-intuitive. But, like opposition to new trade deals from import-competing firms and workers, NIMBY politics is not going anywhere.<sup>201</sup> And TILTs would reduce local opposition to generally-beneficial development projects in a way that does 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 their 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>202</sup> Now, there is no incentive for local residents to support new development if they are harmed at all, and thus city officials can take little information from the fact of local opposition. Under a TILT system, local opposition would become meaningful, as officials

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<sup>201</sup> As Richard Babcock noted, “No one is enthusiastic about zoning except the people.” BABCOCK, *THE ZONING GAME*, *supra* note \_\_, at 17.

<sup>202</sup> For a discussion of this, see Hills and Schleicher, *Zoning Budget*, *supra* note \_\_.

would know that local residents valued defeating the new project more than their TILT payments. The policy could also be designed to address a secondary cost of land use procedure for developers: delay. The clock for how long TILTs were due should start at the moment the proposal was sent to a 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>203</sup>

The cost to citywide taxpayers is ambiguous. If TILTs help projects that would not have otherwise been approved get built, the city will have more revenue, not less.<sup>204</sup> However, the city would lose out on 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>205</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, most notably impact fees and CBAs. The central problem with these tools is that the relevant neighborhood does not consider the full range of benefits and costs to the city or to society at large. The result of negotiations between the 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

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<sup>203</sup> The land will remain unimproved and the value will not increase, meaning there would be no tax increment to be had.

<sup>204</sup> 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.

<sup>205</sup> 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 circumstances, be a step-backwards as it would remove some of the automaticity from the system.

people far away, 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 surplus created by a new project from non-neighborhood based users of development 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 TILTs system. Impact fees and CBAs make it more dear.

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>206</sup> The best way to characterize CBAs is that they are effectively a form of private log-rolling between developers and neighbors with the intent of presenting a settled deal to legislators and enforced by contract.<sup>207</sup> However, as Vicki Been has argued, the enforceability of these contracts and their legal status under the Supreme Court's exactions

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<sup>206</sup> For the best discussion of how CBAs work, see Vicki Been, *Reassessing the State and Local Government Toolkit: Community Benefits Agreements: A New Local Government Tool or Another Variation on the Exactions Theme?*, 77 U. CHI. L. REV. 5 (2010).

<sup>207</sup> 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, 728 (2010) (discussing success of labor movement in using litigation threats against developers to achieve policy ends); Herman George, *Community Development and the Politics of Deracialization: The Case of Denver, Colorado, 1991-2003*, 594 ANNALS 143 (2004) (discussing use of CBAs to achieve goals about employment).



doctrine is in some doubt.<sup>208</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>209</sup>

Impact fees allow a local government to demand payments to offset the increased need for additional public services created by a development.<sup>210</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>211</sup> And the Supreme Court's "exaction" cases undergirded this statutory requirement with two other requirements: any exaction must have "essential nexus" to a legitimate state interest that could have served as a reason for rejecting a proposed development, and the size of the concession must be roughly proportional to the effect the development would have on the community.<sup>212</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 that 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 homeowner most central 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

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<sup>208</sup> Been, *Community Benefits Agreements*, *supra* note \_\_, at 27-29.

<sup>209</sup> 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.

<sup>210</sup> See Been, "*Exit*" *As a Constraint*, *supra* note \_\_, at 480-83.

<sup>211</sup> See Mark Fenster, *Takings Formalism and Regulatory Formulas: Exactions and the Consequences of Clarity*, 92 Calif. L. Rev. 609, 622-25 (2004)

<sup>212</sup> *Nollan v. California Coastal Commission*, 483 U.S. 825, 837 (1987); *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994).

value of a development, they give neighbors a stake in the developments' success. This is in stark contrast to the difficult politics of CBAs, the enforcement of which often results in fights that last years and destroys value for both neighbors and developers.<sup>213</sup>

However, 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>214</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 strong preferences for sunlight. However, the holders of these preferences are unlike neighborhood opposition -- they have no particular Olsonian advantage in organizing for political battle and would get no particular bounce from the absence of parties in the local legislature. A locality with a well-functioning TILT program would still see political conflict over development, but that conflict would not be slanted towards the 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 need to be enough to reduce

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<sup>213</sup> Consider the fight over Atlantic Yards in Brooklyn, in which the existence of a CBA did not buy off local opposition sufficiently to stop a lengthy fight over development, and where the developer had to constantly justify whether he complied with the terms of the CBA.

<sup>214</sup> See Wallace E. Oates, *Property Taxation and Local Public Spending: The Renter Effect*, 17 J. Urb. Econ. 419 (2005) (finding that if renters had the same attitudes as homeowners, local public spending would be 10% 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.

opposition but not so large as to burden the public fisc. And a city would need to adopt rules that limited the chances that TILT payments would be given in cases where were not needed, as doing so would reduce general tax revenue.<sup>215</sup> However, 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.

**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>216</sup> When homevoters dominate development land use politics, it puts decisions in the hands of a city's most risk-averse lobby. But blocking development is a pretty inefficient form of insurance against reductions in housing values. Karl Case, Robert Shiller and Alan Weiss proposed a far better one, creating an options market for home value insurance based on what is now known as the Case-Schiller Housing Price Index.<sup>217</sup> This type of insurance would be good for homeowners because it would protect their biggest asset against factors outside of their control. More importantly for our purposes here, the widespread adoption of such tools would shift investment in housing, and hence

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<sup>215</sup>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 and 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.

<sup>216</sup> FISCHEL, HOMEVOTER HYPOTHESIS, *supra* note \_\_, at 8-10.

<sup>217</sup> See ROBERT J. SHILLER, THE NEW FINANCIAL ORDER: RISK IN THE 21ST CENTURY 118-36 (2003); Karl E. Case, Robert J. Shiller, and Allan N. Weiss, *Index-Based Futures and Options Markets in Real Estate*, 19 J. PORTFOLIO MGMT. 83, 86-91 (1993).

concern about the negative spillovers of new development, from individuals with one major investment (their home) to diversified and less-risk averse investors.<sup>218</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>219</sup> Homeowners can only get protection against region-wide decreases in property values, which provides 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>220</sup> Other tools are needed.

Fennell has suggested several ideas to reform land use policy that would provide risk-averse incumbent homeowners with some insurance. Impact fees require developers to pay for the need for public services created by development.<sup>221</sup> 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

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<sup>218</sup> 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, 886-889 (1999) (discussing benefits of homeowner insurance for limiting NIMBY influence); FISCHEL, HOMEVOTER HYPOTHESIS, *supra* note \_\_, at 268-70 (same)

<sup>219</sup> Mary Ellen Slayter, *Housing Bets Attract Little Action*, WASH. POST, November 22, 2008 at F1 ("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.'")

<sup>220</sup> Lee Anne Fennell and Julie Roin, *Controlling Residential Stakes*, 77 U. CHI. L. REV. 143, 157 (2010). Fennell and Roin suggest that policies try to deal with both the NIMBY problem discussed above caused by "overstaking" or residents with too much invested in their home, and "understating" or where residents without much invested in their homes do not invest in the quality of their neighborhood, leading to neglect of common functions. *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. Andrew J. Oswald, *The Housing Market and Europe's Unemployment: A Non-Technical Paper* (1999) available at [www2.warwick.ac.uk/fac/soc/economics/staff/academic/oswald/homesnt.pdf](http://www2.warwick.ac.uk/fac/soc/economics/staff/academic/oswald/homesnt.pdf); Andrew J. Oswald, *A Conjecture on the Explanation for High Unemployment in the Industrial Nations: Part I*, (1996) available at <http://www2.warwick.ac.uk/fac/soc/economics/staff/academic/oswald/unempap.pdf>. See also Tim Hartford, *The Renter's Manifesto: Why home ownership causes unemployment*, Slate, March 17, 2007.

<sup>221</sup> See note \_\_ and accompanying text.

city with fees that depend on its actual effect over time according to some set fee schedule.<sup>222</sup>

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>223</sup>

Fennell has also suggested a more complicated tool, which she calls entitlements subject to a self-made option, or ESSMOs.<sup>224</sup> A property owner would have to pay a fee to engage in some type of land use, but the community 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 "buy out" price on the initial purchase price. This gives 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 really 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>225</sup> If the fees 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 taking advantage of the centrality of procedure to land use politics. Consider Section 201 of the Trade Act of 1974.<sup>226</sup> Faced with rising protectionist sentiment, Congress revised the method under which "safeguards" measures become appropriate

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<sup>222</sup> See LEE ANNE FENNEL, *THE UNBOUNDED HOME: PROPERTY VALUES BEYOND PROPERTY LINES* 99-101 (2009). Fennell does not explicitly talk about using her fee schedule idea to apply to impact fees. But the concept is the same.

<sup>223</sup> It would also give developers incentives to reduce whatever neighboring residents find objectionable, not just in the project's plans, but on a going forward basis.

<sup>224</sup> FENNEL, *THE UNBOUNDED HOME*, *supra* note \_\_, at 103-119.

<sup>225</sup> It could, perhaps, be done through a special assessment, but this would be procedurally complicated.

<sup>226</sup> Trade Act of 1974, 19 U.S.C. 2251-54 (2000)

as part of the authorization of fast track. 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>227</sup> If the International Trade Commission (ITC) determines the conditions are met, it suggests a remedy to the President, which can include across-the-board tariff increases in the industry.

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 U.S. 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>228</sup> Control over the agenda is a powerful tool. Even an avowedly pro-free trade President like George W. Bush approved massive safeguard measures on the steel industry.<sup>229</sup> Section 201 thus gives a form of insurance to industries that are worried that a new trade deal contains excessive downside risk. These groups know that if things go really sideways, they can apply for a temporary reprieve from foreign competition. By including safeguards, countries can pass more wide-ranging trade deals.<sup>230</sup>

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<sup>227</sup> Chad P. Brown and Rachel McCulloh, *U.S. Trade Policy and the Adjustment Process*, 52 IMF Staff Papers, 107, 111-115 (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 and Goldstein, *supra* note \_\_, at 340-41

<sup>228</sup> This may be more theoretical than real, however. 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 Actions Survive WTO Review?: Section 201 Investigations in International Trade Law*, 29 Loy. L.A. Int'l & Comp. L. Rev. 43, 44 (2007)

<sup>229</sup> *Id.* at 49-50; Note: *Agreement on Safeguards: Realistic Tools for Protecting Domestic Industry or Protectionist Measures?*, 27 SUFFOLK TRANSNAT'L L. REV. 153, 184 (2003) (noting political benefits of imposing Section 201 remedies for President Bush).

<sup>230</sup> Sykes, *supra* note \_\_, at \_\_.

Something similar could be done in land use. We could give potential opponents to new development a form of *political* insurance. When considering an up-zoning, the City Council could include a provision 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, 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 tradeoffs, it would likely pass.

This type of 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 as 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.

#### **IV. Conclusion: The Law and Politics of City Unplanning**

I want to end this paper with the work that is still to be done. This paper has surely 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 provides a relatively barebones view of how local politics works. And surely many extensions, both theoretical and empirical, are left to do. Similarly, the proposals are not complete, nor are the details provided particularly crucial to either the point of the paper, although I hope they are interesting and promising starting points.

However, what I hope this paper has achieved is to provide a basis for looking at city planning and zoning through a different lens. Prior approaches, be they inspired by public choice or regime theory or whatever else, treat the outcomes of land use to either be a black box of voter preferences or the inevitable result of social forces that cannot be influenced by political decisions. What this paper has argued is that this is both a too narrow and too limiting perspective. Instead, it has argued that the limits we place on the development of our built environment are contingent and path-dependent. Further, changing how we make land use decisions -- that is, changing land use law and procedure -- can affect the content of those decisions. Our cities are our own and the law of city planning matters to how they look and how we live.