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Recalibrating Local Politics to Increase the Supply of Housing

State planning mandates and development-rights auctions can bolster pro-housing factions in local government.

✦ BY CHRIS ELMENDORF

In January of 2018, California State Sen. Scott Wiener shocked the body politic with a bill that would have zoned every tract of land in the state near a bus, rail, or ferry stop for 8–10 story buildings. His bill was soon softened and then defeated, but not before launching a national debate about housing costs, “NIMBYism,” and the critical importance of increasing residential density near mass transit.

Wiener’s bill was not a one-off. In the next legislative session, he came back with a successor bill, SB 50, that had comparatively modest vertical ambitions (4–5 stories) but broader geographic reach. Similar bills to relax height limits and density restrictions are also under consideration in Oregon and Washington.

These bills are the most visible manifestation of a serious effort by state legislators to address a housing shortage 50 years in the making. That leadership is coming from the West Coast is not coincidental. A generation ago, West Coast lawmakers challenged the idea that land use is a purely local responsibility. They established state agencies to oversee local governments’ land-use plans and they required localities to accommodate projected population growth through periodic revisions of the plans.

As a means of ensuring an adequate supply of housing, these planning mandates have been disappointments. California now has a “housing deficit” of some 3.5 million homes relative to population, and metropolitan housing stocks in Washington and

Oregon have expanded much more slowly than those of economically comparable cities in the South (where land-use controls are weaker). But, if nothing else, the West Coast planning mandates established a precedent for an active state role in municipal land use.

The new upzoning bills draw upon this precedent, even as they push the state’s role in a new direction. But they don’t squarely confront the underlying problem: Local governments are dominated by homeowners, homeowners have a vested interest in the land-use status quo, and homeowner-dominated local governments have an enormous variety of tools with which to vitiate state mandates.

In the early 1980s, California enacted a very modest upzoning mandate, requiring local governments to allow so-called accessory dwelling units (ADUs) on parcels zoned for residential use. (An ADU is a separate dwelling unit, typically created by repurposing the basement or garage of an existing house.) Studying local implementation of California’s ADU legislation, Notre Dame law professors Margaret Brinig and Nicole Garnett concluded that most cities had effectively thwarted it with a “thousand paper cuts.” Fed up with local insubordination, California in the last couple of years has stripped away most every residue of local control over the siting and regulation of ADUs.

This is making a difference, finally. But a wholesale state takeover would not be tenable for more visible and transformative upzonings. In the areas it would zone for taller buildings, Wiener’s SB 50 would not have displaced local control over permitting, design standards, demolition restrictions, impact fees, affordable-housing requirements, and more. Should the bill pass, localities that don’t want taller buildings could make them ever more difficult to build.

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Ultimately, California and other high-cost states aren't likely to make a lot of headway on the housing problem unless they also train their interventions on the political incentives and opportunities of local officials. This is not a new insight. Recognizing that local governments answer to homeowners, Dartmouth's Bill Fischel, Harvard's Ed Glaeser, and others have argued that policymakers should endeavor to change the interests of homeowners. The mortgage-interest deduction could be stripped from borrowers in high-cost markets, or homeowners could be required to insure against market declines. Such interventions would make an increase in housing supply (and attendant reduction in prices) less threatening to incumbent homeowners. But these ideas haven't caught on in legislative circles, and even if they were adopted, they would do nothing about NIMBYism motivated by a genuine desire to keep one's community the way it is.

Is there a way for states to usefully recalibrate the local politics of land use while accepting homeowners as they are? This essay argues that state planning mandates could be redeployed in this way, shifting land-use authority toward local officials who are more supportive of new housing and helping those officials make credible and politically defensible deregulatory commitments. I also suggest that the states could incentivize upzoning and permit

streamlining by authorizing local governments to auction, and thus profit from, newly created development rights.

STATE PLANNING MANDATES AS INSTRUMENTS OF POLITICAL RECALIBRATION

California and the other West Coast states require local governments to periodically revise their general land-use plan (or the "housing element" of the plan) so as to accommodate projected population growth. The revision must be submitted to a state agency for review and approval, and in principle the resulting plan supersedes local ordinances with which it conflicts.

The West Coast planning model is premised on a very dubious theory of housing need, one that ignores the endogeneity of population growth to land-use regulation. Even by its own metric of need, the model has been a failure. But I think it can be salvaged. The trick is not to find the perfect central planner to set housing-production targets, but to treat the model as a device for subtly recalibrating local politics, shifting power and policy-making discretion toward relatively pro-housing local actors and enabling those actors to make deregulatory commitments that are tough for NIMBYs to undo. While the nominal purpose of the West Coast model is to get every local government to permit its "fair share" of housing, the actual purpose should be to help



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housing-tolerant local actors remove every unreasonable barrier to new housing.

The germ of this idea is already present in California. State law requires local governments to include in the housing element of their plan an analysis of housing-supply constraints and a schedule of actions to remove constraints. To date, this mandate hasn't achieved a great deal. Part of the problem is that the legal standards for whether a housing element is adequate, and for whether a local ordinance conflicts with the plan, have had no teeth. Housing elements provided little ammunition to developers battling in the trenches, trying to get projects approved.

But California has started to bolster the requirements for a compliant housing element, and the state recently amended its Housing Accountability Act (HAA) to make it costly for local governments to deny plan-compliant projects. Since 2017, the HAA has required local governments to deem proposed projects compliant with applicable standards if a reasonable person *could* deem the project compliant. In 2018, the legislature stipulated that the relevant "zoning standards and criteria" are those found in the general plan (which the housing element amends). Local governments that lose an HAA challenge must pay the prevailing party's legal fees.

Now that the housing element is starting to matter for development permitting, the housing element/state review framework has real potential to function as a one-way liberalization ratchet. If a housing-tolerant faction happens to control a city council when the housing element is up for revision, it can enact a plan that provides for big increases in height, bulk, and density. That plan, once approved by the state's housing agency, will be somewhat sticky because any amendment to the housing element must also be submitted to the state for review and approval. If the next municipal election returns the NIMBYs to power, they can try to amend the plan, but the state agency might well reject their amendments.

As yet, this ratchet effect is rather weak because the applicable "standard of review" requires courts to defer to local governments in cases about the validity of a housing element or amendment. A simple fix would be for the legislature to change the standard of review, requiring deference to the state housing agency. That would make the original, agency-approved housing element more constraining of subsequently elected NIMBYs.

The legislature could also strengthen the hand of local "Yes In My Backyard" (YIMBY) factions by authorizing mayors to promulgate interim housing elements in the event that the state's deadline for revision passes without the local government having enacted a new, compliant plan. Mayors, who answer to a citywide electorate, tend to be more supportive of new housing than city councilpersons elected from neighborhood districts. If mayors could issue interim housing elements without the council's approval, this would give mayors substantial leverage in negotiations over the contents of any council-drafted plan. The city council would not want to risk a mayoral veto lest the deadline pass and the mayor issue a housing element of her own design.

States could also use the planning framework to reduce the political transaction costs of unwinding local growth controls that were adopted by ballot initiative or baked into city charters. For example, the legislature could declare that any "constraint" to new housing identified in a housing element but not reformed on schedule becomes inoperative as a matter of state law. This would set up the mayor (or closet YIMBYs on the city council) to fix the most problematic local constraints while deflecting blame to the state.

To make this concrete, consider the provision of San Francisco's city charter that makes all new housing subject to "discretionary review." Discretionary review entitles any neighbor of a proposed development to tie up the project for years by filing a petition and paying a small fee. San Francisco's housing element acknowledges that discretionary review is a significant and quite arbitrary constraint on housing development. But the plan is silent on what the city intends do about it. Presumably the city council that enacted the plan didn't want to take heat from NIMBYs who have become expert exploiters of discretionary review. And why bother? Even if the council had been willing to join the battle, it wouldn't have been able to repeal discretionary review without a politically difficult (and probably losing) referendum vote.

If California reformed its planning framework as I have described, San Francisco's city council could jettison discretionary review without a popular vote, court order, or even an explicit decision to eliminate the procedure. The council could simply enact a housing element that labels discretionary review a "constraint" that the city intends to reform in some unspecified manner by, say, the third year of the planning cycle. If the city then did *nothing* about discretionary review, the procedure would become inoperative (as a matter of state law) at the end of year three. No doubt, some neighborhood groups would lobby against the city including "reform of discretionary review" in the housing element's schedule of actions to address constraints, but local officials would be positioned to shift the blame: "We really had no choice; we had to address discretionary review or else we'd never have gotten the housing plan approved."

Moreover, because the mayor would have authority to issue interim housing elements, reform of discretionary review wouldn't even depend on the existence of a pro-housing majority on the city council. The mayor could threaten to veto any housing element that does not address the topic, and so long as she had enough allies on the council to block an override, she'd be able to issue her own housing plan in place of the council's.

The bottom line is that with some relatively simple tweaks, California's planning framework could function as a subtle, indirect means of redistributing local policymaking authority toward housing-tolerant factions. It could function in this way both at the moment of housing-element revision (by giving mayors the upper hand) and over time (through the ratchet effect and through passive unwinding of voter-adopted growth controls).

Making headway on the “local politics problem” does not require changing the preferences of homeowners and need not entail a frontal attack on the structure of local governments.

AUCTIONING THE UPZONE

Homeowners trying to seal their neighborhoods in amber are not the only political impediment to new housing. Other local actors see that upzoning creates an economic surplus and they want some of the pie. In theory, these “value extractors” could be part of a pro-development coalition. (If no development takes place, there’s no value to extract.) The problem is that the available tools for value extraction work very poorly, such that cities end up destroying value while grasping at it. If the state gave local governments a more effective tool for value capture, fiscally minded local officials would have an incentive to accommodate more housing and an easier time maintaining a supportive political coalition. That, in a nutshell, grounds the case for auctioning the upzone.

Value capture done badly / Today, local governments engaged in the business of capturing value from land-use permissions (which is to say, virtually all local governments) have three basic tools at their disposal. They can charge impact fees, which nominally recoup the cost of public infrastructure that services the new development. They can impose regulatory mandates, such as requiring the developer to pay union wages or set aside units for low-income housing. And they can negotiate ad hoc exactions in exchange for discretionary permits, rezonings, or agreements to freeze development regulations. None of these devices do value extraction very well.

Impact fees utilize an efficient medium of exchange (money), but they are constrained by state laws and judicial precedents that prevent local governments from charging more than the cost of services. Local governments can fudge the cost-of-service studies, but this takes work and exposes the government to legal risk. Rigid impact-fee schedules also deter development on some—perhaps many—sites. To see this, imagine that an expensive city raises height limits in a residential neighborhood from 40 feet to 80 feet. In the absence of impact fees and other exactions, some developers would make big investments in land assembly, cobbling small parcels into tracts that are large enough for an 80-foot building. Other developers would propose vertical additions that require costly engineering and tear-down projects that have significant opportunity costs. But if the city legislated a hefty per-unit or per-square-foot impact fee, the only viable projects might be those on the rare extant parcels that are both large and vacant. Marginal sites would not be redeveloped.

Regulatory mandates, such as affordable-housing requirements, carry forward the principal vice of impact fees (the setting of a fixed price, which will deter development of marginal sites) while abandoning their principal virtue (an efficient medium of exchange). As Fischel observed long ago, in-kind benefits are generally worth less to local governments than their cash equivalent.

The regulatory mandate is nonetheless very attractive for value-extractors because it has allowed local governments to end-run legal limits on the size of impact fees.

Ad-hoc exactions have been the big story of land-use law since the 1970s. Local governments zone for much less development than market conditions warrant. Developers then ask for rezonings or exemptions, offering money and land for parks, affordable housing, schools, transportation, and more. This arrangement permits the “price” of the exaction to be adjusted on a project-by-project basis and, if done cleverly, it also allows the local government to evade legal limits on the amount that can be exacted.

But as law professors Rick Hills and David Schleicher have observed in these pages (“Balancing the Zoning Budget,” Fall 2011; “Can ‘Planning’ Deregulate Land Use?” Fall 2015), the rise of development-by-negotiation has had serious downsides. It has created enormous uncertainty about property rights, delayed the production of badly needed housing, and discouraged efficient national builders from competing in urban markets. Developers with local knowledge and connections have a serious advantage in the world of discretionary permitting, even if they’re inefficient builders.

Value capture done right / There is a better way: Authorize local governments to auction, and thus profit from, the development rights created by upzoning pursuant to state policy.

A local government that intends to liberalize its zoning ordinance would apply to the state for permission to sell the newly created development rights. The state’s housing agency would grant permission after confirming that the auction plan and local zoning ordinance conform to certain state-law requirements.

Development rights would be auctioned in the form of tradeable “development allowances” roughly analogous to the emissions allowances that are now bought and sold under cap-and-trade regimes for greenhouse gas emissions. Each allowance would permit its owner to build, say, 100 square feet of housing in excess of the baseline, up to a maximum defined by the new zoning map. To illustrate, imagine a parcel of 5,000 square feet that had been zoned for a floor-to-area ratio of 2:1, i.e., 2 square feet of housing for every square foot of lot size. After upzoning, the maximum floor-to-area ratio is 8:1. This means that the owner of the parcel, who previously could build no more than 10,000 square feet, may now construct as many as 40,000 square feet. But to obtain a permit to build 40,000 square feet, she would have to acquire and redeem 300 development allowances ($[(40,000 - 10,000) \div 100 = 300]$).

To protect landowners’ reasonable expectations—and to fend off constitutional challenges—the state legislature should carefully define the *development baseline*, i.e., the intensity of development at or below which local governments may not demand development allowances. A landowner who seeks only to build something similar to what most others have already built should not have to pay for the privilege. Nor should local governments make landowners pay for the density allowed under

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longstanding zoning classifications. Accordingly, I recommend defining the baseline as the greater of either the typical density of parcels that have already been developed for housing within the local government's territory, or the locally permitted density for the parcel in question as of the date of the state law authorizing the auctions.

To maximize revenue from development-allowance auctions, a local government could assign land parcels to "zones" within which the development rights are expected to be of roughly equal value. Development allowances would be fungible within, but not between, these zones. Zones could be defined geographically and by the current use or condition of parcels, reflecting the fact that the value conferred by upzoning depends on both the location and current use of a parcel.

Right price, right medium, right incentive / The great advantage of the auction mechanism for value extraction is that it obtains "public benefits" in their most generally useful form—i.e., money, which can be spent on anything—while using markets rather than planners to set the price. It solves the problem of the mispriced regulatory exaction that deters development rather than extracting value from it.

In contrast to legislated affordable-housing mandates and impact-fee schedules, the price of tradeable development allowances would automatically adjust to a level that allows all otherwise-viable projects in the upzoned area to proceed. To see the intuition, imagine a site—say, a commercial warehouse—that has been rezoned for high-density housing. A developer would pay less for this site under a regime in which she must also pay for allowances, compared to an otherwise-similar regime in which she could develop the site without redeeming allowances. Yet with or without the allowance requirement, competition among developers trying to purchase developable sites would raise the price of the "site plus the right to build X square feet on the site" to the level at which developers earn a normal, risk-adjusted rate of return. The effect of introducing the development-allowance requirement would be to redistribute what developers pay for the site-plus-right-to-build between the owner of the site and the owners of development allowances.

Importantly, too, the auction model would create a powerful fiscal incentive for local governments to streamline and clarify their development regulations. If a local government maintained discretionary permitting protocols, the high cost of regulatory uncertainty would be borne by the local government itself as forgone revenue. Bidders wouldn't offer very much for development allowances that merely license the owner to haggle with city officials. But if the allowances actually functioned as entitlements to build, they would be enormously valuable in the high-cost, supply-constrained markets that are increasingly characteristic of big cities today.

The state could facilitate this streamlining by giving local governments the option of making regulatory and procedural commitments undertaken in connection with the auctions

enforceable as state law. For example, as part of its auction plan, a local government might propose strict time frames for reviewing development proposals within the upzoned areas, with a proviso that if the government fails to act on a development application by the appointed hour, the application shall be "deemed approved" as a matter of law. Once the auction receives the state's approval, this commitment would become enforceable as state law, enduring for the lifespan of the development allowances or until waived by the state agency. Much like state planning mandates, the auction model could be used to create local deregulatory ratchets, enabling housing-tolerant factions to make commitments that would be hard for subsequent city councils to undo.

Monitoring local governments / Another virtue of the auction model is that it would help state regulators understand which local governments are using their land-use authority mainly to extract value from new development and which are trying to kill development instead. The good types—the local governments that just want the money—would be eager to use the auction right. In supply-constrained regions, they'd define exchangeable-allowance zones and commit to regulations that result in most if not all classes of development allowances trading at substantial prices. (The price of allowances could fall nearly to zero in a zone that consists of already-developed properties if the benefits of redevelopment are marginal compared to the value of existing uses.)

By contrast, NIMBY jurisdictions would be reluctant to use their auction authority. Their auctions would bring in little revenue while laying bare their bad faith. No developer would buy a tradeable development allowance if the "right" to build exists on paper only. By comparing the price of development allowances with the price of finished housing across zones and jurisdictions, state oversight agencies would get a clearer picture of which local governments probably have substantial hidden barriers to development. Monitoring the price of development allowances would be much easier than surveying thickets of land-use regulations and local administrative practice.

Of course, states can also get a bead on bad-actor local governments by monitoring housing production and the price of land and housing. Where housing prices are high and good sites remain underdeveloped year after year, something is amiss. But the development-allowance market would provide additional information (at low cost) because it's forward-looking and does not require the state to have deep knowledge about particular parcels of land. Allowance prices would reflect what developers expect local governments to permit in the future, not what has been allowed in the past. And, compared to the market in land, the development-allowance market should be much more standardized and transparent. Whereas parcels of land vary by topography, size, existing use, and proximity to value-enhancing and value-diminishing nearby uses, development allowances would be homogenous. Each allowance would entitle its owner to exactly the same thing: the opportunity to build a given number of square

feet, within the new zoning envelope and above the development baseline, on any parcel within the zone.

OBJECTIONS TO THE AUCTION MODEL

The auction model invites two sorts of objections, one legal and the other pragmatic. Let us consider them in turn.

Unconstitutional taking / The U.S. Constitution forbids state and local governments from taking private property for public use without just compensation. Elaborating on this idea, the Supreme Court has held that discretionary conditions on development permits are permissible only if proportionate to specific, identified harms or infrastructure needs occasioned by the project.

Under the auction model, the price of development allowances would be roughly proportional to the market value of new housing, rather than to possible harms from particular developments. It might therefore be said that requiring landowners to redeem allowances as a condition of development is unconstitutional.

This argument should fail, however, because the constitutional harm-mitigation principle is best understood as governing only *discretionary* conditions on development permits. Under the auction model, the requirement that landowners redeem allowances to build above the development baseline would be *mandatory* and simple math would determine the number of allowances for a given project.

This is not sophistry. Discretionary conditions are particularly susceptible to favoritism and abuse. The courts that have complained about extortionate behavior by local governments should cheer the auction model because, as we have seen, it would actually encourage local governments to curtail their own discretion.

Beyond the fine points of doctrine, might there be some more basic constitutional or normative objection? A generation ago, Fischel and the late University of Maryland economist Bob Nelson (See “An Intellectual Odyssey Cut Short,” p. 50.) argued that local governments should have more or less unfettered discretion to sell rezonings for cash. Their proposals went nowhere. Some critics attacked the “sale” of zoning as corrupt and others bashed it as extortionate.

The model I have sketched sidesteps the usual zoning-for-sale objections by vesting authority to approve the rezoning-plus-auction in a different government than the one that would profit from it. Local governments could only sell development rights created by upzonings that advance the state’s policies and that have the approval of the state’s housing agency. The state policy of promoting urban growth would continue to be shaped by environmental, economic, and equity goals, not the prospect of filling state-budget holes with auction revenues (because the state wouldn’t pocket the revenues). In a legal challenge, the public-profit aspect of the scheme could be defended not as a way of raising revenue but as a rational means by which the state fosters local-government compliance with its policies.

Nor does requiring the purchase of development allowances by landowners who want to use the expanded zoning envelope deprive them of anything to which they might reasonably have felt entitled. People who own developable property in expensive urban markets are either lucky legatees or risk-taking participants in the land-development process. Either way, they cannot possibly have a reasonable expectation that the state will relax local density restrictions—precisely because state overrides have been so uncommon and ineffectual in the past.

All that said, constitutional takings doctrine remains unsettled and it’s possible that a court would strike down the auction model. But no judge who would reject it should think she is protecting landowners in the process. The alternative is not liberal as-of-right zoning, but the perpetuation of restrictive controls, leavened occasionally by ad-hoc exceptions for the politically connected.

Might auctions backfire? / Despite the auction model’s advantages over present-day modes of value extraction, it does come with risks. For example, if someone cornered the market in allowances, the allowance requirement could become a significant impediment to new development. This is a reason to design the market carefully and subject it to antitrust controls, but not to dismiss the idea out of hand.

Another concern is that local governments with big territories and therefore some market power over the regional supply of housing would upzone too slowly. If these governments behaved like profit-maximizing monopolists, they’d keep the supply of housing inefficiently low. This is a legitimate concern, but zoning is already so restrictive that the opportunity to profit from its relaxation seems likely to have a liberalizing effect. Also, there’s no reason why a state-upzoning mandate like Senator Wiener’s SB 50 could not be coupled with a municipal right to auction the development rights thereby created, with the state requiring all allowances to be auctioned within a short window of time.

In my view, the most serious problem with the auction proposal is that it could give local governments with market power a fiscal incentive to deny projects whose scale is below the baseline or that are located outside the upzoned area—that is, projects for which the government may not demand allowances. If the local government signals that it will reject such projects, bidders at the auction may pay more for allowances to build the privileged class of projects. Brazil, the one country that has authorized development-rights auctions, experienced this very problem. Local officials in São Paulo downzoned the entire city before auctioning an upzone in select locations.

It is to prevent a recurrence of the São Paulo experience that I would require cities to obtain state approval for their auction plans. The reviewing agency should deny approval to any municipality that has recently downzoned sites outside of the auction area, and the agency could condition its approval on the city making a legally enforceable commitment to a “zoning budget” for non-upzoned sites. (A concept introduced by Hills and Schleicher,

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a zoning budget is an aggregate number of buildable square feet or units that a city commits to allowing citywide or in a designated area.) But even if a city made this commitment, it might still use permitting discretion, parking requirements, offsite improvement demands, impact fees, and all manner of other interventions to hamstring development on the non-upzoned sites.

To discourage such abuses, a state that authorizes development-rights auctions should also enact a nondiscrimination rule requiring local governments to apply the same (or no more onerous) permitting procedures, fees, etc. to projects outside of the upzoned area as to projects within it. It's an open question how this would all play out. The nondiscrimination rule might well spur development on the non-upzoned sites, inducing cities to apply the same streamlined permitting procedures that they have an incentive to enact for the upzoned areas. Even if it does not, the fiscal incentive to upzone could lead to a wave of upzoning whose positive effect on the supply of housing far outweighs any negative effects of subtle procedural shenanigans vis-à-vis non-upzoned sites.

Then again, it's possible that the negative effects would prove to be large and difficult for the state to control, even with auction-preapproval, zoning-budget, and nondiscrimination requirements. All one can say for sure is that the existing arrangements

for regulating residential land use are working so poorly that it's time for bold experiments. Auctioning the upzone is worth a try.

CONCLUSION

For scholars who have long been concerned about exclusionary zoning and other local barriers to housing supply, the new state upzoning bills, exemplified by California's SB 50, are an exciting development. But unless the states also undertake to recalibrate the political incentives and opportunities of local government officials (or, improbably, take over the field of development regulation), many of the projects the bills mean to enable are likely to be precluded or killed by local officials exercising their residual regulatory authority and permitting discretion.

A state-led reengineering of the local political economy of land use need not entail drastic steps like consolidation of municipalities, bans on districted elections, or transfer of zoning authority from local to regional governments, let alone attacks on the interests of homeowners themselves. Rather, the state frameworks through which local governments are periodically required to plan for new housing can themselves be used as subtle instruments of political recalibration, with a further boost provided by authorizing local governments to auction the upzone. R

Comment

BY WILLIAM A. FISCHEL

Chris Elmendorf has revived and put a twist on an idea that was first extensively developed by the recently deceased economist Robert H. Nelson. (See "In Memoriam: Robert H. Nelson," p. 50.) In *Zoning and Property Rights* (MIT Press, 1977), Nelson looked at the burgeoning set of local land-use regulations that we call "zoning" and concluded that all was not well. He found little objection in the traditional function of zoning, which was to separate residential neighborhoods from industrial and commercial zones. But by the 1970s, zoning was becoming a vehicle for general exclusion from the community, to the detriment of outsiders and, potentially, the entire metropolitan area in which the community was located.

Rather than proposing a restoration of rights to private own-

ers, Nelson concluded that it would be best to recognize that zoning had become a de facto property right, held by the political actors who controlled the community. The trouble with this redistribution of use rights, Nelson argued, was that the community's right of control could not be sold to parties who could make better use of it. He proposed to make zoning fully fungible. The sales would be consensual: The existing political body would have to be satisfied with the price that developers would offer to change zoning to accommodate new uses. Developers, having purchased the use rights, could proceed with their plans without further ado.

I later made a similar proposal within the framework of law-and-economics in *The Economics of Zoning Laws* (Johns Hopkins University Press, 1985). As the Coase theorem would suggest, which party owns the right to develop is irrelevant if the right is easily transferred. To developers frustrated by growth-control zoning, Nelson and I said, *Get over it and trade.*

California leaders have come around to a conclusion that many economic studies have supported: Zoning has caused the state's unreasonably high housing prices that are holding back many businesses that cannot hire out-of-staters. Zoning has also contributed to urban sprawl in that land-use regulations have deterred the increased density of housing near business centers and mass-transit stations. New housing for those who have jobs in Sunnyvale is built miles away in Stockton. The legendary commutes from the Central Valley to Silicon Valley have wasted gas, congested roads, and stood in the way of the state's greenhouse-gas reduction goals.

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Financial interest/ The California State Legislature has responded to this in typical fashion. It has, with numerous laws, ordered the local governments to revise their local master plans to accommodate more development. As Elmendorf points out, these never work. The reason for their failure, I submit, is in the construction of local master plans, which are written as unranked grab bags to appeal to every interest. *Of course, we want higher-density development near our transit stations, public officials say, but we also must preserve open space, groundwater sources, endangered species, prime agricultural land, historic structures, and traditional community character.* And so the projects don't get built.

Elmendorf realizes that the top-down approach won't work without making more intensive development in the financial interest of the community that controls zoning. Instead of dealing with developers on a parcel-by-parcel basis, he proposes that the state give localities the right to auction the right to develop more intensively—"upzone"—entire areas whose development would meet state goals. Developers would bid for these rights in a competitive market and the rights would be transferable among parcels within a designated area. The revenue from the auctions could be used for any local purpose, such as new parks, road repairs, or just tax reductions. To make sure the upzoning rights would fetch a higher price, the community would, Elmendorf submits, try to commit itself in advance to smoothing any other bumps in the development process, such as sewer connections, impact fees, and parking requirements.

Too many interests? As a law professor, Elmendorf is aware that there are some legal niceties to be dealt with. The plan looks like "contract zoning," whose quid-pro-quo dealing is frowned upon by courts. But he points out that his proposed deals, requiring state approval, are much more indirect than contract zoning and so are likely to pass legal muster. The popularity of tradable pollution emission permits has undermined concern about selling the right to develop. Some might say the proposal is a "regulatory taking" of the property owner's pre-existing development rights but, if so, the value of those rights in most California communities is so low as not to be worth litigating. Legal barriers are not the issue that gives me pause.

What concerns me about the proposal is that the local elected officials, who are empowered to design and implement the upzoning auction, cannot reliably deliver development rights. Elmendorf is aware that the development process involves many interested parties who need to be satisfied before the permits can be granted. Some years ago, these became so convoluted that California legislation established institutions to deal with them. Among the institutions are community benefit agreements (CBAs), which corral community factions and negotiate with developers to satisfy local interests. Among the major factions who have availed themselves of CBAs are labor unions, which can demand that only union workers be employed in the projects. The union members do not have to be community residents and the added cost of

labor can discourage some otherwise desirable projects.

CBA beneficiaries are unlikely to look kindly on a plan that monetizes the value of their benefits as a result of open bidding for them. They aren't against developers paying; it's who gets the proceeds that would concern them. A program to auction upzonings would make it clear how much current CBAs cost the community at large. If the CBAs are left in place, the value of upzoning rights would be reduced by the need for the developer to satisfy various factions. It would seem obvious that upzoning auctions would produce revenue that actually benefits the entire community instead of the better-organized interest groups, and those groups would not appreciate the public exposure of their cost to the public at large.

The other parties to whom attention must be paid are homeowners who are especially close to the upzoning area. Nearby homeowners are usually the first to cry *Not in my backyard!* in response to an upzoning proposal or even a project that actually complies with all existing standards.

As I have written in *The Homevoter Hypothesis* (Harvard, 2001), NIMBYism is not necessarily irrational, even if opponents of development sometimes trot out far-fetched concerns. A home is the biggest single investment most people have, and the risks of adverse neighborhood effects are concentrated in that immobile asset and are not covered by homeowner insurance. You can insure against the structure burning down but not against increased crime or loss of a pleasant view. Homeowners instead use zoning as a substitute for value insurance.

Upzoning auctions might actually add to homeowners' perceived risk of land-use change. In the present (dysfunctional) system of case-by-case negotiation, homeowners at least are presented with a tangible project that they can address in zoning hearings and other forums. But a development right purchased at an upzoning auction has no physical embodiment. It is merely an enhanced Floor Area Ratio, allowing a building of greater height or lot coverage. Its use is constrained by the zone, but its size and other elements of its configuration are left largely to the imagination. Of course, there can be later public review of specific projects but, as Elmendorf points out, the community authorities have a strong incentive to clear the way for developers in order to enhance the value of the development rights they are selling. It is likely that homeowners would double down against the use of an upzoning auction.

All this is not to throw cold water on the Elmendorf proposal. He is correct that the prospect of cashing in on development rights will make it easier for local authorities and most of their constituents to accept state demands for upzoning. If nothing else, the proposal will expose the mendacity of many of the arguments against infill development. What may be needed to make this idea work is some additional insurance for nearby neighbors who would bear disproportionate burdens to their expectations of the status quo. Putting together that kind of market would be a useful addition to this worthy proposal. R