

Incremental Densification Auctions: A Politically Viable Method of
Producing Infill Housing in Existing Single-Family Neighborhoods

by

Karl Phillip Baker

B.A. History
Tulane University, 2001

J.D.
Harvard Law School, 2007

SUBMITTED TO THE DEPARTMENT OF URBAN STUDIES AND PLANNING IN
PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE DEGREE OF
MASTER IN CITY PLANNING
AT THE
MASSACHUSETTS INSTITUTE OF TECHNOLOGY
FEBRUARY 2008

© 2008 Karl Phillip Baker. All rights reserved.

The author hereby grants to MIT permission to reproduce
and to distribute publicly paper and electronic
copies of this thesis document in whole or in part
in any medium now known or hereafter created.

Signature of Author: _____

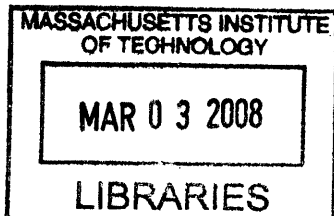
Department of Urban Studies and Planning
September 4, 2007

Certified by: _____

Sam Bass Warner
Visiting Professor of Urban History
Thesis Supervisor

Accepted by: _____

Langley C. Keyes
Ford Professor of City and Regional Planning
Chair, MCP Committee



ROTCH

Incremental Densification Auctions: A Politically Viable Method of Producing Infill Housing in Existing Single-Family Neighborhoods

by

Karl Phillip Baker

Submitted to the Department of Urban Studies and Planning
on September 4, 2007 in Partial Fulfillment of the
Requirements for the Degree of
Master in City Planning

ABSTRACT:

This paper examines the problem of convincing homeowners to accept new housing density in their neighborhoods. This paper proposes that densification that places additional housing units in preexisting single-family neighborhoods is socially desirable as a way of slowing sprawl, utilizing existing infrastructure, providing affordable housing, promoting consumer choice and slowing suburban decline. The paucity of such development currently occurring is argued to result primarily from restrictive land use regulation as there are strong indications that densification would otherwise be economically viable in many locations.

This paper approaches the question of removing regulatory barriers from the perspective of devising a process that would effectively reduce homeowner apprehension about the effects of densification. Devising a system that explicitly regulates the pace of change and captures increases in land value attributable to densification is found to be essential to overcoming homeowner concerns about densification. Traditional land use tools are deemed inadequate to achieve these goals and thus it is proposed that local governments allocate densification rights through public auctions where the rights to densify are separate and distinct from any traditional real property ownership interest.

This proposal for densification auctions is evaluated according to various legal restrictions courts and legislatures have imposed on the methods local governments may use to regulate land use. The proposed densification auction is found to potentially violate many of these legal rules. It is argued, however, that the underlying rationales supporting these legal restrictions cease to reason and therefore that they should be relaxed in the specific context of incremental densification.

Thesis Supervisor: Sam Bass Warner
Title: Visiting Professor of Urban History

Chapter 1. Introduction	7
What is incremental densification?.....	7
Approach/Disclaimer	7
Chapter 2. Why densification is good for America	11
Justification #1: It may be the only real alternative to sprawl	11
Justification #2: It could save money by utilizing existing infrastructure	18
Justification #3: It could help provide affordable, accessible housing	20
Justification #4: It would promote consumer choice	22
Justification #5: It may help slow suburban decline	23
Chapter 3. Case studies: Hollin Hall and Houston	29
Hollin Hall	29
Houston	42
Chapter 4. Why densification is rare in single-family neighborhoods	55
Densification is quite rare in single-family neighborhoods	55
Possible scenarios	57
The argument that densification is economically viable.....	59
Empirical studies dealing with the viability of densification.....	65
Conclusion	73
Chapter 5. Regulation and incremental densification.....	75
How regulation limits incremental densification.....	75
How to approach changing these regulation	75
Proposed means of inducing homeowners to support densification.....	80
Other considerations	86
Chapter 6. Analysis of methods of allocating densification rights.....	93
Potential methods of allocating the right to densify	93
Traditional methods	93
A proposal for allocating densification rights through auctions.....	101
Chapter 7. How law precludes a densification auction	109
Rules limiting ability to capture and distribute gains	109
Rules requiring uniform treatment.....	125
Chapter 8. Conclusion.....	143
Bibliography	147

Chapter 1. Introduction

WHAT IS INCREMENTAL DENSIFICATION?

As discussed herein, “incremental densification” means *gradual* processes that yield an increase in the housing unit density of existing single-family neighborhoods. Incremental densification could take the form of accessory apartments, single-family homes on small lots, townhouses, or multi-family housing. This specific nomenclature is used rather than the more readily recognizable term “infill” for three basic reasons. First, the concept of incremental densification explored herein may be accomplished through “infill” *or* “redevelopment” depending upon whether existing homes are demolished in the process. Second, both “infill” and “redevelopment” have strong associations with specific contexts (e.g. central cities and larger parcels of land) that are more or less outside the purview of the topic explored herein. Lastly, usage of the modifier “incremental” is meant to emphasize the modest pace of change contemplated, which separates incremental densification from other forms of densification that proceed through a wholesale redevelopment of a given area over a relatively short period of time, often at the hands of a single developer.

APPROACH/DISCLAIMER

This paper aims to explore two basic questions. First, what is responsible for the apparent dearth of incremental densification across single-family neighborhoods in America? Second, how might a policy of incremental densification be conceivably advanced given the political conditions currently restraining it, and can this be done without a change in the underlying legal structure?

Surprisingly or not, these topics have attracted almost no attention from scholars and policymakers. In approaching this broad topic, therefore, I have found it necessary to make several assumptions and bypass some important issues. While I do believe the assumptions made are quite reasonable and the bypassed issues do not undercut the basic arguments, it seems initially worth noting the degree to which many issues dealt with herein could benefit from some empirical research and more advanced treatment. For example, no attempts have been made to quantify the extent to which incremental densification is currently occurring, or the extent to which it would likely occur in the absence of regulation. Either of these tasks would be a serious undertaking given that it would likely require a detailed analysis of a wide sample of very fine grained datasets.¹ While possession of this data would be tremendously helpful, its nonexistence should not preclude a meaningful exploration of the potential benefits of incremental densification or the manner in which public policy may need to be reconfigured in order to meet the challenge. In my view, developing at least a rudimentary understanding of the potential benefits and success of incremental densification is a prerequisite for engendering greater interest in the subject. Likewise, there is no data that quantifies the raw amount of densification that would occur if regulations were relaxed. Substantial persuasive evidence, however, does suggest that regulation is indeed an important binding restraint on densification. Therefore, an examination of how the impulse towards such regulations

¹ I did attempt to examine the issue of how much densification was currently occurring by examining a sample of census tracts in various cities and looking at changes in housing units over a ten year period (1990-2000). The data available, however, appeared too coarse to distinguish between development on vacant land and what would be considered incremental densification and/or too unreliable due to sampling to distinguish between real changes in the number of housing units and random variation in the sampling.

could be removed seems justified. In summary, proceeding off of these assumptions and others is both necessary and reasonable.

This paper is organized into seven chapters (including this introduction). The organization of these chapters is generally designed to provide a linear course of argument in which acceptance of the arguments advanced in one chapter lead to examination of the questions addressed in the following chapter. Chapter Two serves to provide the basic justification for reading the rest of the paper as it furthers several arguments for why densification in single-family neighborhoods may lead to socially desirable outcomes in terms of preventing sprawl, utilizing existing infrastructure, providing affordable and convenient housing, promoting consumer choice, and forestalling suburban decline. Chapter Three provides some grounding for the rest of the paper by describing two real-world examples of densification in single-family neighborhoods. In addition to providing a tangible context for understanding the ideas presented in the remainder of the paper, analysis of these “case studies” produces some tentative conclusions about the interests of the various stakeholders involved in incremental densification.

In Chapter Four, the question of what impedes densification from occurring more frequently in single-family neighborhoods is engaged with the evidence pointing towards land use regulation as a primary culprit. Chapter Five addresses the issue of why local governments choose to limit densification through regulation. Using the logic of William

Fischel's *Homevoter Hypothesis*, two approaches to shifting the behavior of "homevoters" and consequently local governments are presented.²

Armed with the understanding from Chapter Five, Chapter Six explores the inadequacy of traditional systems of land use regulation in terms of how they are ill-suited to manage specific problems posed by incremental densification and align the interests of the community in favor of densification. Chapter Six concludes with the presentation of a proposal for a method of land use regulation that involves auctioning development rights for densification which seems much better suited to balancing the various interests at stake with respect to densification in single-family neighborhoods. Chapter Seven then runs this proposal past various legal doctrines that may preclude the ability of any local government to actually implement a densification auction system. These legal doctrines are then critically analyzed to determine whether or not they are being properly constructed or whether the state courts or legislatures should consider changing them to allow dynamic processes, such as incremental densification, to again take root in our cities.

² WILLIAM A. FISCHEL, *THE HOMEVOTER HYPOTHESIS* (2001).

Chapter 2. Why densification is good for America

Before investigating any further, the case must be made that densification in single-family neighborhoods is a worthwhile endeavor. Otherwise, it makes no sense as a normative matter to be proposing ways to alter the existing legal structure to accommodate this sort of change. In the following chapter, I have identified five arguments why densification in single-family neighborhoods may be socially beneficial.

JUSTIFICATION #1: IT MAY BE THE ONLY REAL ALTERNATIVE TO SPRAWL

The Census Bureau estimates that the population of the United States will grow to approximately 420 million by 2050.³ If recent patterns of development continue with urban land consumption outpacing population growth by a factor of 2.7,⁴ metropolitan areas will consume 130% more land than they did in the year 2000.⁵ Furthermore, this growth will be quite unevenly distributed suggesting that that metropolitan regions in the South and West could experience even more extreme expansions of land consumption if current patterns of land use persist.⁶

There is a wide body of literature arguing that this path of development will impose unacceptable costs on society and the environment. There are also some who besmirch the conventional wisdom by arguing that on the whole sprawl is a good for society. Analysis and critic of this debate is beyond the purview of this paper, but in the

³ U.S. CENSUS BUREAU, U.S. INTERIM PROJECTIONS BY AGE, SEX, RACE, AND HISPANIC ORIGIN TABLE 2A (2004), available at <http://www.census.gov/ipc/www/usinterimproj/natprojt2a.xls>.

⁴ JULIE CAMPOLI AND ALEX S. MACLEAN, VISUALIZING DENSITY 4 (2007).

⁵ The 130% figure is derived from a simple calculation multiplying the expected population growth (48%) by the ratio by which land consumption has outpaced population growth (2.7).

⁶ U.S. CENSUS BUREAU, POPULATION DIVISION, INTERIM STATE POPULATION PROJECTIONS TABLE 7 (2005), available at <http://www.census.gov/population/projections/PressTab7.xls> (predicting that the Northeast and Midwest will grow 7.6% and 9.5% between 2000 and 2030, while the South and West grow 42.9% and 45.8%, respectively).

interest of full disclosure it should be noted that the author tends to agree with the former body of people (i.e. those that think sprawl is a problem). As such, my own interest in incremental densification stems partly from my belief that it may be critical to accomplishing any real program of “Smart Growth.”

A Missing Piece of the Puzzle

The focus of Smart Growth advocates has been mostly on controlling the form of development at the fringe. Portland’s Urban Growth Boundary, for example, is aimed mostly at addressing developing along the fringe. Likewise, most New Urbanist communities tend to be greenfield developments near the fringe of metropolitan areas. Outside of central cities and transit-oriented development, the idea of reconfiguring what is already on the ground attracts little attention. While Smart Growth strategies commonly mention “infill” as a strategy, it seems woefully underdeveloped and understood in only the most limited terms. To this observer, the idea of reconfiguring and densifying parts of the existing city--especially single-family neighborhoods--seems to always play second fiddle (if even that) to new subdivision plans and grandiose conversions of underutilized property into mixed-use centers.

There are several possible explanations for why incremental densification has been largely ignored as a Smart Growth strategy. It might be simply a failure of imagination aided and abetted perhaps by the current climate of regulation and intense aversion to neighborhood change and/or density. While such oversight may be understandable, those truly concerned with improving land use policy would seem to be doing a great disservice to themselves and society if they allowed themselves to be

blinded into a myopic view by the status quo. After all, land use regulations can be changed or even eliminated altogether. In addition, popular opinion about development can change or be changed, especially if it proves possible to reconfigure the dynamics of homeowner interests as proposed in Chapter Five. Perhaps the field of urban planning has become too timid in its approach to the existing regulatory and political landscape, with these forces dictating not only present actions but our ideas about the future?

Practical Concerns with “Infill” and Why They Do Not Affect Incremental Densification

A more charitable explanation of why incremental densification has been basically ignored may be the sense that time is better spent dealing with new development on the fringe because advocating change there is bound to have much more of an impact than any changes that occur within the existing city. Drawing on his experience as an inner-city infill developer in Saint Louis, William Farris argued this position in 2001, stating that:

...[S]mart growth advocates should be realistic about the amount of development that will occur in built-up areas versus outlying open land as various stakeholders consider future policies. The U.S. population is expected to double in this century. It is hard to imagine that a large percentage of that growth will occur in existing built up areas. Smart growth advocates should focus especially on encouraging higher-density quality development on open peripheral land.⁷

Farris and those like him find it “hard to imagine” that a significant percentage of growth could be accommodated within existing built-up areas for a host of reasons that may be summarized as “negative infill market factors.”⁸ Farris asserts that an optimal infill site is characterized by “a receptive neighborhood with well-maintained properties,

⁷ J. Terrence Farris, *The Barriers to Using Urban Infill Development to Achieve Smart Growth*, 12 HOUSING POLICY DEBATE 1, 26 (2001).

⁸ Farris, *supra* note 7, at 7.

good land price, adequate utilities, no major land problems, appropriate zoning, and potential development profitability compared with alternative sites.”⁹ Finding that such infill sites are exceedingly rare, Farris’ natural conclusion is that development will continue to flow naturally towards greenfields sites into the foreseeable future.

While there is surely some truth to the point Farris has made, the breadth of the argument rests on some rather tenuous assumptions. In response to Farris’ call to basically ignore “infill,” demographer William Fulton takes issue with two implicit assumptions underlying Farris’ argument.¹⁰ First, Fulton points out that NIMBYism, environmental considerations and other factors have made greenfield development progressively more expensive and difficult to permit. Thus, one cannot simply show significant barriers to development at infill sites and conclude that greenfield development is superior. Second, Fulton points out that Farris’ refutation of the potential for infill development is based on the faulty premise that infill sites are largely found only in central cities. According to Fulton, Farris overlooks the fact that “[w]e have been urbanizing the countryside aggressively for more than a century [and] the sheer number of infill sites in the nation has become truly vast.... surely somewhere in the millions.”¹¹

While Fulton does not consider the specific consequences of a reorientation towards suburban rather than central city infill, one can quickly see how such a change in orientation casts considerable doubt on many of the pragmatic concerns about infill voiced by Farris and others like him. For example, Farris asserts that absorption of a

⁹ Farris, *supra* note 7, at 2.

¹⁰ William Fulton, *Comment on J. Terrene Farris’s “The Barriers to Using Urban Infill Development to Achieve Smart Growth”*, 12 HOUSING POLICY DEBATE 41 (2001).

¹¹ *Id.* at 43-44.

significant percentage of growth is belied by the fact that “[m]ost people want [a] single-family home with a lot.”¹² Whether or not this is true, this most obviously would not preclude densification that involves shrinking but not eliminating lots (e.g. what is occurring in Hollin Hall, Virginia discussed in Chapter 3). Therefore, the issue does not have to be framed as “lot” vs. “no lot” but rather may become a question of how large of a lot people want. On this point, it might come as a surprise to Farris that the median lot size of new single-family homes has actually been steadily declining over the past decade, even as interior space has grown.¹³ Furthermore, while Farris may be right that “most people want a single-family home with a lot,” one must consider how this preference competes with other ones, such as commuting times, neighborhood quality and affordability. The ongoing rapid process of densification in the inner parts of Houston (as discussed in Chapter 3) gives some indication as to how these preferences could play out. In sum, if incremental densification provides new, affordable homes in nice neighborhoods within a reasonable commute of job centers, we might be surprised by how quickly people’s interest in a large lot diminishes.

Farris’ concern about land assembly is another example of how the commonly articulated practical barriers to infill do not transfer to the suburban context. Farris mentions divided ownership, eminent domain and title problems as common issues plaguing infill development.¹⁴ These issues obviously do not transfer as problems for incremental densification since acquisitions in this context are basically no more

¹² Farris, *supra* note 7, at 8.

¹³ NATIONAL ASSOCIATION OF HOME BUILDERS ECONOMICS GROUP, CHARACTERISTICS OF NEW SINGLE FAMILY HOMES COMPLETED, 1970-2005 (2006) (showing a steady decline from the peak recorded median lot size of 10,000 ft.² in 1990 to 8,847 ft.² in 2005, the lowest median lot size recorded since 1985. During the same time period, the median size of a new home continently increased from 1,905 ft.² to 2,227 ft.²).

¹⁴ Farris, *supra* note 7, at 11-14.

complicated than a standard residential transaction. They may even be potentially less complicated where the existing structure is set to be demolished because one can ignore home inspections and the like. A typical homebuyer does not need a phalanx of lawyers and if zoning clearly allows for densification then neither, presumably, would a developer engaging in incremental densification. Other concerns mentioned by Farris that clearly do not transfer to densification in single-family neighborhoods are the brownfields concerns and the negative externalities commonly found in inner-city neighborhoods (e.g. crime or bad schools).¹⁵

Remaining Concerns

To be certain, a couple of Farris' major concerns—regulatory restrictions and NIMBYism—do transfer to the context of incremental densification.¹⁶ But these issues, it should be noted, are likely to be present to some extent in any development context and they are malleable. Current regulatory restrictions can be changed; otherwise, there would be little purpose in discussing land use policy at all. Likewise, while NIMBYism is a major concern, throwing in the towel could hardly be the right response. Instead, where broader social welfare seems to demand it, it seems only prudent to seek to understand the source of NIMBY sentiments and explore ways of counteracting that sentiment. Following on William Fischel's advice that "[t]he reforms more likely to succeed are those that address the fundamental reasons that homevoters are so skittish

¹⁵ See Farris, *supra* note 7, at 7, 10.

¹⁶ See Farris, *supra* note 7, at 19-24.

about neighborhood change,”¹⁷ this paper seeks to do exactly that by envisioning a way to reduce and even reverse neighborhood sentiment against densification.

Why Focus on Single-Family Neighborhoods?

As described above, single-family suburban neighborhoods may hold several advantages over central cities locations in terms of providing infill opportunities for housing. There are also other reasons to focus on these areas. The first reason is that these opportunities have been almost entirely ignored. Stepping back from the literature, the paradox of devoting attention to the possibilities of housing in nearly every conceivable part of the metropolitan area (e.g. brownfields, greyfields) but the places arguably best suited for it—existing residential neighborhoods—is really striking. The second reason for this focus is that single-family neighborhoods comprise easily the largest percentage of developed land in all metropolitan regions.¹⁸ Therefore, there is at least a *prima facie* case that these places hold the largest potential of housing a growing population without sprawling further into the countryside.

Recap

While in the end Farris may ultimately prove correct about suburban as well as urban “infill,” given its potential it would seem irrational to not at least consider incremental densification as a Smart Growth Strategy in some detail. The present climate

¹⁷ FISCHEL, *supra* note 2, at 3.

¹⁸ See, e.g., Press Release, Metropolitan Council, Metropolitan Council Releases Land use Data (July 10, 2006) (estimating the 71% of the developed land in the seven-county Minneapolis-St. Paul metropolitan region was devoted to residential use), available at http://www.metrocouncil.org/news/2006/news_539.htm; US Census Bureau, Census 2000 SF3 (showing that roughly 60% of Americans live in single-family homes; combined with the fact that single-family homes consume far more land per dwelling than other forms of housing, it seems apparent that single-family residential comprise the single largest land use in metropolitan America).

of regulation and popular prejudice to density may appear insurmountable, but those truly interested in containing sprawl should at least closely consider the possibility of densifying existing single-family neighborhoods before throwing in their lot with “compact sprawl” on the fringe.

JUSTIFICATION #2: IT COULD SAVE MONEY BY UTILIZING EXISTING INFRASTRUCTURE

Many have argued that by utilizing preexisting infrastructure urban infill has the potential to generate costs savings as compared to development on the fringe. To Farris and skeptics, this argument is a red herring as urban infrastructure is often obsolete and “[h]igh-density infill housing on existing lots may require additional investment (e.g. alley upgrades, underground cable, or drainage) to comply with market demand for off-street parking and garbage removal.”¹⁹ Regardless of which side wins this argument, one can imagine a number of reasons why densification in suburban single-family neighborhoods might differ from traditional urban infill in terms of the validity of the infrastructure cost-savings argument. For one, the infrastructure in these places is newer and possibly better maintained than urban infrastructure. It is also currently servicing the basic type of development contemplated by incremental densification making it quite different from inner-city infill projects that may be replacing 19th century brownstone and a high-rise condominium towers.

Unfortunately, there is “no straight answer” to the question of how much excess capacity exists in single-family residential neighborhoods.²⁰ Given that there are no strong indications that infrastructure in most existing neighborhoods are teetering on the

¹⁹ Farris, *supra* note 7, at 14.

²⁰ Electronic Mail from Eran Ben-Joseph, Professor of Landscape Architecture and Urban Planner, MIT (May 11, 2007) (on file with author).

edge of collapse, it may be safe to assume that is at least some excess capacity in many places. In Hollin Hall and Houston (discussed in Chapter 3), the only infrastructure issue that seemed particularly noteworthy was stormwater management. For certain, there are bound to be some places where infrastructure capacity would pose a challenge. For example, areas that rely on septic systems rather than sewage systems would have a hard time densifying without upgrading to sewers.²¹ Where there is excess infrastructure capacity, however, incremental densification could generate real savings as compared to most other forms of development (e.g. greenfield development or traditional urban infill).

Beyond this potential of fitting a few more units into an existing system, one might also consider the potential of incremental densification to help spread the costs of paying for needed upgrades in existing infrastructure systems. This could take place either by directing some of the profit earned through densification towards these infrastructure improvements, or by adding more beneficiaries that can be expected to share in costs of upgrading a system.

Finally, there may be opportunities for infrastructure gains through incremental densification that result directly from the aging population and declining birth rate.²² The number of children enrolled in elementary schools and secondary schools has just recently surpassed the number enrolled at the crest of the babyboom in 1970.²³ Over this period, however, the total population increased by nearly 50% and the percentage of

²¹ Electronic Mail from Eran Ben-Joseph, *supra* note 20.

²² CENTER FOR DISEASE CONTROL, TABLE 1-1. LIVE BIRTHS, BIRTH RATES, AND FERTILITY RATES, BY RACE: UNITED STATES, 1909-99 (showing a decline in birthrates from a peak of 26.6 in 1947 to an all-time low of 14.5 in 1999; fertility rates also decline from a high of 122.7 in 1957 to 65.9 in 1999), *available at* <http://www.cdc.gov/nchs/data/statab/t991x01.pdf>.

²³ Press Release, US Census Bureau News, School Enrollment Surpasses 1970 Baby-Boom Crest (June 1, 2005), *available at* <http://www.census.gov/Press-Release/www/releases/archives/education/005157.html>.

the population comprising school-aged children declined by about 25%.²⁴ Over the next several decades, this trend is expected to continue with school-aged children making up a progressively smaller portion of the population.²⁵ When considered in connection with the ongoing outward expansion of metropolitan areas and lack of densification taking place in existing communities, it seems that many older suburban communities must have school facilities that were designed to accommodate far more children than they currently do. As expected, “the population of central cities and inner suburbs is aging, leading to reduced enrollment in schools in those areas, and the closing of many adequate school buildings that are no longer needed.”²⁶ Incremental densification may offer an opportunity for society to avoid abandoning this existing infrastructure.²⁷

JUSTIFICATION #3: IT COULD HELP PROVIDE AFFORDABLE, ACCESSIBLE HOUSING

Many scholars have argued that land use policy is at least partly responsible for shortages of affordable housing. Research by Edward Glaeser and Joseph Gyourko backs up this argument with evidence strongly suggesting that “government regulation is responsible for high housing costs where they exist.”²⁸ In their research, Glaeser and Gyourko focused on the role of supply in determining housing price. Relying on previous studies that had found that “physical homes can be supplied almost elastically,”

²⁴ US CENSUS BUREAU, DEMOGRAPHIC TRENDS IN THE 20TH CENTURY 11, 56 (2002).

²⁵ U.S. CENSUS BUREAU, U.S. INTERIM PROJECTIONS BY AGE, SEX, RACE, AND HISPANIC ORIGIN TABLE 2A (2004), available at <http://www.census.gov/ipc/www/usinterimproj/natprojt02a.xls> (the percentage is expected to decline from 21.74% in 2000 to 19.31% in 2050).

²⁶ THE NATIONAL CENTER FOR PUBLIC POLICY AND HIGHER EDUCATION, STATE SPENDING FOR HIGHER EDUCATION IN THE NEXT DECADE 7 (1999), available at <http://www.highereducation.org/reports/hovey/hovey7.shtml>

²⁷ While incremental densification might require higher marginal costs as it could generate the need for more teachers and teaching materials, the reduction in infrastructure costs could reduce the average cost of educating a child, which would seem to be the relevant consideration for local governments.

²⁸ Edward L. Glaeser and Joseph Gyourko, *The Impact of Building Restrictions on Housing Affordability*, 9 ECONOMIC POLICY REVIEW 19, 35 (2003).

they focus on rival hypotheses explaining the function of “the land component of housing” in determining the supply of housing.²⁹

Initially, Glaeser and Gyourko looked at the variation between cities in how much of a factor land price appeared to play in determining the cost of housing. Not surprisingly, regional difference between high cost locations (e.g. California) and low cost locations (e.g. many Midwest cities) were pronounced.³⁰ While the commonsense understandings for why land prices are higher in San Francisco than Kansas City really boil down to the issue of land scarcity (e.g. labor markets, geography, weather), Glaeser and Gyourko argue that land scarcity is generally not the cause of high land costs in the housing market but rather that the cause is excessive regulation.³¹

According to Glaeser and Gyourko, the “best evidence” that this is true is the existence of a significant gap between estimates of the value of residential land on the “extensive” and “intensive” margins.³² In layman terms, one could describe this gap as the difference between the value of a quarter-acre of land that could only be used as extra yard and the value of a quarter-acre that could be used as a new home site. According to Glaeser and Gyourko, the size of this significant gap implied that a sizable “implicit

²⁹ Glaeser, *supra* note 28, at 28; see also Stuart S. Rosenthal, *Residential Buildings and the Cost of Construction: New Evidence on the Efficiency of the Housing Market*, 81 *The Review of Economics and Statistics* 288 (2003) (using data from Vancouver, British Columbia, Rosenthal found that the construction cost component of housing prices was priced efficiently with any surplus profits being eliminated before the end of the construction cycle leading to the conclusion that observed inefficiencies in the housing market are attributable to inefficiencies in the land market and not the construction market).

³⁰ Glaeser, *supra* note 28, at 27 (For example, the number of existing homes in San Francisco where land accounted for more than 40% of the value of homes approached 100%. In Kansas City, on the other hand, this condition was estimated to exist in only 10-20% of homes. This data was from 1999.)

³¹ Glaeser, *supra* note 28, at 28. (asserting that while “land itself is fairly abundant, ... zoning authorities make new construction extremely costly”).

³² Glaeser, *supra* note 28, at 23.

development tax” was factored into the price of housing.³³ While the size of this tax was found to differ greatly between metropolitan areas, it was present to some extent in nearly all metropolitan areas examined. Not surprisingly, the largest gap was found in San Francisco, where residential land was valued on the extensive and intensive margin at \$7.84/sf and \$63.72/sf, respectively. In other words, a half acre of yard in San Francisco is worth \$86,000 versus \$700,000 as a buildable lot. Even in Houston, which is often falsely assumed to be without any land use regulation (as discussed in the Chapter 3), Glaeser and Gyourko discovered a sizable discrepancy between the value of a half acre as yard (\$17,000) versus as a buildable lot (\$48,000).³⁴

It should be noted that because many forms of densification might require demolition of existing structures, it seems unlikely that this would be the lowest-cost option for providing usable housing structures. On this point, accessory units and other forms of densification that do not require demolition offer the best hope. Densification seems to offer a more credible solution, however, if the affordable housing problem is conceived to be not one of providing the lowest possible cost housing but rather one of having an adequate supply of reasonably priced housing within a close proximity of jobs and other amenities,

JUSTIFICATION #4: IT WOULD PROMOTE CONSUMER CHOICE

Densification in existing single-family neighborhoods would increase the supply of a particular kind of product not readily available in the market today. This product, in the most basic sense, would be more housing in desirable locations. It might also be

³³ Glaeser, *supra* note 28, at 23, 31

³⁴ Glaeser, *supra* note 28, at 29-31.

cheaper housing in desired locations, or bigger houses on smaller lots in desirable locations. Regardless of how one defines the product, it seems difficult to quibble with the notion that this process would be enhancing consumer choice as this concept is classically understood unless it were somehow subsidized by the government. Interestingly, this argument co-opts one of the primary arguments employed by sprawl defenders, namely that sprawl should be allowed because this is what people really want. As Jonathan Levine has argued persuasively in his recent book, *Zoned Out*, Smart Growth advocates are often too quick to concede to the implied premise of this argument, i.e. the one in which “the status quo in metropolitan development is constructed as the market.”³⁵ As the evidence, both generally with respect to metropolitan development and particularly with respect to incremental densification, appears to contradict this assumption, it seems that the norm of consumer sovereignty actually offers solid support for relaxing the regulatory rules that currently prohibit densification.

JUSTIFICATION #5: IT MAY HELP SLOW SUBURBAN DECLINE

In recent years, demographers and urban sociologists have identified a new trend in metropolitan America: suburban decline. The emergence of this phenomenon has been attributed to a number of factors. Two important ones that point to a role that incremental densification could play in reversing some of these trends are: (1) a lack of housing reinvestment; and (2) local government fiscal imbalances.

³⁵ JONATHAN LEVINE, *ZONED OUT: REGULATION, MARKETS, AND CHOICES IN TRANSPORTATION AND METROPOLITAN LAND USE 202* (2006).

Lack of Reinvestment

Without reinvestment, the structural component of housing deteriorates and depreciates over time. Thus, neighborhoods in which homeowners generally choose not to reinvest in their homes may be expected to decline.³⁶ While individual choices as to whether to reinvest may be influenced by personal circumstances, broader trends of reinvestment across neighborhoods--the kind that signal decline--have different origins. In studying suburban decline, William Lucy and David Phillips discovered that neighborhoods dominated by housing built between 1940 and 1980 were the most prone to decline.³⁷ One of Lucy and Phillips' suggested explanations for why neighborhoods dominated by housing built during this period are so peculiarly susceptible to decline centers on the fact that housing built during this period tended to be "developed over wide swaths of land during a short time frame."³⁸ This pattern of development means that housing ages "in unison [with the surrounding neighborhood] creating special pressures on people considering whether to reinvest in maintaining and upgrading their properties."³⁹ Under these conditions, Lucy and Phillips concluded that "it seems unlikely that the reinvestment will be the dominant choice."⁴⁰ These neighborhoods, it seems, are faced with a classical collective action problem where everyone would be better off if reinvestment occurred but none had the right incentives to do so individually.

Lucy and Phillips proposed a host of remedies to the general problem of suburban decline in terms of subsidized mortgages, regional governance, revenue sharing, and

³⁶ WILLIAM H. LUCY AND DAVID L. PHILLIPS, *CONFRONTING SUBURBAN DECLINE: STRATEGIC PLANNING FOR METROPOLITAN RENEWAL* 198 (2000) ("Neighborhoods and jurisdictions depend on reinvestment to be sustainable in the long run.").

³⁷ LUCY, *supra* note 36, at 206.

³⁸ LUCY, *supra* note 36, at 208.

³⁹ LUCY, *supra* note 36, at 208.

⁴⁰ LUCY, *supra* note 36, at 216.

more equitable education financing.⁴¹ One potential solution they did not consider, which would not require direct public investment or governmental reorganization, is incremental densification.

Permitting densification alters the calculations that inform the decision whether or not to reinvest and could tip the balance in favor of redevelopment or investment.⁴² Thus, incremental densification may offer a way for communities to overcome their collective action problem. For example, where densification is allowed on a limited number of parcels, it might jumpstart a broader trend of reinvestment as other homeowners observe reinvestment and decide it is now safe to reinvest in their homes.⁴³ These possibilities are theoretical and closer analysis would be needed to determine the extent to which conditions exist where densification would spur reinvestment in declining suburban areas. Nevertheless, it seems like a plausible scenario that should be considered.

One immediate concern many might have with the idea of using densification to spur reinvestment in single-family neighborhoods is that in allowing greater density the process would actually be diminishing the value of homes and furthering the decline of the neighborhood. This bias towards “density” is deeply ingrained but it is worth noting the fact that in many instances densification may actually yield more expensive homes inhabited by wealthier persons than those in the surrounding neighborhood (see e.g. Hollin Hall discussed in Chapter 3). How could this be, one might ask, given that the

⁴¹ LUCY, *supra* note 36, at 275-290.

⁴² See *infra* page 61 for discussion of the “optimal redevelopment rule” and how the option to densify could encourage redevelopment.

⁴³ The idea is similar in many respects to traditional mean of revitalization where the hope is that initial public investment will be “leveraged” and induce private investment.

new homes have smaller lots? Actually, this makes a great deal of intuitive sense given how new housing offers lower maintenance costs and can be designed to suit contemporary preferences. Therefore, contrary to commonly held perceptions, it may be the newcomers, rather than the existing residents, that should rationally be more concerned about the ‘house next door.’

Fiscal issues

Declining suburban jurisdictions are at-risk of entering a vicious cycle of fiscal imbalance.⁴⁴ This cycle begins as rising maintenance costs meet a declining or stagnant tax base, and in order to make up the shortfall local governments must either cut services or raise taxes. Either decision is then assumed to be capitalized into home values, which in turn reduces the tax base further, thus causing more cuts or tax hikes, and so on. The only way to counteract this problem, it seems, is to find some way to increase property values. Since current zoning often imposes a suboptimal development density, allowing densification should very well increase aggregate property values. In other words, it may offer an ‘out’ for communities stuck in this vicious cycle.

An immediate concern with this proposal may be that along with increased tax revenues, new housing would also bring greater service costs. To some extent, therefore, this argument depends on the validity of the assertions made earlier with respect to infrastructure efficiency. This potential pitfall might also be remedied if local governments were allowed to capture the increase in economic rent attributable to the upzoning for densification. This idea (explored in Chapter Five) is essentially that by

⁴⁴ See, e.g., Jon Shure, *Forward* to HENRY A. COLEMAN, *FISCAL STRESS: IT'S NOT JUST A BIG CITY PROBLEM* (2002).

capturing part of what would ordinarily be a windfall to the landowner, local governments can acquire a current surplus to offset future deficits or invest in public amenities that could help stem the community's decline.⁴⁵

The Alternative

When discussing the role incremental densification may have in stemming suburban decline, it is useful to consider the alternatives. Assuming local governments do not receive outside help, their options seem fairly limited. If reinvestment in housing does not occur and a fiscal imbalance persists, it seems inevitable that these communities will continue to decline and deteriorate. At some point in the future, areas with desirable location might be redeveloped or re-gentrified. This will probably only occur, however, after property values have slumped for decades, making this a particularly bad proposition for existing homeowners.⁴⁶ In the meantime, the wider region will be afflicted by all the ills that come with having an area of deteriorating neighborhoods between the central city and the newer suburbs. In my opinion, the better alternative for the homeowners certainly seems to be gradual or incremental change.

⁴⁵ This might go beyond what are commonly thought of exactions to include some sum that could compensate for the present value of expected future fiscal deficits attributable to the new homes.

⁴⁶ A potential future for these homeowners might be demonstrated by the story of the Overton Park in Lubbock, Texas where decades of deterioration in a neighborhood adjoining the Texas Tech campus eventually attracted the interest of a single developer that has undertaken "the nation's largest privately-funded revitalization project." This project covers 325 acres and will convert the neighborhood that primarily consisted of single-family dwellings and small apartments to an area predominated by modern apartment complex and mixed-use centers. See Kate Pierce, *One Man's Crazy Dream: Despite the Naysayers, One Family Turned 325 Neglected Acres Into a Haven For Families and Texas Tech Students*, 30 UNITS 34 (2006).

Chapter 3. Case studies: Hollin Hall and Houston

HOLLIN HALL

Overview

Approximately ten miles due south of the Washington Monument, a “zoning quirk” has freshly exposed a pent-up demand for densification and the conflicted nature of existing homeowners’ attitudes towards densification.⁴⁷ Technically a misnomer, this ‘zoning quirk’ results from an interpretation of Fairfax County’s subdivision regulations that allows two homes to be built on properties where only one has stood for over fifty years.⁴⁸ The densification occurring here is not the result of any intentional government policy, but it has a lot to say about the underlying dynamics of the process and how it might be configured to attract homeowner support.

A brief history is necessary to understand and gain a full appreciation of what has happened at Hollin Hall. Developed in the 1940s, the original developer of Hollin Hall recorded plats for 6,500 square foot lots one day before a new zoning amendment requiring 7,200 square foot lots took effect.⁴⁹ Despite the developer’s successful preemption of the new zoning restrictions, most homes in Hollin Hall were initially built

⁴⁷ Lisa Rein, *Zoning Quirk Radically Altering Neighborhood: Builders Razing Old Fairfax Houses to Erect Two in Each Place*, THE WASHINGTON POST, JULY 24, 2006, at B1 (using the term “Zoning Quirk,” this article was actually the one that alerted my attention to the issue of incremental densification); Microsoft Map Point (used to calculate distance between Hollin Hall and Washington Monument).

⁴⁸ Despite the persistence of some adjoining homeowner in litigating this issue, the interpretative issue seems quite simple. Looking at the zoning ordinance, the zoning administrator rightfully determined that it allowed the lots recorded prior to the amendment to be used “for any use permitted in the zoning district...even though the lot does not meet the minimum district size, lot area, and/or width requirements of the district, provided all other regulations of the Ordinance can be satisfied.” FAIRFAX COUNTY ZONING ORDINANCE § 2-405(1). The Board of Zoning Appeals, Circuit Court of Fairfax County and Virginia Supreme Court all agreed. Brief in Opposition for BZA of Fairfax County at 6, *Concerned Citizens of Hollin Hall Virginia v. Board of Zoning Appeals of Fairfax County* (Va. 2007) (No. 07-0058).

⁴⁹ Brief in Opposition, *supra* note 48, at 3.

straddling the boundary line of two 6,500 square foot lots.⁵⁰ While some have attributed this path of development to the fact that land was cheap,⁵¹ a more plausible explanation could be that the developer or the homeowners were concerned about how the city would react to homes built on 6,500 square foot lots. Nevertheless, the end result was that Hollin Hall looked and felt exactly like a neighborhood of 13,000 square foot lots in an area that was rezoned in 1978 to require 10,500 square foot minimum lot sizes.⁵²



Figure 1: Aerial View of Hollin Hall
Source: Google Earth

Sixty years later, developers are seizing upon the punctuality of the original developer and pursuing an opportunity to densify Hollin Hall by utilizing each recorded

⁵⁰ Brief in Opposition, *supra* note 48, at 4. The lots actually vary slightly in size but not materially.

⁵¹ Rein, *supra* note 47.

⁵² FAIRFAX COUNTY ZONING ORDINANCE § 3-302.

6,500 square foot lot. Between May 2005 and April 2006 developers acquired eleven of the sixty-four homes that straddle double lots.⁵³ When some nearby homeowners learned of the developers' plans and the County Zoning Administrator's acquiescence to it, they formed a group called "Concerned Citizens of Hollin Hall Village" and fought tooth-and-nail against the proposed densification. They appealed the decision of the Zoning Administrator all the way to the Virginia Supreme Court but on May 8, 2007 the Virginia Supreme Court's refused to hear their appeal, essentially ending the dispute about whether zoning permitted densification in Hollin Hall.⁵⁴ The first building permits were issued the very next day and as of August 26, 2007 there were seventeen new homes (apparently still under construction) for sale as "the NEW Hollin Hall."⁵⁵ This "NEW Hollin Hall" happens to consist of 3,400 to 3,900 square foot new homes with asking prices in the range of \$1-1.25 million.⁵⁶ At three stories each, these homes may dwarf the preexisting relatively modest homes that range between 1,200 and 1,700 square feet and have recently sold for around \$500,000 when not being purchased with densification on the mind of the purchaser.⁵⁷

⁵³ FAIRFAX COUNTY DEPARTMENT OF TAX ADMINISTRATION, REAL ESTATE ASSESSMENT INFORMATION SITE, available at <http://icare.fairfaxcounty.gov/Main/Home.aspx>.

⁵⁴ SUPREME COURT OF VIRGINIA CASE INFORMATION SYSTEM, available at <http://208.210.219.132/scolar/select.jsp>.

⁵⁵ DEPARTMENT OF PUBLIC WORKS AND ENVIRONMENTAL SERVICES, BUILDING PERMIT RECORDS, available at http://66.179.23.21/DP1/Metroplex/FairfaxCounty/permit/WIZ_SELECTPLAN.asp; See, e.g. Washington Post, Real Estate (MLS# FX6477320), available at <http://washingtonpost.2.homescape.com/> (accessed August 21, 2007) (the ALL CAPS font for "new" was utilized in the advertisements for someone unknown reason).

⁵⁶ *Id.*

⁵⁷ FAIRFAX COUNTY DEPARTMENT OF TAX ADMINISTRATION, *supra* note 53.

The Developer's Profit Interest: A Rough Estimate of the Potential

The developers have been motivated by all accounts by the large potential for profit through densification that is in turn driven by the strong and growing demand for housing near the District of Columbia.⁵⁸ The developers' land use attorney, Jerry Emrich, believes that even with the somewhat unanticipated delays and expenses, his clients and others will continue to pursue these densification opportunities simply because the opportunity for profit was so substantial.⁵⁹ This substantial profit arises from the fact that the developers appear to be able to nearly quadruple the value of some of the properties by replacing a modest single-family home with two larger, luxurious homes. While it is too soon to know exactly how successful the developers will be in selling these homes, the basic numbers are quite astounding. Take for example, 8033-35 Washington Road. Purchased by Hollin Hall LLC for \$630,000 in June 2005, it appears that two homes are now being built on this site, each with a listed asking price of \$1.25 million. Estimating the hard costs for construction for each one of these home at around \$270,000, and soft costs of around \$100,000, the back of the envelope analysis assuming the properties sell for about 95% of the asking price yields a profit potential of \$655,000 per densified Hollin Hall lot.⁶⁰ This profit accounts for 37.4% of the total sale price--far

⁵⁸ Telephone Interview with Chuck Hagee, Reporter, Mount Vernon Gazette (February 14, 2007); Telephone Interview with Gerald Hyland, Mount Vernon District Supervisor (February 22, 2007); Telephone Interview with Jerry K. Emrich, Attorney for the Developers (February 21, 2007).

⁵⁹ Telephone Interview with Jerry K. Emrich, *supra* note 58.

⁶⁰ Cost estimates were derived using the website [costbook.com](http://www.costbook.com), which bases its estimates on the National Building Cost Manual, and the average sales price breakdown from the NAHB survey. The [costbook.com](http://www.costbook.com) estimate is specific to the Zip Code where Hollin Hall is located and assumes high-quality construction and installations on a 3900 square foot home. The NAHB survey costs were for a typical 2800 square foot house on a national basis, which I then increased to take into account the larger size of the Hollin Hall homes. Land costs were assumed to be the \$630,000 the builders paid for the lots plus about \$10,000 in demolition costs. See National Association of Homebuilders, *Building a Balance: Construction Costs for Single-Family Home* (September 15, 2005), available at <http://www.nahb.org/generic.aspx?genericContentID=51646>.

in excess of the national average of approximately 9.8% profit on new homes.⁶¹ While this analysis ignores the additional legal costs incurred by the developers, it does give a rough picture of why developers were so interested in the double lots at Hollin Hall. The chart below gives a general breakdown of this back of the envelop analysis.

	One House	Two Houses
Land Cost	\$ 630,000	\$ 630,000
Demolition	\$ 10,000	\$ 10,000
Lot Preparation Cost	\$ 48,000	\$ 96,000
Construction Costs	\$ 270,000	\$ 540,000
Financing Cost	\$ 21,000	\$ 42,000
Overhead and General Expenses	\$ 30,000	\$ 60,000
Marketing	\$ 14,000	\$ 28,000
Sales Commission	\$ 36,000	\$ 71,000
Total Soft Costs Total	\$ 101,000	\$ 202,000
Total Costs	\$ 1,069,000	\$ 1,487,000
Total Sales Price	\$ 1,187,500	\$ 2,375,000
Profit	\$ 189,000	\$ 888,000
Profit %	10.0%	37.4%
Excess over Average Profit	\$ 2,125	\$ 655,000

In actuality, the profits realized will certainly be lower given the long legal battles during which the developers were incurring direct legal costs, additional financing costs, and being delayed into a cooling housing market. It may also cost somewhat more to build homes within existing residential neighborhoods. Moreover, there was at least some possibility that the entire densification scheme would fall through making this land development scheme substantially more risky than a typical development.

⁶¹ According to the NAHB survey, on average 9.8% of the price of a new home represents the builder's profit. See National Association of Homebuilders, *supra* note 60.

It should be noted that it appears that only six of the eleven lots purchased by the developers are being densified—the other five lots are giving birth to only one home. This may relate to the stormwater issues raised by the neighborhood and the county but this has not been confirmed. Combining the entire development, however, the back of the envelope analysis still yields a profit of \$5.9 million and a margin of 29%.

	Single House Developments	Two House Developments	SUM
Total Profits	\$ 592,500	\$ 5,326,500	\$ 5,919,000
Sale Price	\$ 5,937,500	\$ 14,250,000	\$ 20,187,500
Profit %	10.0%	37.4%	29.3%

While it would be great to see the final numbers at Hollin Hall, these rough estimates make clear just how profitable densification can be in a place like Hollin Hall.

Premiums Paid to Homeowners

Another financial perspective worthy of examination is that of the homeowners who sold their properties to the developers. Even though they were planning to demolish completely the existing homes, Emrich's clients seemed able to pay a substantial premium over what other buyers were offering. The fact that they paid a premium may perhaps be best illustrated by the fact that during the eleven months when they were purchasing homes, there were no other recorded purchases.⁶² Thus, for every house on the market (and those that were not) the developers were able to outbid every other prospective purchaser. This suggests the clear dominance of the densification option over all others. Also suggestive is the fact that the twelve month period during which the developers were purchasing properties was especially active in terms of the number of

⁶² FAIRFAX COUNTY DEPARTMENT OF TAX ADMINISTRATION, *supra* note 53.

transactions recorded (eleven) as compared to the preceding twelve months when there were only four market transactions.⁶³ It appears that the developers were willing to offer a substantial premium simply to secure more lots quickly for densification.

While distinguishing between the premium the developers were willing to pay because of densification and variations due to shifts in the housing market is difficult, there is a substantial gap between the average price the developers paid (\$646,000) and the average price paid in transactions during the prior twelve months (\$434,000) and the following twelve months (\$509,000).⁶⁴ Estimating the price that would have been paid by a typical homeowner according to the mean of before and after (\$472,000), the average price premium paid by the developers could be estimated to be \$176,000—a substantial gain for a middle-class family. Aggregating these gains together, the surplus captured just by the homeowners would be \$1.92 million.

The True Value of the Right to Densify Hollin Hall?

While the \$1.92 million estimate of the surplus might be inflated by a miscalculation of the general market conditions persisting during the twelve months the developers were purchasing their properties, one could certainly argue that the price the developers were willing to pay was decreased by the uncertainty that lay ahead in the permitting process and the novelty of what they were attempting to do. How much then would the densification rights be worth if the legal uncertainties had been removed?

⁶³ *Id.*

⁶⁴ Averages calculated using data from FAIRFAX COUNTY DEPARTMENT OF TAX ADMINISTRATION, *SUPRA* NOTE 53.

Using the financial analysis outlined above where densification in Hollin Hall could yield supernormal profits of up to 39%, one can derive an even higher estimate of the value of the densification rights. For purposes of this analysis, it is assumed that the land itself has a separate value of \$500,000. This approach isolates the value of allowing densification and also includes the premium paid to the homeowners by the developers in the value of the densification rights. This analysis yields a value for each densification right in Hollin Hall of a whopping \$531,500 where the developer is allowed a 15% profit margin.

	15% Profit	20% Profit
Land Cost	\$ 640,000	\$ 640,000
Demolition	\$ 10,000	\$ 10,000
Construction Costs	\$ 540,000	\$ 540,000
Lot Preparation Costs	\$ 96,000	\$ 96,000
Financing Cost	\$ 42,000	\$ 42,000
Overhead and General Expenses	\$ 60,000	\$ 60,000
Marketing	\$ 28,000	\$ 28,000
Sales Commission	\$ 71,250	\$ 71,250
Soft Costs Total	\$ 201,250	\$ 201,250
Total Costs	\$ 1,487,250	\$ 1,487,250
Total Sales Price	\$ 2,375,000	\$ 2,375,000
Difference	\$ 887,750	\$ 887,750
Developer's Profit	\$ 356,250	\$ 475,000
Value of Densification Right	\$ 531,500	\$ 412,750

Regardless of where the exact figure lies, one thing is clear—there is a lot of value to be created in allowing densification to occur in a place like Hollin Hall where the demand for housing exceeds the existing supply. An effective means of capturing and distributing this increase in value to the community at-large, as discussed in Chapters 5

and 6, may be a necessary condition to organizing a system under which homeowners and local government might actively pursue incremental densification.

Property Tax Revenue

The local government's interest in densification may also be examined by considering the aggregate increase in property values associated with incremental densification at Hollin Hall. Assuming existing property values were to neither go up nor down, the addition of seventeen homes valued at approximately \$1.1 million to replace eleven homes that were valued at approximately \$500,000 would increase the aggregate property values in the area by \$13.2 million. At the general residential tax rate currently in place in Fairfax County this would translate into about \$117,480 additional dollars of tax revenue per year.⁶⁵

Neighborhood Interests

While the position of the developers involved at Hollin Hall seems quite straightforward, the neighborhood interests are conflicted. On the one hand, there are many who publicly opposed the actual proposals, mostly out of stated concern for what these big, tall houses would do to "neighborhood character."⁶⁶ Lurking behind this public face of opposition, however, some homeowners are conflicted about the idea of shutting down the densification option since this could cost them a sizable sum when it comes time to sell their homes.

⁶⁵ The current tax rate is \$0.89 per \$100 of assessed value. See FAIRFAX COUNTY REAL ESTATE FAQs, http://www.fairfaxcounty.gov/dta/FAQ_RE_Tax_Rate.htm

⁶⁶ Telephone Interview with Gerrald Hyland, *supra* note 58. I attempted to speak with the public leader of this opposition, Catherine Voorhees, but she refused to speak with me without giving any reason.

This silent countervailing interest favoring densification made an appearance when County Supervisor Gerry Hyland presented Hollin Hall residents with options for stopping any more densification through a special zoning amendment.⁶⁷ Hyland's proposals would not have stopped densification on the four properties the developers had already purchased, but they would have prevented any additional densification. Supervisor Hyland found it "amazing" that his proposals were basically met with "just silence" after having listened for months to outraged Hollin Hall homeowners; after the meeting, he never heard back from the citizen group about his proposals.⁶⁸ Hyland assumes that when it came down to giving up the right to build two houses in Northern Virginia a majority of the homeowners were simply "not willing."⁶⁹ A reporter who covers these stories for the Mount Vernon Gazette and attended the meeting sensed a similar dynamic, saying that the "900 pound gorilla" in the room that no one wanted to recognize was the fact that removing the densification option would be quite costly for the homeowners who were essentially "sitting on a gold mine."⁷⁰ The leader of the Concerned Citizens for Hollin Hall Village argued that the neighborhoods decision not to go along with the Supervisor's plan was really based on their confidence that the courts would overturn the Zoning Administrator's decision;⁷¹ however, given the circumstances, it seems more likely that this was just an effort to put a good spin on a bad story.

⁶⁷ See Chuck Hagee, *Twentieth Century Subdivision Wrestles with 21st Century Growth*, MOUNT VERNON GAZETTE, MARCH 9, 2006.

⁶⁸ Telephone Interview with Gerald Hyland, *supra* note 58.

⁶⁹ Telephone Interview with Gerald Hyland, *supra* note 58.

⁷⁰ Telephone Interview with Chuck Hagee, *supra* note 58.

⁷¹ Chuck Hagee, *Hollin Hall Demolition Begins: Developer Makes a Pre-Emptive Strike on Hollin Hall Village*, MOUNT VERNON GAZETTE, JUNE 15, 2006.

While the story of Hollin Hall is a compelling one in terms of how densification in single-family neighborhoods is economically viable and how given the right incentives homeowners may actually support it, there are some cautionary aspects of the story as well. For instance, the opposition to the project as well as some county officials have voiced concern about densification in Hollin Hall may impact the already strained storm water management system in the neighborhood.⁷² While the motives behind voicing these concerns may be impure, the concerns are legitimate. The developer is paying for a Public Improvement Plan that would improve drainage of stormwater out of the community,⁷³ but this plan is not required to take into account anything more than the incremental problems caused by each house. Concerns about the wider process of densification, according to county officials, are not legally considered because there was no broader site plan or rezoning.⁷⁴ Thus, there seems to be a potential that future densification may have to pay significantly more to deal with stormwater management than the first wave, or that it could be denied altogether if the system is unable to handle it. The importance of these kinds of inequities will be explored in more detail later in the paper but it seems useful to note a real world example of how such thresholds could create inequities among homeowners.

Furthermore, a look at the numbers involved indicates that the concerns about “Neighborhood Character” may not be mere bluster either. All eleven of the acquired properties are within very close proximity to each other. The furthest distance between

⁷² Petition for Appeal by Concerned Citizens of Hollin Hall Village, *Concerned Citizens of Hollin Hall Virginia v. Board of Zoning Appeals of Fairfax County* (Va. 2007) (No. 07-0058).

⁷³ Chuck Hagee, *Hollin Hall Village Debates Storm Drainage*, MT. VERNON GAZETTE, December 21, 2006.

⁷⁴ Hagee, *supra* note 73.

any two of these properties is less than 1000 feet.⁷⁵ Nine of the properties are located on adjacent blocks.⁷⁶ Looking at the thirty-nine homes that previously existed on these blocks, the eleven transacted sales could have increased the density of this area 23% from approximately 2.6 to 3.5 units per acre. In actuality, the increase will only be about 15% up to approximately three units per acre because of the five lots where only one new house is being built. Still, this phase of development will mean that 25% of the homes on these blocks will be new and the increase in built space (because of the larger size of the new homes) will be even more extreme. Moreover, this change is taking place all at once and these numbers do not take into account the potential for more densification occurring now that the Virginia Supreme Court has rejected the legal challenges. Given these circumstances, one can understand the apprehension of those living nearby as their neighborhood is really changing and quite rapidly. These concerns are noted here because taking account of their legitimacy is an important reason why an *incremental* strategy is favored, as discussed in Chapter Five.

Summary

Hollin Hall illustrates that powerful financial motives exist for densification as well as how the potential to capitalize on this opportunity may shift homeowner's positions with respect to densification. On the dark side, Hollin Hall also suggests how the unregulated drive towards densification might lead to unjust or unwise results as infrastructure may be quickly overwhelmed and the interests of existing homeowners in preserving neighborhood character is ignored.

⁷⁵ Distances calculated using GOOGLE EARTH.

⁷⁶ FAIRFAX COUNTY DEPARTMENT OF TAX ADMINISTRATION, *supra* note 53.

Perhaps the most enlightening aspect of the story of Hollin Hall, however, derives from the fact that it is essentially an accident of history. If the subdivision plats had been filed just one day later in 1943, it is extremely doubtful that anyone would have even considered the idea of building new housing in this area.

To do so would require a rezoning or a variance, neither or which could be sanely expected under the circumstances.⁷⁷

Other than the history of double lots and the homes being slight smaller than the national average--between 1,200 and 1,700 square feet--everything else about Hollin Hall is pretty average. The tax assessor records indicate that the

existing homes are of “average” construction and

“average” condition. The 13,000 square foot

(approximately a quarter acre) lots are nothing special.

The average household income for Hollin Hall’s census

tract is \$94,000; the average in the DC metro area is

\$92,000. Thus, there is reason to think that the

potentials of densification that was exposed by accident

at Hollin Hall may have a much broader potential.



Figure 3: Home in Hollin Hall Ready for Demolition

Source: Hollin Hall Gazette



Figure 2: The "NEW Hollin Hall

Source: MRIS

⁷⁷ The former option seems fanciful in terms of how local governments operate and also the spot zoning doctrine discussed *infra* in Chapter 7. The later option would and should fail as a matter of law because it could not meet the variance test, discussed briefly in Chapter 6.

HOUSTON

Houston presents a somewhat different story as it is one of the few (or only) places in America where the city has actually encouraged densification in single-family neighborhoods. While Houston is famous for its lack of ‘zoning,’ this distinction ultimately begs the question of what exactly constitutes ‘zoning.’⁷⁸ It may be widely known in certain circles that private covenants frequently take the place of zoning in Houston, but far fewer may be aware that the City of Houston actually imposes direct land use regulations using its power to regulate subdivisions.

Using these powers, the City of Houston has imposed minimum lot sizes across the City since 1963. Up until 1993, these regulations were uniformly applied across the city but this changed in 1999 when the city divided the city into ‘urban’ and ‘suburban’ zones. The ordinance established more relaxed restrictions within the ‘urban area,’ which was defined as all the area within Interstate 610 (known locally as the “Loop”).⁷⁹ This area was estimated to have housed 433,000 in 2000 within an area of approximately ninety-three square miles. Despite its designation as “urban,” it is composed predominately of single-family neighborhoods built at modest densities.⁸⁰ According to the Director of the Planning Department in office when the 1999 amendment was passed, the change in policy was required because “[t]he old ordinance really impeded redevelopment and revitalization in the inner city because it was a very old, suburban

⁷⁸ Houston voters most recently rejected ‘zoning’ in a 1993 referendum. Teddy M. Kapur, *Land Use Regulation in Houston Contradicts the City's Free Market Reputation*, 34 ENVIRONMENTAL LAW REPORTER 10045 (2004).

⁷⁹ Matt Schwartz, *Revised Subdivision Ordinance Sent To Panel: Areas Would be Tagged as Urban Or Suburban*, HOUSTON CHRONICLE, September 8, 1998, at A13.

⁸⁰ Mike Snyder, *Reshaping Neighborhoods: Communities Inside The Loop Suffer Growing Pains; City Is Devising Policies To Accommodate Population Density And Quality Of Life*, HOUSTON CHRONICLE, March 4, 2007, at A1.

ordinance.”⁸¹ Neighborhood groups, on the other hand, characterized these ordinance changes as “truly a developer-take-all.”⁸²

One of the most visible changes enacted at this time was the reduction in the minimum lot sizes required within the ‘urban’ zone from 5,000 to 3,500 square feet (or 12.4 units/acre).⁸³ The new ordinance actually allowed much higher densities through townhouse developments using open space offset such that densities could reach twenty-seven units per acre on minimum lot sizes of 1,400 square feet.⁸⁴ Whether or not these changes truly relaxed restrictions is questionable since the preexisting policy of the city often allowed similar degrees of densification through the designation of “tracts” that were not formally registered as new subdivisions but which allowed developers to essentially subdivide existing lots.⁸⁵

This deliberate policy of encouraging densification has apparently worked as recent studies estimate that the population inside the Loop increased by 20% between 2000 and 2006.⁸⁶ While some of this population growth may be attributed to the influx of persons displaced by Hurricane Katrina, the sense is that a significant portion of this growth is attributable to development taking place in existing neighborhoods where developers are building “two or three townhomes on a lot where one house formerly stood.”⁸⁷ Furthermore, because densification in Houston is often accompanied by gentrification that yields smaller household sizes, the growth in housing units far

⁸¹ Matt Schwartz, *supra* note 79.

⁸² Matt Schwartz, *supra* note 79.

⁸³ Matt Schwartz, *supra* note 79;

⁸⁴ HOUSTON, TEX., CODE OF ORDINANCES §§ 42-183 – 42-185 (2006).

⁸⁵ Telephone Interview with Jason Holoubek, Planner City of Houston Department of Planning & Development, May 11, 2007.

⁸⁶ Mike Snyder, *supra* note 80.

⁸⁷ Mike Snyder, *supra* note 80; Interview with Jason Holoubek, May 11, 2007,

outpaces population growth in the parts of the city where the townhome developments have been concentrated.⁸⁸

As would be expected, significant price appreciation has accompanied the drive towards densification with the price per square foot of housing inside the loop doubling between 1995 and 2006, outpacing appreciation in other parts of the Houston metropolitan region.⁸⁹ Prices per square foot for housing inside the loop are now double the price outside the loop. With traffic conditions continuing to worsen in Houston and the City planning to build a new light rail system, these trends should continue. Future projections are that the population of this area will increase by another 18% by 2015, yielding a net increase of 44% between 2000 and 2015. If these projections hold true, the average population density in this area will have increased from seven units per acre to ten units per acre.⁹⁰

The fiscal impacts of this new development appear to have been universally positive according to Jason Holoubek who works with the City of Houston's Planning and Development Department. According to Holoubek, "as far as the city is concerned, it pays for itself."⁹¹ This is because the additional costs the city incurs to upgrade infrastructure and school children have been greatly exceeded by the additional tax revenues generated. While this fiscal surplus may be partly attributable to the correlation between densification and gentrification in Houston, it is certainly noteworthy given the prevalent presumption that housing development will not pay for itself.

⁸⁸ Telephone interview with Jason Holoubek, *supra* note 85.

⁸⁹ Nancy Sarnoff, *Houston-Area Home Prices Continue to Climb: Despite the Good News, PRICES LOST STEAM AND EARLY 2007 SALES WERE DOWN*, HOUSTON CHRONICLE, April 15, 2007

⁹⁰ Mike Snyder, *supra* note 80.

⁹¹ Telephone interview with Jason Holoubek, *supra* note 85.

Impacted areas: the ‘Greater Heights’

It should be understood that many areas inside the Loop are governed by more stringent private covenants that supersede the city’s regulations. Thus, the impact of the city’s policy allowing densification has been concentrated in a few older neighborhoods that were developed prior to when deed restrictions became the norm in Houston after World War Two.⁹² The hotbed of activity, it seems, has been an area referred to as ‘the Greater Heights.’ Comprising an area of 7.3 square miles, this cluster or diverse neighborhoods had a population of 41,486 according to the 2000 census.⁹³ At a population density of about 8.8 units per acre, this area consists mostly of single-family neighborhoods as one can see in the Land Use Map inserted below in which the Greater Heights area is marked out and single-family residential uses are depicted as yellow.

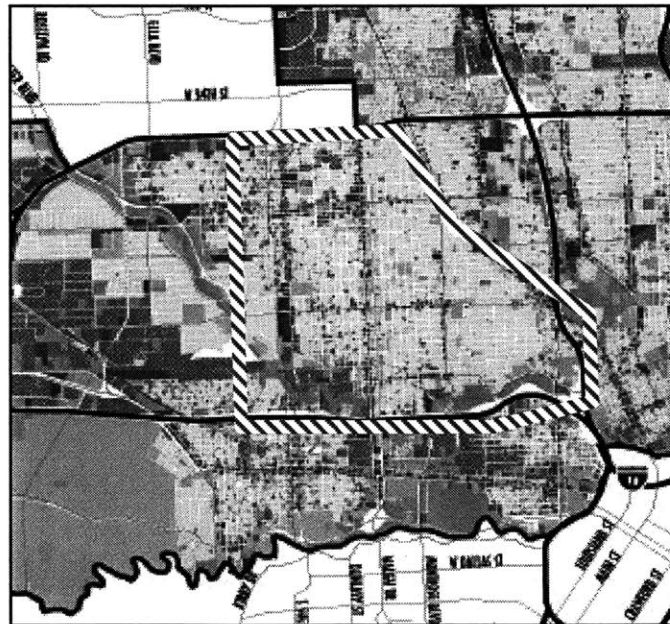


Figure 4: Land Use in the Heights

Source: City of Houston Land Use and Demographic Profile (June 2003)

⁹² Telephone Interview with Jason Holoubek, *supra* note 85.

⁹³ CITY OF HOUSTON, NEIGHBORHOOD DEMOGRAPHIC DATA FROM 2000 CENSUS, available at http://www.houstontx.gov/planning/suprnbhds/2001_demog/15_greaterheights.htm

Located one to four miles from downtown Houston, this area is considered attractive because of its short commute, leafy neighborhoods, and housing that is uniquely old for Houston.⁹⁴ As one of the older neighborhoods in Houston, it is also largely free of restrictive private neighborhood covenants. According to a local neighborhood historic preservation group, the pace of demolitions in this area has been about one per day in 2007, although many of these are accomplished to build monster homes rather than densification development.⁹⁵ The *Houston Chronicle* recently published an editorial in which they neatly summarized the changes ongoing in the “Greater Heights”:

The Heights-area neighborhoods, like many of Houston's inner-loop communities, are undergoing explosive redevelopment. Older homes are demolished and spacious lots frequently splintered for condos and narrow multistory dwellings some call "shotgun mansions." While developers profit from splitting lots, longtime residents feel impoverished by the increasing building density and the razing of large trees.⁹⁶

Predictably, these changes have generated an opposition centered in the Greater Heights area. The major concerns voiced against densification in Houston seem analogous to those voiced at Hollin Hall and nationally with respect to another form of densification, the so-called trend of mansionization or monster homes.⁹⁷ Concerns about “neighborhood character” seem to be at the top of the list, but there also seems to be a

⁹⁴ Interview with Mark Sterling, Member of The Neighborhood Preservation Subcommittee of the Houston Planning Commission, March 2, 2007.

⁹⁵ Save the Bungalows, Frequently Asked Questions, available at <http://savethebungalows.org/FAQs.html>. It is unclear how many of these involved densification and how many simply involve bigger homes.

⁹⁶ Editorial, *Neighborhood Threat: Planning Commission's Rejection of Sunset Heights Lot Size Petition Needs Swift Reconsideration*, HOUSTON CHRONICLE, January 18, 2006, at B8.

⁹⁷ See Terry S. Szold, *Mansionization and Its Discontents*, 71 JOURNAL OF THE AMERICAN PLANNING ASSOCIATION 189 (2005) (discussing the various reasons people opposed “mansionization,” among that “[c]oncern about the design of such a structure being out of character with an existing neighborhood’s built form...is a common objection and associated with the pejorative term *McMansion*”).

concern about stormwater management (as in Hollin Hall), traffic and parking. Other prominent concerns include the removal of mature trees and historic homes.⁹⁸

While the City has yet to reverse its course, neighborhood groups have successfully lobbied the city for ways to stem the tide of densification. The approach taken to these issues has generally been one that more-or-less delegates authority to neighborhoods or individual blocks to decide whether or not to restrict densification in a particular area. According to Jason Holoubek, these measures are aimed at producing a compromise between the broader interests in densification and preservation of intact, stable single-family neighborhoods.⁹⁹ Exemplary of this approach is the program set up in 2001 that enables neighborhoods lacking deed restrictions to establish more stringent subdivision controls by petitioning the city for a “prevailing lot size designation.” Under the original ordinance, petitions had to meet a number of specific criteria to qualify for the designation.¹⁰⁰ Some of these criteria were objective, such as the requirements that no more than 60% of lots within the petitioning area contain more than two residential units and that no more than 75% of the lots covered by the application vary in area by more than 10% from the average lot size in the petitioning area.¹⁰¹ This latter criterion would prove important in barring some applications in areas where significant densification had already occurred because lot size conformity had already been damaged. Other criteria under the ordinance were more subjective, such as the requirements that there be “sufficient support” in the neighborhood for the designation

⁹⁸ Telephone Interview with Mark Sterling, *supra* note 94.

⁹⁹ Telephone Interview with Jason Holoubek, *supra* note 85.

¹⁰⁰ See HOUSTON, TEX., ORDINANCE NO. 01-1100 (amended and replaced in 2007 by § 42-213).

¹⁰¹ *Id.*

and that the petition would “further the goal of preserving the prevailing lot size character of the area.”¹⁰²

While the designation of prevailing lot sizes formally resulted from legislative action by the City Council, the process of reviewing applications suggests that the intention was to delegate sufficient authority to the neighborhoods in a manner vaguely reminiscent of the establishment of private covenants, which require universal consent. Thus, if a petition met the numerical criteria and was signed by the persons owning 51% or more of the affected lots and no owner filed a protest, the City Planning Commission was obliged to recommend approval of the proposal to the City Council without holding a public hearing. The failure to get 51% or the protest of a single owner, on the other hand, would trigger a public hearing and force the City Planning Commission to decide on the merits whether or not to forward the proposal to the City Council. Prevailing lot size designations also expire after twenty years, a further parallel between prevailing lot size designations and private covenants.¹⁰³

Between 2001 and 2006, over two hundred prevailing lot size petitions were approved. Minimum lot sizes established through this process range from 2,300 to 9,450 square feet.¹⁰⁴ Mapping the location of the petitions reveals a particularly high concentration in the Greater Heights, where upwards of 75%¹⁰⁵ of petitions were filed:

¹⁰² HOUSTON, TEX., ORDINANCE NO. 01-1100 (amended and replaced in 2007 by § 42-213).

¹⁰³ HOUSTON, TEX., ORDINANCE NO. 01-1100 (amended and replaced in 2007 by § 42-213).

¹⁰⁴ CITY OF HOUSTON DEPARTMENT OF PLANNING AND DEVELOPMENT, MINIMUM LOT SIZE APPROVALS, available at <http://www.houstontx.gov/planning/DevelopmentRegs/PLS.htm>.

¹⁰⁵ Telephone Interview with Jason Holoubek, *supra* note 85.

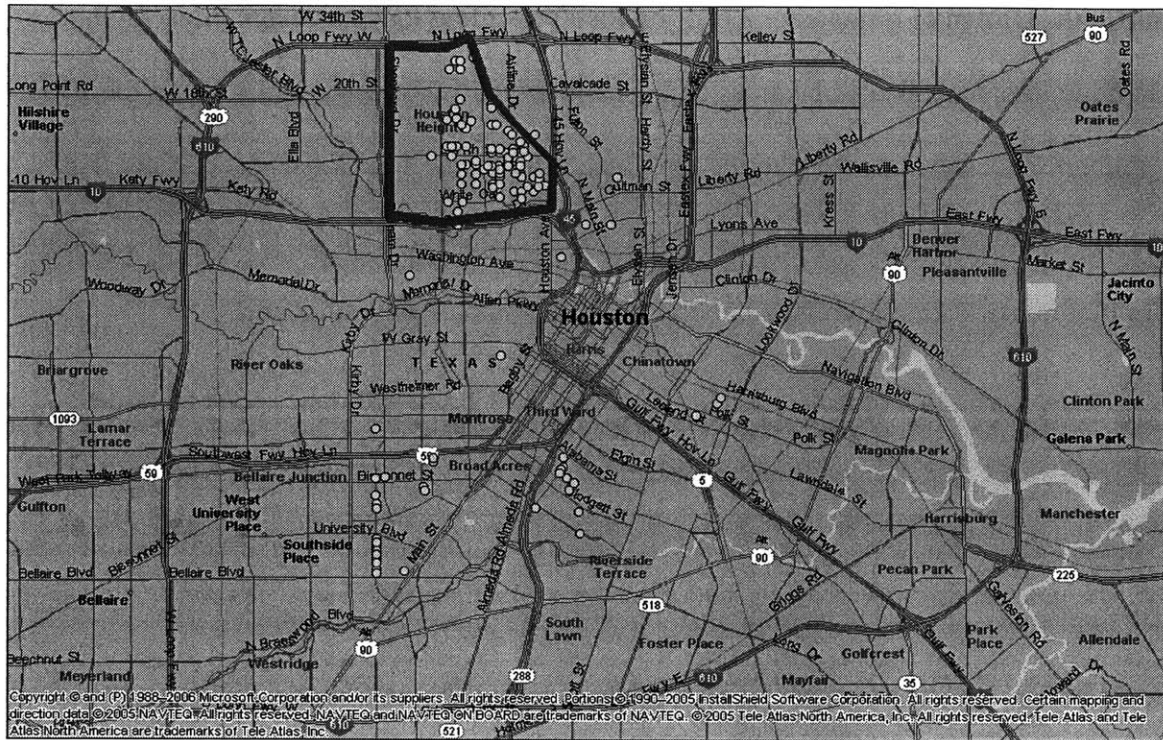


Figure 5: Location of Prevailing Lot Size Designations
Source: Author Mapping Data from the Houston Department of Planning and Development
Mapping Accomplished using Microsoft MapPoint

Even within the locus of most of this activity (Houston Heights proper) a majority of parcels are still not covered by prevailing lot size designation.¹⁰⁶ Despite the incomplete coverage, the people I spoke with in Houston agreed that this tool has been mostly successful in halting townhouse development in the wealthiest and most historic parts of the Houston Heights. In the adjoining areas and other parts of the city, on the other hand, the process was continuing.¹⁰⁷ Mark Sterling, a member of the city's Neighborhood Planning Subcommittee, thought this might be because homeowners in less advantaged communities lack the necessary incentives, resources or knowledge to

¹⁰⁶ Telephone Interview with Jason Holoubek, *supra* note 85.

¹⁰⁷ Telephone Interview with Mark Sterling, *supra* note 94; Telephone Interview with Jason Holoubek, *supra* note 85.

fulfill the burden of organizing a petition for a prevailing lot size designation.¹⁰⁸ In addition, there are also some areas that could not qualify for designation under the 2001 Ordinance because their lots varied too much from the average lot size (i.e. more than 10%).¹⁰⁹ Interestingly, it seems this condition would naturally arise through any previous form of densification involving subdivision or townhouse development.

Some high-profile failures of the prevailing lot size ordinance led neighborhood groups to seek and obtain amendments to the prevailing lot size scheme. Adopted in March 2007, the new program differs primarily in that there is no longer any requirement for uniformity of lot sizes within an application area. Instead of requiring 75% lot sizes to be within 10% of the mean lot size, the new scheme allows any neighborhood to adopt a “minimum lot size” that is calibrated using a complex formula that does not demand explanation here. Under the new rules, historic districts are also given special treatment allowing them to adopt relatively larger minimum lot sizes. This special treatment is augmented by the fact that in April 2007 the City Council loosened the requirements for establishing historic districts. While the impact these recently adopted changes on the way minimum lot sizes are regulated in Houston remains to be seen, the development community is evidently concerned. In a recent article in the *Houston Chronicle*, a spokesperson of the Greater Houston Builders Association stated his concern that these new rules will hamper redevelopment in areas that “need to redevelop” and “have an impact on the affordability of housing.”¹¹⁰

¹⁰⁸ Telephone Interview with Mark Sterling, *supra* note 94

¹⁰⁹ Rachel Graves, *Council to Consider a Minimum Lot Size*, HOUSTON CHRONICLE, December 11, 2001, at A23; Telephone Interview with Jason Holoubek, *supra* note 85..

¹¹⁰ Jennifer Friedberg, *Home Builders Wary of Rule Changes*, HOUSTON CHRONICLE, May 3, 2007, at TW3.

Sunset Heights

The reality that some homeowners in Houston might resist prevailing lot size designations for economic reasons was brought home in 2006 when a petition involving a portion of the Sunset Heights neighborhood was rejected by the City Planning Commission on the grounds that it lacked “sufficient support.”¹¹¹ Thus, there seem to be parallels between Sunset Heights and Hollin Hall in terms of how blunt conflicts exists within neighborhoods between those interests in preservation and those interested in profit.

The scene of the drama was a roughly fifty-four acre section of the middle-class neighborhood of Sunset Height that is located just inside the Loop and less than four miles from downtown Houston. The underlying conditions encouraging densification are suggested by the fact that during 2005 the price per square foot of housing in Sunset Heights had appreciated at a rate double that of all other areas inside the Loop and triple that of the entire Houston metropolitan area.¹¹² On the ground, five replatting proposals were “in the works” at the time the petition for a prevailing lot size designation was denied.¹¹³

The Sunset Heights petition was supported by the city planning director and was submitted with signatures from 46% of the affected property owners. While the City Planning Commission had approved other petitions that came with signatures from as little as 31% of the property owners, the City Planning Commission voted 7-6 against

¹¹¹ Tom Manning, *Sunset Heights Split On Minimum Lot Issue: Supporters Opt to Focus Efforts on Smaller-Scale City Ordinances*, HOUSTON CHRONICLE, January 26, 2006, at TW1.

¹¹² Price per square foot increased 11.1% during 2005 as compared to as compared to 6.1% inside the Loop at 4.3% across the metropolitan area. Sarnoff, *supra* note 89; Crawford Realty Advisors Data, *available at* <http://www.chron.com/>.

¹¹³ Editorial, HOUSTON CHRONICLE, *supra* note 96.

forwarding this petition to the City Council, thus killing the proposal.¹¹⁴ Critics contended that the decision was the result of undue influence by developers on the Commission,¹¹⁵ but there was real opposition from some in the neighborhood against the proposal and other legitimate reasons why the petition failed. Fifteen percent of the affected property owners met the deadline to formally register a protest, but an “anti-petition” circulated in advance of the meeting was said to have collected signatures from eighty-one affected property owners (roughly 31%).¹¹⁶ The opposition framed its argument in terms of property rights, stating that the prevailing lot size petition would decrease property values.¹¹⁷ It should be noted, however, that the significance of the opposition in influencing the City Planning Commission’s decision is debated. According to Holoubek and Sterling, a more important factor in the decision may have been the existence of homes built on double or even triple lots throughout the neighborhood (similar to Hollin Hall) that made it questionable whether under the existing ordinance the City could legally designate the prevailing lot size sought by the petition.

Later in 2006, Sunset Heights was again the locus of controversy concerning minimum lot sizes. Having failed to establish a prevailing lot size, neighborhood preservationists shifted their attention to adopting prevailing lot sizes for smaller parts of the neighborhood. On August 15th the City Council approved one these petition to establish a prevailing lot size of 6,000 square feet for a one block section of East 24th

¹¹⁴ Editorial, HOUSTON CHRONICLE, *supra* note 96.

¹¹⁵ Tom Manning, *Residents Briefed on Changing Rules: Officials Suggest that Heights Group Seek More Support From Its Neighbors*, HOUSTON CHRONICLE, March 9, 2006, at 3.

¹¹⁶ Editorial, HOUSTON CHRONICLE, *supra* note 96; Manning, *supra* note 111.

¹¹⁷ Manning, *supra* note 111.

Street.¹¹⁸ To the dismay of those who had pushed for this designation, it proved to be a paper tiger as a developer exploited a loophole in the law and gained the reluctant approval of the City Planning Commission to build four condominiums on a vacant corner lot measuring less than 9,000 square feet.¹¹⁹ While the technical aspect of how this was accomplished (i.e. why condominium developments were not covered by the prevailing lot size designation) is not especially relevant to the broader questions about densification, this episode hints at the power of the economic forces favoring densification with developers and their customers being willing to submit to a condominium regime where that allows for a few more housing units in a desired neighborhood.¹²⁰

Summary

The ongoing developments in Houston demonstrate a number of important points. First, in Houston it is economically viable and yielding a significant increase in the number of housing units. Second, it is paying for itself and not overtaxing the existing infrastructure. On the other hand, community backlash and opposition threatens to slow or halt the process. On a most basic level, therefore, mitigating community concerns appears to be the most fundamental challenge for unleashing incremental densification in Houston and likely elsewhere.

¹¹⁸ CITY OF HOUSTON DEPARTMENT OF PLANNING AND DEVELOPMENT, *supra* note 104.

¹¹⁹ Mike Snyder, *Condos Approved with Displeasure: Sunset Heights Project Follows Letter, Not Spirit, Of Lot-Size Law*, THE HOUSTON CHRONICLE, November 10, 2006, at B1.

¹²⁰ While I did not investigate the matter fully, all indications seemed to be that the only reason a condominium regime was being used was to exploit the loophole.

Chapter 4. Why densification is rare in single-family neighborhoods

Incremental densification has historically been part of the natural evolution and growth of cities. The economist William Wheaton provides a colorful description of how this process unfolded through early American history:

Historically, widespread redevelopment of urban sites has been an important force in shaping the land use patterns of many cities. Consider New York or Boston, for example. Around 1800, both of these cities had predominately detached wood-frame housing. Over the next 50 years, most of this housing was replaced with three- to five-story row houses of masonry construction, at much higher FAR levels. Today, virtually none of the first-generation housing remains. While fires contributed some of this transition, historical documents clearly show that many owners simply demolished and rebuilt their sites as the cities grew very rapidly in the first half of the nineteenth century. After 100 or more years, these same cities experienced another wave of redevelopment to a third generation of housing. Particularly at very valuable sites such as those near parks and transportation terminals, row houses were replaced with elevator-serviced apartment buildings, involving a further increase in the site's FAR.¹²¹

While innovations such as the advent of the automobile have undoubtedly altered this process, the fundamental logic that drives densification remains the same. The densification occurring in Houston, one of the most auto-dependent cities in the world, illustrates this fact.

DENSIFICATION IS QUITE RARE IN SINGLE-FAMILY NEIGHBORHOODS

While there are no extant empirical studies to prove it, the available evidence points strongly towards a conclusion that Hollin Hall and Houston are rare exceptions to the general rule that densification does not occur in single-family neighborhoods.

¹²¹ DENISE DiPASQUALE AND WILLIAM C. WHEATON, URBAN ECONOMICS AND REAL ESTATE MARKETS, 83-84 (1996).

One indication that densification is quite rare is the striking permanence of low density single-family land use designations. In arguing that “A Diamond is Forever, a Suburban R-1 Zone Nearly So,” Jonathan Levine relies upon his finding that between only 0.3% of the land in Massachusetts zoned for low-density single-family development moved into any other category between 1970 and 1999. Levine concludes from this data that “the single-family zone is impervious to economic and demographic changes and tends to keep its form even over a period of several decades.”¹²² While one might quibble with generalizing from data from slow-growth Massachusetts to other parts of the county with higher growth rates, there seems to be no convincing reason for doubting Levin’s basic conclusion about the stagnation of single-family zoning. Levine also relied upon the “impressions” of city planners and others and in my research and experience I have found no one who asserts that there is a significant amount of densification occurring in existing single-family neighborhoods. Furthermore, places where the process has occurred (aside from Houston) are usually painted as anomalies, suggesting again that the process is quite rare. A caveat should be made to recognize the attention that accessory housing units have received. The numbers of accessory units, however, are still quite small and might be looked at as a niche market rather than a comprehensive housing strategy. For the most part, single-family neighborhoods regardless of their density are essentially deemed “built-out.” Or as Levine puts it, “[t]he presumption is that once a neighborhood is developed, its form is set, and future transformations are largely precluded.”¹²³

¹²² LEVINE, *supra* note 35, at 78.

¹²³ LEVINE, *supra* note 35, at 79.

POSSIBLE SCENARIOS

Assuming one accepts the supposition that densification in single-family neighborhoods is rare, the natural impulse is to ask “why?” Broadly speaking, there are two categories of potential explanations: (1) regulation-based and (2) market-based.

Using these categories, one can construct a matrix of four potential scenarios.

	Economically Viable	Not Economically Viable
Regulation Allows	A	B
Regulation Prohibits	C	D

Under these scenarios we would expect the following:

Scenario A. This is the only scenario where densification would actually be occurring. Because it is assumed that densification is largely not occurring, this scenario may be essentially discounted.

Scenario B. In this scenario, the sole reason why densification does not occur is because it is not economically viable. Demonstrating the existence of this scenario would require showing that regulation actually permits densification.

Scenario C. In this scenario, regulation is the sole reasons densification is not occurring. Demonstrating the existence of this scenario would require a showing that densification is economically viable.

Scenario D. In this scenario, both regulation and economics are against densification. In the parlance of economists, regulation in this scenario is “non-binding.”

Demonstrating the existence of this scenario would require showing that regulation does not allow densification *and* that densification is not economically viable.

It should be noted that each of these scenarios likely exists somewhere in America. The real interest of this paper, however, is in the incidence of scenario C. As noted above, the prevalence of Scenario A would be quite visible in terms of densification actually occurring on a significant scale. Given the lack of evidence of widespread densification, this scenario is basically ignored. A common understanding of the manner in which minimum lot sizes in existing single-family neighborhoods roughly conform to existing lot sizes further suggests that Scenario B is not a high level candidate either. Thus, the competition is really between Scenario C and Scenario D.

The key question in distinguishing between Scenario C and Scenario D is whether or not densification is economically viable. It should be remembered that it is by no means necessary to demonstrate that Scenario C occurs in a majority of places but rather only that it occurs in enough places to justify considering removing the regulatory restrictions that are effectively restraining this process of densification. The approach to this question I have adopted appeals first to the development of economic theory and models that concern the conditions under which densification might be expected to occur and then to tangible indications that the conditions suggested by these models are present in significant areas.

THE ARGUMENT THAT DENSIFICATION IS ECONOMICALLY VIABLE

Basic Urban Land Theory: Optimal Development Densities

A core premise of urban land models is that “land must be priced at each site so that its occupant is charged for the value of whatever locational advantages exist at that site.”¹²⁴ Because of a process called *factor substitution*, this pricing should generally result in better locations being developed at higher densities.¹²⁵ Therefore, each location will have an optimal development density that corresponds to the density that will maximize profits (i.e. “the highest and best use”). For housing, this optimal development density takes into account the relationship between the hedonic value of a unit of housing built at a given density at a particular location and the cost of construction per unit at that density in that particular location. It is assumed that as density increases, the hedonic value of housing declines and construction costs increase.¹²⁶

It should be noted that locational value is not the only factor driving optimal development density. For example, new technology making higher density development more palatable (e.g. the elevator) or cheaper would increase the optimal density at some locations. For purposes of this paper, however, the focus is on changes in locational advantages as the driver in shifts of optimal development densities. Holding other factors constant, any increase in the locational advantages should increase the optimal

¹²⁴ DiPASQUALE, *supra* note 121, at 36.

¹²⁵ DiPASQUALE, *supra* note 121, at 61. Taking into account heterogeneous consumers with different levels of wealth, this would not necessarily imply higher population density but rather a higher intensity of capital investment. Thus, a very wealthy person who hated to commute might live at the very center of town in a very large home on large lot. This would, of course, be very expensive and someone would have to be willing to live there as opposed to living somewhere else and having the opportunity to save money for other pursuits or live in an even bigger house or have an even bigger lot, or all of the above.

¹²⁶ DiPASQUALE, *supra* note 121, at 74.

development density. However, small shifts in optimal development density do *not* make densification economically feasible (this point is discussed in more detail below).

The locational advantages of a particular place can change for a variety of different reasons. The advent of automobile transportation, for example, is widely assumed to have reduced the locational advantage of many central business districts. Conversely, the emergence of suburban employment centers (e.g. Tyson's Corner Virginia) has increased the locational advantage of nearby places. Without improvements in transportation technology, growth of a metropolitan area should increase land values and consequently the optimal development density of many locations. For example, when the first houses were built in Hollin Hall during the 1940s, they were on the outskirts of the D.C. Metropolitan Area.¹²⁷ However, the population of the political subdivisions of Northern Virginia within thirty miles of the Washington Monument has grown from 169,521 in 1940 to an estimated 2,055,014 in 2006.¹²⁸ As new development stretches thirty or forty miles from the center of Washington, Hollin Hall could legitimately be called "close-in" and attract buyers interested in a relatively shorter commute than what is being offered elsewhere. While other factors could drive optimal densities up (e.g. the development of new suburban job centers or transit systems), the influence of population growth alone over the long term would seem significant enough to justify a presumption that optimal development densities have increased at many locations within metropolitan areas. Moreover, to the extent original

¹²⁷ This was determined mapping the density of housing built during specific decade. The author used Microsoft MapPoint, which comes with census data incorporated, to map this data.

¹²⁸ US CENSUS BUREAU, SELECTED HISTORICAL DECENNIAL CENSUS POPULATION AND HOUSING COUNTS TABLE 27 (1995); US CENSUS BUREAU, 2000 CENSUS SUMMARY File 1.

development densities were depressed below their optimal level at the time of development, the difference between actual development densities and optimal development densities will be more pronounced.

The Optimal Redevelopment Rule

The fact that there is a gap between existing development densities and optimal development densities does not imply that densification is economically viable. This is because there is often an opportunity cost in increasing density that must be weighed against the gains from densification. This opportunity cost is most obvious when considering forms of densification that require demolition of existing structures. It should be noted that opportunity costs may also exist with respect to densification processes that do not require the demolition of existing structures. Adding an accessory unit or building a home next door on what was previously open space might diminish the value of the existing structure. While these opportunity costs are less severe, they may nevertheless be important in marginal cases. Thus, William Wheaton seems correct in asserting that “modern development at market density is always competing with the value of existing structures built years earlier.”¹²⁹

The “optimal redevelopment rule” holds that “[f]or redevelopment of a site to occur, the net residual value to land if developed optimally must exceed the gross value of land and capital that currently exists on the site plus the cost of demolishing the old capital.”¹³⁰ Underneath the jargon, the optimal development rule is really quite simple. It can be summarized easily in the statement that densification will not occur unless it is

¹²⁹ DiPASQUALE, *supra* note 121, at 81.

¹³⁰ DiPASQUALE, *supra* note 121, at 85

profitable. Unsurprisingly, empirical studies of redevelopment processes have found that reality generally conforms to the optimal redevelopment rule.¹³¹

A more precise articulation of the conditions under which densification is economically viable is put forth in the following equation taken directly from Denise DiPasquale and William Wheaton's textbook on *Urban Economics and Real Estate Markets*. It should be noted that this equation is designed to deal with densification in terms of FAR, rather than housing units, but DiPasquale and Wheaton state that the discussion could "easily be recast using the [housing] units measure."¹³² The equation giving us the conditions where densification is economically feasible is:

$$\rho^* - \rho^0 > \delta F^0 \text{ implies } \frac{F^*}{F^0} > \frac{\alpha^0 - \beta F^0 + \delta}{(\alpha - \mu) - (\beta + \tau) F^*} \quad 133$$

The first inequality here ($\rho^* - \rho^0 > \delta F^0$) is essentially the optimal redevelopment rule where ρ^* represents the land residual value after redevelopment, ρ^0 represents the land residual value before redevelopment, and δF^0 represents the cost of demolition. This equation is therefore telling us more precisely what is required for a particular site to pass the redevelopment rule.

For the second equation, the left side of the inequality is basically the increase in density that results from the densification, a ratio between the optimal development density (F^*) and the existing development density (F^0). The right side of this inequality is the part that adds to our understanding of this issue. There α^0 represents the hedonic

¹³¹ Rosenthal, *supra* note 29, at 183.

¹³² DiPASQUALE, *supra* note 121, at 74.

¹³³ DiPASQUALE, *supra* note 121, at 85.

value per unit (e.g. square foot) of the existing housing; β represents the marginal reduction in value per unit that results when density is increased; F^0 represents the existing density; δ represents the demolition cost per unit; α represents the hedonic value of the new housing per unit; μ represents the basic cost of construction per unit; τ represents incremental additional construction costs per unit to build at higher densities; and F^* again represents the optimal development density.

This equation suggests that densification is more likely to be economically viable where:

1. There is a large disparity between optimal development densities and existing densities.
2. There is a large disparity between the quality of existing housing and the housing that would be built today. Thus, outdated or poorly maintained housing seem like prime likely candidates for densification.
3. Prospective purchasers do not discount significantly the value of housing on smaller lot sizes. It should be noted that good design could significantly lessen the negative effects brought by higher density.
4. Construction costs are low. Therefore, one might expect the process to take root more easily in a place like Houston rather than Boston, which has relatively high construction costs. This factor might also influence the timing of densification processes.

5. Building at higher densities results in relatively low increases in the average cost of construction per unit.
6. Demolition costs are low.

While DiPasquale and Wheaton's equation does not take it into account, the cost of securing the right to densify is bound to be an important variable in determining where densification is economically viable. Within the existing equation, this cost might best be conceptualized as part of the demolition costs, but an argument might also be made for placing them within the construction cost variable. Regardless, any additional expenses involved in undertaking densification (e.g. litigation up to the Virginia Supreme Court) will tend to reduce its economic viability.

The manner in which restrictive land use regulation discourages densification is readily apparent. Where regulations restrict densities below the optimal development density but above the current development densities, the probability of densification would be directly reduced and would only occur where there were other strong factors, such as a disparity between existing housing and future housing, a relatively small decrease in hedonic value from building at higher densities, etc... To the extent land use regulation limits density to that currently on the ground (as it does in many places), densification in terms of housing units would, of course, be impossible. One might still have densification in terms of FAR, as commonly does occur with home additions and "monster homes."

A final complication to the concise formula set out above is the fact that some forms of densification might not require the demolition of existing structures. One way

of looking at these forms of densification might be to view them as more-or-less vacant land development options. Some refinement to this understanding would be required in order to take into account the opportunity costs to existing housing that may result from densification, but these opportunity costs should be significantly lower. Thus, one would expect densification that does not require demolition to have a lower threshold in terms of the imbalance needed between optimal development densities and existing development densities. Furthermore, there may be situations where there are essentially three options with respect to a particular property: (1) do nothing; (2) demolishing the existing housing and multiple new housing units; and (3) retain the existing housing *and* build new housing. This complexity does not appear to have been dealt with in the economic literature, but one might expect a decision rule to be some sort of hybrid between the one applied to vacant land development and the optimal redevelopment rule.

EMPIRICAL STUDIES DEALING WITH THE VIABILITY OF DENSIFICATION

The most complete extant attempt to empirically examine the feasibility of densification seems to be a working paper by Juan Onésimo Sandoval and John Landis that addressed the infill capacity of the San Francisco Bay Area.¹³⁴ While the study reveals some interesting findings, the data and methodology it uses seem flawed to a degree that it has limited utility in terms of estimating the economical feasibility of densification. A brief summary of the study and its findings is followed by a summary of the reasons why this study does not seem completely reliable in terms of understanding the feasibility of densification.

¹³⁴ Juan Onésimo Sandoval and John Landis, *Estimating the Housing Infill Capacity of the Bay Area* (Working Paper 2000-2006, on file with author).

Focusing on the general issue of infill capacity, this study looked at both vacant parcels and “recyclable parcels,” which were defined as improved parcels that were “economically underutilized” according to a ratio between the portion of the assessed property values attributable to land and improvements.¹³⁵ Sandoval and Landis set the threshold for this ratio at 90%, meaning that recyclable parcels have assessed improvement values of 90% or less of their assessed land values. Using this approach 11% of all parcels in the San Francisco metropolitan area (totaling 3% of total acreage) were identified as recyclable parcels.¹³⁶ Of these recyclable parcels, 91% were in residential use but these comprised only 42% of the total recyclable acreage.¹³⁷

To assess the financial feasibility of infill development on these sites, the authors constructed two hypothetical development scenarios, one developed for multi-family use and one developed for single-family use.¹³⁸ The feasibility analysis determined that out of all infill parcels (vacant and recyclable) only 16% could be profitably developed under the multi-family scenario and only 10% could be profitably developed under the single-family scenario. While the authors found that a realistic range for the infill capacity of all the vacant and recyclable parcels might range from 290,000 to 488,888 net additional housing units (enough to accommodate twenty years of need in the Bay Area), the authors thought that by taking into account economic feasibility, the infill capacity would be reduced to just 39,000-70,000.¹³⁹

¹³⁵ Sandoval, *supra* note 134, at 7.

¹³⁶ Sandoval, *supra* note 134, at 8-10.

¹³⁷ Sandoval, *supra* note 134, at 19.

¹³⁸ Sandoval, *supra* note 134, at 20-27.

¹³⁹ Sandoval, *supra* note 134, at 35.

While the amount of financially feasible infill development capacity identified by Sandoval and Landis is nothing to sneeze at, there are several reasons to question how reliable this study is at least for the purposes of estimating the densification potential of existing single-family neighborhoods. There appear to be problems with both the method of identifying recyclable parcels and the method of screening for financial feasibility.

With respect to the identification of recyclable parcels, the study's primary flaw is that it relies upon tax assessor data to determine the ratio between land value and structural value. There are many problems with this approach that together would seem to imply a systematic bias against identifying recyclable parcels. The Santa Clara County assessor's office, for instance, allows any house purchased for less than \$1 million to utilize a process called "direct enrollment" by which the allocation between land and structural value is made according to (1) a set percentage; (2) the pre-transfer allocation in the assessors records; (3) a flat dollar amount; or (4) a standardized square footage value for the land.¹⁴⁰ Once set, this allocation does not change until the property is sold again. Thus, even if the initial allocation had been correct by some miracle it would probably become increasingly inaccurate over time. This problem is compounded by the fact that in California annual property tax assessments are not permitted to exceed a property's valuation in 1975 (or as of the most recent sale) adjusted upward by a maximum of 2% per annum.¹⁴¹ Assuming that the rapid appreciation in value in the Bay Area over the last couple of decades should be mostly assigned to land as opposed to structural improvements, this would seem to bias towards an undervaluation of land.

¹⁴⁰ CALIFORNIA STATE BOARD OF EQUALIZATION, SANTA CLARA COUNTY ASSESSMENT PRACTICES SURVEY 28-29 (2003), available at <http://www.boe.ca.gov/proptaxes/pdf/43apsr.pdf>.

¹⁴¹ See CALIFORNIA CONSTITUTION, art. XIII A, § 2 (2007).

Finally, even assuming assessed values were accurate and properly apportioned between land and structure, the value of land is determined by the existing zoning. With respect to single-family dwellings, the California Constitution mandates further that the value of single-family dwellings be determined only assuming their current *use* as a single-family dwelling.¹⁴² Thus, tax assessor records are quite unreliable in figuring the potential value of land under densification scenarios. Anecdotally, the homes in Hollin Hall would have all failed miserably the recyclable parcel test utilized by Sandoval and John Landis in their study according to their reported assessed values.

The methodology used to screen for financial feasibility presents more problems. An initial flaw is that it only considered two types of development: single-family homes at standard densities and large multifamily projects. This ignores any potential for townhouse development such as has been occurring in Houston. The formula used to test the viability of single-family homes also seems problematic given that the only variable that distinguishes between a feasible and infeasible project was a land cost figure based upon the assessor's average for the jurisdiction for all parcels not sold in the most recent two years. Lastly, the study assumed a uniform lot size equal to the existing average in the jurisdiction. This assumption essentially removes the primary source of profit from densification (i.e. the ability to use existing land most intensively).

¹⁴² CALIFORNIA CONSTITUTION, art. XIII, § 9 (2007) (“The Legislature may provide for the assessment for taxation only on the basis of use of a single-family dwelling, as defined by the Legislature, and so much of the land as is required for its convenient use and occupation, when the dwelling is occupied by an owner and located on land zoned exclusively for single-family dwellings or for agricultural purposes.”).

In sum, Sandoval and Landis have made a valiant effort to tackle a very difficult issue, but this study cannot be relied upon to tell us the degree to which densification in existing single-family neighborhoods is economically viable. It should be noted that the flaws seem mostly related to the inadequacy of available data, suggesting that it would be quite difficult for anyone to truly address this problem using empirical methods.

Persuasive Evidence suggesting viability of densification

Lacking any solid empirical evidence regarding the economic viability of densification, it seems prudent to turn to a variety of persuasive evidence which together tell a compelling story that regulation is likely a binding restraint with respect to densification in a significant portion of metropolitan American (i.e. Scenario C is important).

Another form of densification is already out there, alive and kicking

The phenomenon of “mansionization” or “monster homes” has caused significant consternation and debate in recent years.¹⁴³ According to the National Trust for Historic Preservation, 75,000 homes a year now are treated as teardowns, and the number is growing.¹⁴⁴ As noted above, this is in essence a form of densification. The existence and growth of this trend is persuasive evidence that other forms of densification are economically viable, and arguably in many more places.

Both the kind of densification targeted by this paper and “monster homes” must satisfy the optimal development rule. While there are important differences in how

¹⁴³ See, e.g., Szold, *supra* note 97.

¹⁴⁴ *Teardown Trend Altering Historic Neighborhoods*, National Public Radio Morning Edition, September 26, 2006, available at http://www.nationaltrust.org/teardowns/NPR_Teardown_Trend_26Sept06.pdf.

certain variables are constructed, the conditions under which these phenomena should occur are roughly analogous. First, in both cases there must be a significant imbalance between the optimal development density and the existing development density. Second, an important driving force in both cases would be a large imbalance between the hedonic value per square foot of existing homes and the hedonic value of new homes per square foot that could be built. For “monster homes,” the primary source of this difference might be understood as the extra value homeowners put on having a contemporary layout or design, certain amenities like attached two car garages. This would also play a role in driving housing unit densification but a difference may be discerned in how housing unit densification may double the access to community goods and services. Consistent with the Tiebout Hypothesis, it seems that two smaller houses would have a higher average hedonic value per square-foot than a single large house on the basis of the community attributes alone.¹⁴⁵ This is because enjoyment of the basic services offered in a community does not vary according to size of one’s house or, more to the point, one’s lot. A countervailing factor, of course, might be the potential that homeowners will value a given unit of housing less because it is situated on a smaller lot. Shedding light on this question is a recently published empirical study that attempts to discern essentially whether having a big house in a neighborhood with small houses is better or worse than having a small house in a neighborhood with big houses. Using home sales data from East Baton Rouge, Louisiana, this study basically determined that it was better to have a small house in a neighborhood with big houses, a finding consistent with Hamilton’s

¹⁴⁵ See, e.g., Charles M. Tiebout, *A Pure Theory of Public Expenditure*, 64 JOURNAL OF POLITICAL ECONOMY 416 (1956).

fiscal capitalization hypothesis.¹⁴⁶ Therefore, if the findings of this study may be generalized to say that the fiscal capitalization factor will generally outweigh factors potentially favoring monster homes over housing unit densification, it seems reasonable to conclude that there is greater economic potential for housing unit densification than ‘monster homes.’ While further analysis would be required to understand the full connection between mansionization and densification, its existence does seem to generally support the hypothesis that densification is economically feasible in many places.

Glaeser and Gyourko’s findings

Glaeser and Gyourko’s discovery of a significant gap between residential real estate values at the extensive and intensive margins (discussed *infra* in Chapter 2) also suggests the economic viability of densification. To recall, this gap can be understood in layman terms as the difference between the value of land that may only be used as extra yard and the value of land that may serve as a new home site. Assessing the economic viability of densification implies to some degree a competition between these different values, and Glaeser and Gyourko’s findings suggest that the new home site is the clear winner. This holds true not just in places like San Francisco where the gap is largest, but also in places like Houston, Phoenix, and Cleveland.¹⁴⁷ Interpretation of this relationship is most straightforward and forceful with respect to densification that can be achieved without the demolition of existing structures, but the value gap argues generally for the

¹⁴⁶ Geoffrey K. Turnbull, Jonathan Dombrow, and C.F. Sirmans, *Big House, Little House: Relative Size and Value*, 34 REAL ESTATE ECONOMICS 439 (2006).

¹⁴⁷ Glaeser, *supra* note 28, at 30.

feasibility of all types of densification as it suggests that large lot sizes are not as valued intrinsically as may be commonly assumed.

Persuasive Evidence from Houston and Hollin Hall

The ongoing process of densification in Houston seems to suggest that it may be feasible across a considerable cross section of metropolitan American because Houston has some of the lowest average housing costs and one of the lowest gaps in the value of land on the extensive and intensive margins according to Glaeser and Gyourko.¹⁴⁸ The internal dynamics of Houston also offer clues that regulation is indeed a binding restraint on densification. For one, when the city relaxed its subdivision rules in 1999 this seemed to precipitate and increase in the amount of densification opportunity. Second, densification has only affected non deed-restricted communities. The absence of densification in deed-restricted communities suggests further the degree to which land use controls may mask the true economic viability of densification in other cities.

The story of densification at Hollin Hall may be looked at in a couple different ways. On the one hand, the double lots there existed for several decades without sparking any development interest. On the other hand, aside from the double lots there does not seem to be anything very special about this specific subdivision. The relative average condition of this neighborhood would then seem to suggest that densification may be economically feasible in a larger cross-section of metropolitan America. Furthermore, the fact that this area has not witnessed any “monster home” building seems to suggest that the underlying economics favoring densification here are weaker than in

¹⁴⁸ Glaeser, *supra* note 28, at 30.

many other parts of America where “monster home” building has been a significant occurrence.¹⁴⁹

Chapter 40B

In Massachusetts, Chapter 40B allows developers of projects containing low- and moderate-income housing to override restrictive local zoning ordinances in communities that lack their statutorily prescribed share of regional affordable housing needs (10% of existing housing). Due to the restrictive nature of local zoning, this state statute has become the primary tool for multi-family development in Greater Boston.¹⁵⁰ The popularity of Chapter 40B with for-profit developers makes a prima facie case that existing local land use regulation precludes optimal development densities in Greater Boston. In terms of the scenarios outlined at the beginning of this chapter, one could say that Chapter 40B has shifted many projects from Scenario C to Scenario A. In other words, the existence of state intervention exposes the reality that it has been regulation (and not the market) constraining higher density development in Greater Boston. Analogizing beyond Greater Boston and to single-family development is obviously difficult but Chapter 40B provides a powerful demonstration for the raw power of local land use regulation to suppress development densities that are economically viable.

CONCLUSION

While not backed by any tangible empirical evidence, there are several good reasons for believing that densification is economically feasible in a significant portion of

¹⁴⁹ My conclusion that the Hollin Hall area has not witnessed “monster home” building derives from a search of the Fairfax County tax assessor for homes in the area constructed in the last few years. FAIRFAX COUNTY DEPARTMENT OF TAX ADMINISTRATION, *supra* note 53.

¹⁵⁰ Lynn Fisher, *Chapter 40B Permitting and Litigation: A Report by the Housing Affordability Initiative 1* (2007).

metropolitan American. Thus, it seems that Scenario C (in which regulation is a binding restraint) is likely an important condition in metropolitan American warranting further analysis.

Chapter 5. Regulation and incremental densification

HOW REGULATION LIMITS INCREMENTAL DENSIFICATION

The means by which local government currently prohibits densification is fairly straightforward and not a focus of this paper. The use of minimum lot sizes has been said to be “almost universal,”¹⁵¹ and this is certainly the primary means used to bar densification. Where minimum lot sizes are equal to or exceed existing lot sizes, there is obviously no opportunity for densification unless regulation changes, which seems highly unlikely according to the analysis undertaken by Jonathan Levine (as discussed in Chapter 4). It should be noted briefly that minimum lot sizes are not the only regulatory hurdle for densification. Setback requirements, subdivision regulations, and private covenants may also impose restrictions but for purposes of this paper there is no gain from exploring these limitations in any detail.

HOW TO APPROACH CHANGING THESE REGULATION

The Homevoter Hypothesis

In *The Homevoter Hypothesis*, William Fischel offers a powerful framework for understanding the forces shaping local land use regulation. The thrust of Fischel’s argument is that local land use regulation is best understood through the lens of the median homeowner (i.e. “homevoter”). Fischel argues that to understand the homevoter’s interests it is critical to take account of the enormous financial stake they typically have in their homes. With home equity often accounting for nearly all their wealth, homeowners are naturally quite risk adverse with respect to anything that has the

¹⁵¹ Bengte Evenson and William C Wheaton, *Local Variation in Land Use Regulations*, BROOKINGS-WHARTON PAPERS ON URBAN AFFAIRS 221, 224 (2003).

slightest possibility of reducing property values. Thus, if local governments are indeed responsive to the interests of the homevoter, much of the rationale behind land use regulations may be attributable to an interest in reducing the variance or “risk” in homeowner property values as opposed to an interest in maximizing aggregate property values. Under these conditions one can see how communities might choose land use regulations that are inefficient not just in terms of the wider regional interests but also in terms of the aggregate economic interests of the community itself.

The Homevoter’s Fears of Densification

Fischel’s homevoter hypothesis might explain part of the reason why communities that would be expected to profit economically from densification oppose it. While the overall expected outcome of allowing densification might be positive, individual homeowners may rationally oppose the changes because of the uncertainty it creates. It should be emphasized that the simple uncertainty of whether or not densification will raise overall property values is only a small piece of this analysis. The fact that optimal densification is likely to proceed through stages of limited redevelopment can also divide a community into winners and losers, thus increasing a homeowner’s anxiety about which category he will be assigned.

This dynamic of winners and losers is perhaps best understood by imagining an actual place where densification might occur. In Hollin Hall, for example, it seems there may be some absolute limit to the amount of densification the community can handle without overwhelming the stormwater drainage system. Thus, some of the homeowners that currently hold densification options may never actually get to exercise them.

Alternatively, when they do exercise them they may be worth considerably less due to the mitigation measures required. One could imagine a similar dynamic occurring where increasing neighborhood density gradually reduces demand to live in a particular community because of increased traffic or simply the disappearance of open space. Under any of these scenarios, the winners would be those homeowners who redevelop their property before the returns from densification start to diminish (one might also say that the people who move into the new housing are winners as they are enabled through the process to live in the community of their choosing). The losers, on the other hand, are those that do not redevelop their property until later if at all. In this process they might be losers in an absolute sense if densification causes their property values to decline or they might be losers in the relative sense, as they could feel cheated after watching their neighbors prosper partly at their expense.

In addition the asset-based risk just described, a homeowner also might fear densification because it poses risks to his potential enjoyment of his property. In economic terms, this interest could be understood as the idiosyncratic imputed rental value of living in one's home. Because densification may diminish a homeowner's enjoyment of his property, it has the potential to harm this interest. This could potentially convert net winners under an asset-based understanding of homeowners to net overall losers when considering the loss of personal enjoyment of one's property. At the very least, it would seem to compound the risk aversion described above through the uncertainty it imposes. An important and troubling dynamic to consider is that the homeowners who will rationally have the greatest fears with respect to their enjoyment interests are also likely to be those residents least likely to capitalize on a densification

opportunity. This dynamic is expected because the homeowners with the greatest idiosyncratic interests in future enjoyment of their homes are those expecting to remain in the community for a longest time and thus those least likely to be among the initial homeowners who go forward with densification (i.e. the “losers” described above).

Fischel’s Approach to Reducing Homevoter Risk Aversion

Fischel seems quite correct in asserting that “[t]he reforms more likely to succeed are those that address the fundamental reasons that homevoters are so skittish about neighborhood change.”¹⁵² The reform Fischel seems most enamored with on these grounds is a system of home-value insurance that would reduce homeowner risk aversion by compensating them for all economic losses resulting from particular land use changes. Under Fischel’s proposal, these insurance policies would be provided by developers as bait to entice homevoters into acquiescing to particular land use changes. Fischel recognizes the immense informational difficulties posed by such a proposal, the most pressing being how to establish a baseline for separating losses from the particular land use change from other forces, such as the broader residential real estate market. Fischel also notes other traditional problems, such as “moral hazard,” that would have to be dealt with in the insurance scheme. Encouraged by the “apparent success” of a home value insurance program in Chicago, however, Fischel suggests that “home-value insurance might become a viable means of dealing with NIMBYism.”¹⁵³

Despite Fischel cautious optimism, home-value insurance does not look to be an ideal approach to dealing with neighborhood opposition to densification. One basic

¹⁵² FISCHEL, *supra* note 2, at 3.

¹⁵³ FISCHEL, *supra* note 2, at 270.

problem is that it does nothing to assuage homeowners' concerns about how densification will affect their idiosyncratic interests in their homes. Because this seems to be an important problem reason why "homevoters are so skittish" about densification (e.g. references to "neighborhood characters"), a strategy that does not deal with this problem seems lacking. In addition, the informational problem Fischel acknowledge as serious and unresolved in the general case (the Chicago program he cited to only covered nominal price risk) seem to be exacerbated in the context of densification. This is because densification in single-family residential neighborhoods implies the undertaking of multiple discrete projects across a neighborhood, potentially spread out over a period of years. Assuming these projects were not undertaken by the same developer, it would seem extremely difficult to apportion responsibility to any particular project for any harm to property values that might occur.

A possible answer to this later problem might involve having the government serve as the insurer for all the projects. Ignoring the distinct possibility that local government may not have the power to provide such insurance, this proposal seems problematic because it disconnects the primary economic beneficiaries of densification from responsibility to insure against the risk. Unless the local government charged the developers a fee, the homeowners would be essentially paying to insure themselves for the benefit of either a select few homeowners or a developer. A more basic problem with this proposal as well as the home-value insurance proposal is that generally it offers no real incentive for homeowners to go along with the process.

PROPOSED MEANS OF INDUCING HOMEOWNERS TO SUPPORT DENSIFICATION**Pacing change (i.e. *incremental* densification)**

There are other means of reducing homeowner risk apprehension aside from straight insurance—reducing risk may in fact be one of the best justifications for zoning. Another potential method that seems especially appropriate when considering densification in single-family neighborhoods is pacing change. At the outset, it should be obvious that a non-participating homeowner's risk apprehension would be much greater if one assumes a *laissez-faire* approach to densification rather than a controlled process in which only a limited amounts of densification is allowed to occur each year (e.g. one extra house in a neighborhood with 100 homes). Under the former scenario, the homeowner is faced with the potential for dramatic shifts in neighborhood character over a short period and potentially wild swings in property values. While a shrewd businessman might look at a home in such a neighborhood as presenting a reasonable balance of risk and return, a family relying upon their home equity to pay for college or fund retirement would probably rather avoid this gamble. When the pace of change is controlled, on the other hand, the risks in terms of asset values and idiosyncratic property enjoyment are reduced. To illustrate this point it may be helpful to imagine a scenario in which a local government has decreed in advance that densification will occur at a pace of one home per year for five years in an area that currently has one hundred homes. Under such a scenario, the chances of any increased density popping up next door in the next five years are less than 10%. While this potential could make a few homeowners nervous, it seems clearly less threatening than a *laissez-faire* approach in which every

property on the block might potentially be densified within a year or two, as seems to be a distinct possibility at Hollin Hall.

Pacing change also has the potential of taking advantage of the frequent mobility of the American population to mitigate the overall harm that might otherwise be done to homeowner's idiosyncratic enjoyment of their property. According to the Census Bureau, 14% of the American population and 8% of persons living in owner-occupied housing moved at least once during 2004.¹⁵⁴ These trends also appear to vary significantly between metropolitan areas with the number of person living in the same house in 2000 as they were in 1995 ranging from a high of 66%-68% from metropolitan areas like Pittsburgh and Scranton Scranton Wilkes –Barre, Pennsylvania to a low of 32% in College Station, Texas and 35% in Las Vegas, Nevada.¹⁵⁵ Incidentally, the percentage in the Washington-Baltimore CMSA was right around the aggregate average for all metropolitan residents (53%) and the percentage in the Houston was slightly lower at 49%.¹⁵⁶ While it is difficult to extrapolate precisely from these statistics to any particular neighborhood, they paint a picture of a population that moves frequently and of a county where the population of most neighborhoods turnovers to a large extent every decade. Pacing change can take advantage of this ongoing process to filter between homeowners who really liked the neighborhood as it was and those who really like the neighborhoods as it has become. While the constant state of flux might put some folks off, it seems the best compromise one can make between the social need for allowing urban environments to evolve and individual interests in maintaining neighborhood character.

¹⁵⁴ US CENSUS BUREAU, GEOGRAPHIC MOBILITY: 2004 TO 2005 Table 3 (2006).

¹⁵⁵ US CENSUS BUREAU, 2000 CENSUS SUMMARY FILE 3.

¹⁵⁶ US CENSUS BUREAU, 2000 CENSUS SUMMARY FILE 3.

Stepping further away from Fischel's orbit, a policy of *incremental* densification could also be utilized to provide informational feedback to inform future decisions about densification in a particular area. This might, for example, help local governments deal with the uncertainties in how existing infrastructure would be able to handle additional density. As problems with some systems, like stormwater management or traffic, might be hard to predetermine with much accuracy, incremental change offers an opportunity to incorporate observations of the impacts of already present densification into assessments on the impacts of possible future densification.

More speculatively, *incremental* densification could mitigate concerns existing homeowners might have about how increasing the supply of housing in their neighborhood would impact the equilibrium of the market. In essence, this fear builds on the idea that communities with unique or desirable amenities can essentially create a monopoly through zoning and by limiting supply can increase the wealth of existing homeowners. Glaeser and Gyourko recognize the effect zoning reform might have on this monopoly effect and caution that to make zoning reform politically feasible "it is crucial [to] also try to compensate the losers for this change."¹⁵⁷ While the argument for direct compensation will be considered in the next section, it could be argued that pacing change reduces the need for such compensation by pushing the loss of the monopoly premium further into the future and thus reducing the present value of this loss.

¹⁵⁷ Glaeser, *supra* note 28, at 35.

Capturing increases in land value attributable to densification

The classic way of enticing someone to accept additional risk is to offer to pay them to do so. Paying homeowners and local governments to accept densification seems therefore to be an obvious potential solution to the problem of neighborhoods opposing what appears to be socially optimal development in their midst. The only problem is, where will these payments come from? Conveniently, in considering economically viable densification in places where regulation currently precludes densification, there is an obvious reservoir that could be used to fund such payments: the increase in land value that results from the decision to allow densification.

This “reservoir” may be understood as essentially the economic value of the land within existing single-family neighborhoods that has been depressed as the result of regulatory policies that prohibit development at the optimal development density. Where an individual landowner keeps this increase (or some of it), they have in effect been granted a “windfall” that some scholars would label properly as a “regulatory giving.” The suggestion of making property owners pay for all “givings” would be enormously controversial because taken to its extreme, and applied retroactively, such a policy could be tantamount to the abolition of private property. With respect a process of incremental densification, however, there are some seemingly palatable theoretical justifications for collectively capturing windfalls. One way of approaching the issue is to conceptualize the local government as a trustee or agent of the neighborhood who in capturing the densification premium is essentially negotiating a good price for commonly held property that could not be sold individually by any of the homeowners. Considering again the hypothetical one hundred home subdivision with exactly equal lots helps illuminate this

analogy. Assuming that thoughtful policy and the economic interests of the homeowners would only permit ten additional homes to be built within the subdivision, taking into infrastructure capacity and effects of neighborhood character. Because every lot is basically indistinguishable, it stands to reason that each property owner should have an equal claim to these densification rights. Dividing the ten rights between the one hundred homeowners, however, would grant each homeowner only the right to build one-tenth of a home. One could allow property owners to hold these rights individually but such a system of transferable development rights would probably be unworkable and unnecessarily expensive. Thus, one might simply prefer to have these interests pooled together by the local government (or some other agent) and sold under conditions and for a price that would suit the interests of the property owners.

One might borrow from John Rawls' veil of ignorance idea to more fully explicate the logic of capturing windfalls in this case. The decision for the community of homeowners to make in this case is whether or not to allow this sort of pooling of densification rights to take place. Without the pooling, one of two possible outcomes is possible. The first outcome is basically the status quo in America where densification is largely precluded. Under this scenario, the homeowner is barred essentially from capitalizing on what could be essentially a large percentage of the natural increase in the value of his property. One might say that the homeowner is not allowed to reap the rewards of being a landowner. The second outcome would either be some form of lottery where densification rights are randomly allocated, some corrupt process of assigning rights, or some form of the laissez-faire approach described above that seemed so unpalatable when considering the typical homeowner's interest in minimizing risk. As

compared to the two outcomes mentioned above, it would seem most homeowners would rationally prefer the ability to capture and share land value increases attributable to incremental densification.

Buttressing the above-described arguments is a notion that allowing property owners to retain the land value increase inherent in incremental densification is fundamentally unfair. This notion of fairness that such “givings” would violate might be described as the notion that similarly situated persons should be treated equivalently by the government. Where lot sizes are roughly uniform in single-family neighborhoods, it would seem that for purposes of densification each property owner is similarly situated. Hence, giving away the land appreciation resulting from incremental densification to discrete property owners clearly violates the above-stated fairness norm. While one might hear the response of “first in time, first in right,” such an idea seems particularly inappropriate to govern the transfer of a property right that the government already controls and may therefore distribute. Furthermore, only where one was trying to encourage densification that was of doubtful economical viability would the incentive theory which supports such a view be valid.

Understanding how value capture could encourage homeowners to go along with densification requires some contemplation of how the captured value will be distributed. Admittedly, this is an issue that I have not examined in great detail but I do have a few general thoughts. One idea might be to write equal checks to all the homeowners. It may also be reasonable that immediate abutters who would bear the brunt of any negative externalities from densification should be awarded larger payouts. In addition, where the

densification has negative fiscal consequences for the municipality at-large (but only in these cases), a convincing claim may be made that the local government should be allowed to retain some of this capture to help compensate for the negative fiscal impact.

One may recognize that this form of capture is already widely practiced in the form of exactions. In summary, there are at least three possible categories of claimants.

Deciding how these gains should be allocated, and possibly more importantly *who* should decide how to allocate these gains, are vitally important questions. The fact that I have not answered these questions, however, should not detract from validity of the general argument that capturing and pooling the land value increase attributable to densification could go a long way toward inducing homeowners to go along with densification. It may bear a reminder at this point that the increased economic efficiency that would seemingly results from allowing densification is not the only public policy rationale in favor of densification. As discussed *infra* in Chapter 2, unleashing the power of densification has the potential to serve several other regional, national, and even international purposes. Capturing gains, however, may be absolutely critical to enticing homevoters and local governments to acquiesce to densification.

OTHER CONSIDERATIONS

Neighborhood externalities

One of the classic justifications for zoning is that it helps manage externalities and preserve public goods. This view puts it squarely within the core function of government in providing necessary restraints and regulation in the marketplace. Under this view, minimum lot sizes may be understood as preserving the collective benefit that comes from open space (i.e. lawns) and the general bucolic character of suburban single-family

neighborhoods. Without zoning (or analogous land use controls like private land use controls), one would expect free riders to come along with their small lots or apartment building to take advantage of the good residential character, essentially acting in the words of Justice Sutherland in the landmark *Euclid* decision as “mere parasite[s].”¹⁵⁸ Determining the extent to which incremental densification would actually impose significant externalities on the neighborhood is beyond the purview of this paper. The two basic strategies for addressing these concerns, however, seem to be prevention and compensation. Compensation will be discussed later in this paper. The issue of prevention seems likely to center on design but also perhaps pacing or limiting the amount of densification. While the latter has already been discussed in this paper, the former (design) is not a focus of this paper. It may be worth noting the results of a community survey of neighborhood residents in Victoria, Canada, where a small program allowing single-family infill on small lots in existing neighborhoods has been in existence since the 1980s. Assessing the community’s reaction to the construction of three units on subdivided lots that were built as part of a demonstration project, this survey found that: 90% of all respondents found that the project fit into the existing neighborhood; 80% of the respondents found that the project was a positive development; and 85% disagreed with the notion that the projects were intrusive or detrimental to the neighborhood.¹⁵⁹

Fiscal zoning

Another public goods argument focuses on the provision of a range of municipal services that are paid for largely out of property tax assessments. Because residence in

¹⁵⁸ *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 394 (1926)

¹⁵⁹ AFFORDABILITY AND CHOICE TODAY DEMONSTRATION PROJECT, CASE STUDY: SMALL-LOT SINGLE FAMILY INFILL HOUSING IN THE CITY OF VICTORIA 10 (1997).

the community entitles someone to send their kids to public schools or rely upon the town's police protection, lower valued residences are often assumed to result in a net fiscal drain. Some observers have argued that excluding such residents is the primary purpose of minimum lot sizes. As with externalities, undertaking a detailed analysis of how densification would impact local governments fiscally is largely beyond the scope of this paper. It may be noted that this issue did not seem to be much of concern at Hollin Hall or Houston.¹⁶⁰ In fact, one of the most significant benefits from the City of Houston's perspective seemed to be its positive fiscal impact.¹⁶¹ It seem axiomatic that the presence of fiscal incentives or disincentives for local governments vis-à-vis densification will vary according to the kind of community, the nature of the preexisting housing, and the nature of the new housing. For some services, it may be possible to add density without increasing the cost of services at all, such as where the construction of a few additional homes would probably not have any tangible affect on the cost of running a fire department. For other services, costs would certainly rise but the marginal revenues gained from densification might exceed these costs. Regardless, there may be a potential to compensate for any net fiscal benefit through allowing local governments to retain some of the land value appreciation capture.

Racial or class discrimination

While it is by no means certain that densification would desegregate neighborhoods, it may be identified as a potentially major concern. One must distinguish between those racial or class discrimination that is practiced out of pure personal bigotry

¹⁶⁰ Telephone Interview with Gerald Hyland, *supra* note 58; Telephone Interview with Jason Holoubek, *supra* note 85.

¹⁶¹ Telephone Interview with Jason Holoubek, *supra* note 85.

and racial or class discrimination that is practiced out of rational or irrational concerns about property values. While neither is condoned, the latter can be dealt with in the same way as other concerns about property values whereas the former requires a different approach. I would speculate also that latter is much more common than the former. Solving the former problem would probably require some assertion of authority by the courts, states or federal government.

Another approach: metropolitan governance?

The paper largely assumes the persistence of the current organization of metropolitan land use control (or lack thereof) and thus focuses on the “homevoter” in crafting an understanding of how to make densification politically feasible. Another approach that has been suggested to solving the general NIMBY problem that underlies the opposition to densification is metropolitan governance.¹⁶² Broadly speaking, the attraction to metropolitan governance to solve these problems stems from a belief that decisionmaking at the metropolitan level would be more concerned and responsive to the negative consequences of NIMBYism (e.g. exclusionary zoning) than the current system in which many local government can and do basically ignore the regional and external consequences of their actions. Considering the topic of this paper, this mindset would suggest that metropolitan governments would respond to the anti-sprawl, affordable housing, and consumer choice arguments made in favor of densification in Chapter 2.

¹⁶² 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, 891-892 (1999) (citing ANTHONY DOWNS, NEW VISIONS FOR METROPOLITAN AMERICA 169-82 (1994) for exposition on this idea).

One might look to Portland, Oregon, which is broadly acknowledged to have the most advanced form of regional land use planning in America, to see whether this logic actually holds true. There the issue of increasing density in single-family neighborhoods actually made it on the ballot in 2002, but not in the way an advocate for incremental densification might have hoped. Instead of requiring that existing single-family neighborhoods bear some of the burden of accommodating population growth and infill development, this ballot measure amended the Metro Charter to state essentially that neither the regional plan nor any Metro Ordinance “shall require an increase in the density of single-family neighborhoods within the existing urban growth boundary.”¹⁶³ It should be noted that this ballot measure was actually sponsored by Metro (the regional land use planning authority) and supported by the planning community in Portland as a way to fend off another much stronger anti-density measure.¹⁶⁴ According to Carl Abbott, a Professor of Urban Studies and Planning at Portland State University, this basically means that densification is not going to be targeted in the middle of existing single-family neighborhoods but rather in “regional centers” on the “edges” of neighborhoods.¹⁶⁵ In other words, while local governments could still pursue these policies (as they might anywhere else), Metro has no power to issue a mandate from high above to do so. According to Abbott, there was recently a trend of densification on the east side of Portland occurring in much the same fashion as at Hollin Hall (e.g. existing

¹⁶³ METRO CHARTER, ch. 2, §4-b (2003); MULTNOMAH COUNTY, OREGON, ONLINE VOTERS' PAMPHLET MAY 2002 PRIMARY ELECTION: MEASURE NO. 26-29, *available at* http://www.co.multnomah.or.us/dbcs/elections/2002-05/26_29.shtml.

¹⁶⁴ *See* MULTNOMAH COUNTY, OREGON, ONLINE VOTERS' PAMPHLET MAY 2002 PRIMARY ELECTION: MEASURE NO. 26-11, *available at* http://www.co.multnomah.or.us/dbcs/elections/2002-05/26_11.shtml; Electronic Mail from Carl Abbott, Professor of Urban Studies and Planning at Portland State University (March 24, 2007).

¹⁶⁵ Electronic Mail from Carl Abbott, *supra* note 164.

homes built on double lots) but the Portland City Council acted to stop this process “since it intruded into the heart of neighborhoods.”¹⁶⁶ Thus, it does not seem that metropolitan governance in Portland has been effective in overcoming homeowner aversion to densification. It is hard to know how to interpret this story. One way, however, might be to understand that homeowners do remain a powerful voting majority at the metropolitan level and whereas they may not be organized to block individual neighborhood projects they may still be organized to block general policies aimed at breaking the power of neighborhoods. Interestingly, the anti-density ballot measure approved in 2002 will automatically expire in 2015 unless it is approved by a majority of voters.¹⁶⁷

¹⁶⁶ Electronic Mail from Carl Abbott, *supra* note 164.

¹⁶⁷ METRO CHARTER, ch. 2, §4-b, fn1 (2003).

Chapter 6. Analysis of methods of allocating densification rights

POTENTIAL METHODS OF ALLOCATING THE RIGHT TO DENSIFY

The methods local governments could use to allocate rights to densify may be divided into a few basic categories. This Chapter will examine three traditional methods according to a framework that takes into account how well they (1) define and regulate the pace of change; and (2) capture and distribute increases in land value. This analysis is meant to demonstrate the inadequacy of these methods in terms of overcoming neighborhood opposition. In addition, constraints imposed by law on the utilization of these methods are discussed briefly giving a preview of how the underlying legal structure forces local governments to approach land use regulation in a specific undesirable way. In the last part of this Chapter, a preferred alternative method for allocating rights to densify is described and analyzed according to the same two criteria. Issues regarding the legality of this “preferred” method are reserved for Chapter 7.

TRADITIONAL METHODS

The basic means local governments currently use to assign development rights might perhaps be distilled into the following three categories of allocating densification rights:

1. Rezoning an entire area to allow for additional density.
2. Selectively rezoning discrete parcels for densification.
3. A system of discretionary approvals for particular projects entailing densification.

Rezoning an Entire Area

Of the three above noted methods, rezoning an entire neighborhood to allow additional density seems to entail the least amount of local government control over how much densification occurs and how quickly it occurs. A firm believer in unregulated markets, therefore, might prefer this strategy as it seems the most responsive to the market in determining the rate and extent of densification.¹⁶⁸ While this approach would probably entail allowing only a certain form of densification,¹⁶⁹ the right to engage in that particular form of densification would be distributed over the entire neighborhood and exercisable as-of-right. It is hard to imagine, however, that the typical homeowner would consent to such an approach.

First of all, this method offers no security to homeowners in terms of a certainty about the rate and extent of densification (i.e. pacing). A typical homeowner would not take much comfort from the invisible hand and they would probably tend to overemphasize worst case scenarios. Homeowners' apprehension, as may be recalled, extends to concerns both about the effects densification may have on property values and about the effects it may have on their idiosyncratic enjoyment interests. The failure to do anything to mitigate these concerns makes it difficult to imagine homeowners buying into a complete rezoning proposal in all but the most extreme cases of suboptimal development density.¹⁷⁰

¹⁶⁸ On the other hand, those who believe that under the status quo zoning is basically a fungible commodity could argue that a system relying upon discretionary permits comes closest to approximately a free market.

¹⁶⁹ For instance, where a completely unregulated market would allow the building of large multi-family dwellings, this approach might limit densification to single-family dwellings.

¹⁷⁰ An example of an "extreme case" would be where the profits that could be earned from densification are so large that a developer could offer homeowner's a price that a vast majority would be willing to accept immediately in exchange for moving somewhere else. In the parlance of negotiation theory, the ZOPA

Because a complete rezoning grants equal rights to each homeowner, it might appear at first to succeed in spreading benefits equally (thus, negating the need for capture and distribution of land value increases). While this may be initially true, there are a number of reasons why this equality may be illusory and expected to diminish substantially over time. First, functional limitations imposed by infrastructure or market demand have the potential to create the winners and losers dynamic discussed *infra* in Chapter Five. While this allocation might seem perfectly appropriate in markets where one wants to reward risk takers, this logic may be out-of-place when considering residential neighborhoods where people live real lives and non-economic interests generally drive moving decisions.¹⁷¹ The potential for there being an effective limit on how much densification a given neighborhood can efficiently handle might also encourage some homeowners or developers to develop sooner rather than later, thus exacerbating some of the concerns with pacing. The decisionmaking leading to this outcome could be explained as the difference between how one would with respond to an option with a floating or variable expiration date and one with no expiration date at all.

It should be noted that of all the methods (both traditional and preferred), a complete rezoning is the only one that does not *prima facie* raise serious legal questions concerning whether or not it could implemented. As the complete rezoning fails to

(zone of possible agreement) would be particularly large. In less “extreme” case, on the other hand, a lesser number of homeowners are willing to sell immediately for the price a developer would be able to offer in light of the profit potential for densification.

¹⁷¹ US CENSUS BUREAU, GEOGRAPHIC MOBILITY: 2004 TO 2005, TABLE 31 (showing that among persons living in owner occupied housing, explicitly economic reasons (e.g. wanted cheaper housing) only accounted for 10% of moves whereas explicitly non-economic reasons (e.g. change in marital status) accounted for 54% of moves. The remaining 36% fell into categories such as “Wanted new or better home/ apartment” and “Wanted better neighborhood/ less crime” that could potentially be seen as economic or non-economic reasons for moving.)

address the core issues that seem important to homeowners, the fact that this is the only method of certain legality underscores the problems with the current legal regime and highlights a reason why it may not be surprising that so few homeowner driven localities voluntarily embrace densification in single-family neighborhoods.

Selective Rezoning

The process of selective rezoning discussed here envisions the local government studying a particular area and determining that certain properties should be rezoned to allow for additional density. This contrasts with a process whereby landowners petition the government for rezonings, which is classified for purposes here as a system of discretionary approvals.

As far as pacing change, selective rezoning has much greater potential than a complete rezoning. By rezoning only a select number of parcels at a time, the local government could effectively place an upper bound on the amount of change that can possibly occur within a given time period. From the standpoint of actually encouraging densification, on the other hand, there may be problems in that some of the owners of the parcels selectively rezoned might have idiosyncratic interests relating to living in the neighborhood that would result in their parcels remaining undeveloped for longer than expected or desired. Thus, an advantage of the auction scheme contemplated later in this chapter is that it severs the densification rights from ownership of any particular property. This severance, in turn, allows the densification rights to gravitate towards properties best suited for densification, including those owned by property owners willing to sell.

Despite its promise in restricting the pace of change, selective rezoning appears to do a very poor job of capturing and distributing gains. In contrast to the complete rezoning method, selective rezoning does not even begin with an equal assignment of rights. Therefore, where densification is truly an economically profitable endeavor, the owners of the upzoned property should be expected to receive substantial “givings” or “windfalls.” While exactions could be assessed to offset costs imposed by development, the right to build would be effectively transferred free of charge.¹⁷² This dynamic could surely naturally stir up jealousy and suspicion about the government’s conduct. As the unlucky homeowners would be receiving essentially nothing for allowing densification in their neighborhoods, this jealousy and suspicion could add to the basic underlying reasons homeowners already have for opposing densification.

Under a system of selective rezoning, parcels could theoretically be clustered or spread throughout the community. Only the former approach, however, would likely pass muster under current law which restricts the ability of local governments to single out one of many similarly situated properties for special treatment (e.g. the spot zoning doctrine to be discussed in Chapter 7). In some states, other legal doctrines (e.g. the “change and mistake doctrine”) could even limit the ability of local governments to selectively rezone edge districts or other specified differential areas for clustered rezoning. While further study might indicate that a clustering approach is better for reasons of design and efficiency, it would impose disproportionate impacts on small areas making it difficult to protect homeowners in those areas from the harmful effects of

¹⁷² To recapture the benefit directly, one would have to force a homeowner to pay for the benefit of zoning unilaterally imposed upon him. These seems problematic from a variety of perspectives, not the least of which is that it would probably be incredibly unpopular.

sudden dramatic changes in neighborhood character (i.e. it would be hard to “pace” change in these areas).

Discretionary Approvals

A primary difference between a discretionary approval process and the preceding ones is that it relies upon the initiative of private actors wanting to densify as opposed to initiative of government. Among the traditional methods, this one may be the most promising in terms of its capacity to create a dynamic where homeowner might acquiesce to densification.

In terms of pacing change, discretionary approval processes seems superficially just as capable as selective rezoning. This assumes that local government bodies retain the discretion to deny petitions to densify according to criteria that comport with the basic logic of pacing change in the first place. It should be noted that under existing law, the degree of discretion to approve or reject particular proposals is circumscribed to varying degrees depending upon whether the right to densify is sought through a rezoning, a variance, or a special permit (also known as a “special exception”). Where a landowner requests a rezoning to densify, for example, a decision granting this rezoning would be highly susceptible to invalidation as spot zoning. Likewise, most states strictly limit the power to grant zoning variances and under either of the two tests used by the courts (i.e. the “unnecessary hardship” test, or the “practical difficulties” test) it is highly unlikely that the grant of a variance to allow densification in single-family neighborhoods would

be upheld if challenged.¹⁷³ Of the three primary methods of discretionary approvals, it seems that special permits offer the only real potential for regulating densification under existing law. In fact, this is the method most commonly used in regulating a minor form of densification (accessory units). There is a danger in using special permits, however, in that the ordinance authorizing them must be carefully drafted in order to avoid losing control of the process. The potential to lose control owes to the fact that the discretion of the permitting authority is circumscribed in terms of what it may reject, as opposed to what it may accept. In other words, where a landowner can demonstrate that his project meets the criteria spelled out in the ordinance, the permitting authority has no choice but to grant a special permit.¹⁷⁴ This obviously puts a premium on carefully delineating criteria that can be used to properly pace densification. Furthermore, as with the complete rezoning method, utilization of discretionary permitting process could encourage densification to occur more rapidly than desired as homeowners and developers would seek to avail themselves of the densification permits before they run out. Additionally, when utilizing a special permit process or some other discretionary process, local governments may be constrained in their ability to state definitively up front how much density they are going to allow. While the courts have upheld some programs where local governments have set forth specific “quotas” on development,¹⁷⁵ others have rejected such quotas by finding an insufficient link between the development

¹⁷³ Under the “unnecessary hardship” test, a landowner must show *inter alia* that without the variance the land cannot yield a reasonable return and that his plight is due to unique circumstance not generally found in the neighborhood. Under the “practical difficulties test,” a landowner must usually show *inter alia* that the “physical conditions of the land itself” distinguishes it from other properties in the area in a way that justifies the grant of a variance. DANIEL R. MANDELKER, *LAND USE LAW* §§ 6.44-6.48 (2003).

¹⁷⁴ MANDELKER, *supra* note 173, at §§ 6.53-6.55.

¹⁷⁵ See, e.g., *Construction Indus. Ass’n of Sonoma County v. City of Petaluma*, 522 F.2d 897 (9th Cir. 1975).

quota and what the courts regard as a valid municipal purpose (i.e. something that promotes the public health, morals, safety or welfare).¹⁷⁶ As the former cases have focused on the lack of evidence regarding specific infrastructure or environmental concerns,¹⁷⁷ a quota program premised on allaying community fears about changes in “neighborhood character” might be invalidated. To this extent such quotas cannot be established definitively, a weakness of this approach under the current legal system may be that the local government would be unable to announce upfront the exact amount of densification to be allowed. As the establishment of certainty in the pace of densification would help mitigate some homeowner apprehension about the process, this could reduce the risk reduction gains achievable through a special permitting process.

With respect to capturing land value increase, this method may offer more possibilities than complete or selective rezoning. This is because local government can use their leverage in the discretionary approval process to force developer concessions and payments. It should be noted that current law imposes significant restrictions on how extensively local governments may bargain with developers for zoning benefits (these are discussed in detail in Chapter 7). Assuming *arguendo* that these restrictions were removed, it seems local governments might start to approach a point where they could capture through bilateral negotiations a significant portion of the land value appreciation attributed to the right to densify. There are several reasons, however, why this would not appear to be the *best* method for capturing land value increases. First, the only parties that could enter into negotiations with the local government are those that already own

¹⁷⁶ See *Boca Raton v. Boca Villas Corp.*, 371 So. 2d 154, 155 (Fla. 4th DCA 1979)

¹⁷⁷ *Id.*

property. Since this limitation imposes a high entry cost and limits the number of potential “buyers,” one would expect the local government to achieve less profit in the process of bilateral negotiations than it might in some more open sales process. Second, agency problems (or corruption) might reduce the incentives of local government officials to bargain for the highest possible value. Lastly, because the use of discretionary approval processes entail high transaction costs for both parties, the gains from densification could be eroded.

A PROPOSAL FOR ALLOCATING DENSIFICATION RIGHTS THROUGH AUCTIONS

In thinking about this issue I considered two potential alternative methods of allocating densification rights: (1) an allocation of transferable densification rights and (2) a public auction of the densification rights. Both differ from the traditional methods in that they entail some severance of the right to densify from property ownership. While on a theoretical level transferable densification rights seem attractive, their high transaction costs lead me to conclude that a public auction is a superior method for allocating densification rights. Another problem with a system of transferable development rights is that there seems to be no way of guaranteeing that the sellers of transferable development rights will be the same people to bear the impacts without setting up a system in which the number of sellers is so low (e.g. just the immediate abutters) that one would have to contend with serious holdout problems. Thus, it seems that a system of more or less compulsory participation seems both more efficient and more equitable.

The Proposal

There is no need for great complexity in the densification auction process. A basic process could be quite straightforward. A threshold issue is certainly who controls the process but this issue will be reserved until the basic process has been adequately spelled out.

In the auction, the first step would be to identify the number and form of densification rights. Ideally, a local government or some neighborhood association would study the neighborhood's capacity to absorb additional density. This analysis would take account of infrastructure issues and also those of neighborhood character. To minimize externalities, the densification rights could be shaped through a variety of conditions dealing with things such as height, massing, design, etc... There are a host of possibilities depending upon the circumstances. For instance, one neighborhood might limit the number of rights that could be exercised on any given street to ensure dispersal of the additional density throughout the neighborhood. Alternatively, one neighborhood might only allow the rights to be used in specially defined receiving zones. In setting these guidelines it would be essential to take into account the tradeoff between the benefit of greater restrictions and the price developers would be willing to pay for the densification rights. To the extent the neighborhood has an interest in both sides of the ledger (costs and benefits), which they would as beneficiaries of the auction proceeds, one might expect relatively efficient decisions—or at least more efficient than under the current system.

Next, notice would then be given for an auction. The neighborhood might be allowed to set a reservation price in advance. While this might have the effect of

preventing some densification if the neighborhood arbitrarily sets the price too high, neighborhoods would at least be required to directly engage the question of how much they would pay (or forgo) to prevent socially optimum development. To maximize the ultimate price of the densification rights, it would be best if participation was not limited to property owners. After the auction, the highest bidders would presumably go out and acquire property suitable for the exercise of the right. Alternatively, they might purchase properties or options on properties before bidding in the auction. It seems that the rights would naturally gravitate towards the properties where densification is most appropriate in terms of the optimal redevelopment rule as this would maximize profits. Thus, homeowners already looking to sell and especially those with poorly maintained homes would be the most likely sellers. Assuming a relatively active housing market in which a decent percentage of homeowners would sell their homes each year, it seems likely the extent to which homeowners could ransom developers would be limited given that the developer could easily move to the next homeowner looking to sell. At the very least, the premium paid would be relatively small given the large number of potential sellers, only one of whom would be required to sell to the developer.

In order for this scheme to work, those who purchase the rights would need to be reasonably secure against future challenges by neighbors or local government trying to block a project. Any open-ended questions about whether the rights could be utilized would obviously seriously erode their value. One might consider, however, a provision whereby local governments or neighborhoods could buyback the densification rights at a premium to compensate the developer for at least his lost time and money.

A Hypothetical Example: Hollin Hall

As the densification occurring in Hollin Hall has already been discussed, it may be used as a means for illustrating further the manner in which a densification auction could function and how it could pace change and distribute gains effectively. In this hypothetical, it is assumed that while the market forces driving densification remain constant, there are no as-of-right densification rights (i.e. double lots) at Hollin hall.

We may start with a relatively self contained area of Hollin Hall where all the densification has occurred. This area is bounded on two sides by conservation land and on the other by a collector road and a commercial thoroughfare. Prior to densification, this area contained roughly 101 homes (for simplicity sake we'll say there are 100 homes here). In the hypothetical, one might imagine a county planning office in connection with a neighborhood association studying this area to determine the appropriate pace and scale of densification. While seventeen new homes are currently being built and marketed within a subsection of this area, looking at the overall impacts of development one might determine that a slower pace of change was appropriate. One might decide, for instance, to allocate a single densification right each year for ten years. Each right would allow a developer to subdivide an existing property to build two housing units and thus the total number of housing units in the subdivision would increase slowly but surely by 10% over ten years.

The back of the envelope analysis discussed in Chapter 3 estimates that developers should be willing to pay approximately \$531,500 for each densification right if they are expecting a 15% profit margin. More conservatively, allowing the developers a 20% profit margin still yields a \$412,500 value. For simplicity sake, I will posit that

the auction would cost \$62,500 leaving the amount realized from the auction at \$350,000. If this entire amount were then distributed to homeowners, each would receive \$3,500 in the first year and approximately \$3,888 in the tenth year. Under current tax rates, this amount could cover 78-91% of each homeowner's property taxes. The county, on the other hand, would realize approximately \$15,130 annually as a result of the increased property values associated with each densification project (two million dollar homes)—eventually a total of \$151,130 in tax revenues per year. One might also allow the county to capture some portion of the auction funds (e.g. 10%) that could go into general funds or be used to fund specific infrastructure improvements in the area.

With the basic economics of the approach outline, some more specific issues may be addressed. First of all, there is the question of a reservation price. In this example, the Hollin Hall homeowners might be given the right to set a reservation price for the auction below which a right would not be sold. For example, the community might establish a reservation price of \$300,000. Under the assumptions outlined above, this should not stop the auction from occurring. If the reservation price, however, were set at \$700,000, this could prevent the densification rights from being sold. In setting a reservation price too high, however, homeowners would be fully aware that they were potentially sacrificing up to \$7,000 into their own pocket by setting such a high reservation price.

In the example constructed, I have also stipulated that the purchasers of new homes built using densification rights do not participate in the profits from selling densification rights. This seems to make sense given that it is the preexisting lots and homeowners that are in essence sacrificing to allow densification to occur. The new

homeowners are still seen as beneficiaries of the program, however, in how it enables them to live in a community or form of housing that would be otherwise unavailable.

It has to be understood that the example of Hollin Hall may be somewhat extreme in the high property values there and high demand for housing. Thinking about incremental densification in lower income communities would obviously entail a quite different analysis. To the extent, however, densification is supported by economics in any area, one can see how it could allow for distributions to be made to homeowners as an incentive to allowing and even welcoming densification. Furthermore, as discussed in Chapter 2, incremental densification may be particularly useful in declining suburban communities as a way of spurring needed reinvestment in the community. Thus, there may be additional indirect benefits to homeowners in those communities outside of the direct cash benefits discussed with respect to the Hollin Hall hypothetical.

In terms of the effects on neighborhood character, adding one additional home per year over ten years would yield a gradual transformation of Hollin Hall quite different from the current transformation. Numerically, any given homeowner would have a roughly 1 in 50 chance of having densification occur on a neighboring lot during a given year. Thus, the likelihood of living next to a construction site in any given year would be roughly 2%. Even over ten year, the chances are only 20%. After five years, only 5% of the lots in the neighborhood would have been transformed. With on average 50% of the homeowners turning over even five years, the typical homeowner would experience relatively little actual change during their residence in the area. While longer-term

homeowners would see more, they would also profit the most directly from allowing densification.

Why it is the best approach

The auction method seems like the best way to control pacing while maximizing land value appreciation capture. With respect to pacing change, the auction process would enable a local government to set definitive limits on the amount of densification allowed. While a regime of transferable development rights would accomplish the same, among the traditional tools only selective rezoning seems to have this full potential. One potential problem the auction process could create is that a larger local government jurisdiction might be incentivized by the financial rewards to allow too much densification. A solution to this problem would be to vest some control over the process at the neighborhood level and ensure that most of the benefits go back to the neighborhoods where the interest in controlling pacing is most urgent. While an idea of having neighborhoods set reservation prices was proposed above, this might not be the best way to engage neighborhoods in the process and there are many other possibilities.

With respect to capturing and distributing land value appreciation, it seems hard to imagine a better system than an open auction. While discretionary approval processes freed from the limitations imposed by current law might do a reasonably good job, it could not match the ability of an open auction to maximize the capture of land value appreciation. Likewise, a system of transferable development rights will have some clear deadweight loss as a result of the transaction costs involved.

Chapter 7. How law precludes a densification auction

At the conclusion of the previous chapter, the argument was put forth that auctioning densification rights and distributing the proceeds from the auction among affected parties is the best method in terms of its ability to mitigate the basic concerns homeowners have with respect to densification. Unfortunately, the core structural attributes that make the auction process attractive also likely make it illegal. These legal problems can be divided between those concerning the capture of land value appreciation and those concerning the means of pacing change. In this chapter, an analysis of the specific legal doctrines underlying these concerns is combined with a critical inquiry into whether the primary policy rationales for these doctrines make sense in the context of incremental densification.

RULES LIMITING ABILITY TO CAPTURE AND DISTRIBUTE GAINS

The idea of selling or auctioning land use entitlements has been around for some time,¹⁷⁸ but proponents have long understood that selling or auctioning land use entitlements would be illegal under American law.¹⁷⁹ It is worth noting that auctions are in fact used to allocate land use entitlements in some other countries (such as China).¹⁸⁰ A clear exposition of the prevailing view that selling or auctioning is illegal was

¹⁷⁸ See Madelyn Glickfield, "Sale of Development Permission: Zoning on the Auction Block," WINDFALLS FOR WIPEOUTS 376, 380 (noting that "In 1967, Marion Clawson, the dean of American resource economists, outlined an idea that local municipalities might sell rezoning to capture the windfalls that rezoning confers on property owners.").

¹⁷⁹ See WILLIAM A. FISCHER, THE ECONOMICS OF ZONING LAWS: A PROPERTY RIGHTS APPROACH TO AMERICAN LAND USE CONTROLS 70 (1986); Glickfield, *supra* note 178, 376-398.

¹⁸⁰ See, e.g., Dale A. Whitman, *Chinese Mortgage Law: an American Perspective*, 15 COLUM. J. ASIAN L. 35, 78 (2001); Mark T. Kremzner, *Managing Urban Land In China: The Emerging Legal Framework And Its Role In Development*, 7 PAC. RIM L. & POL'Y 611 (1998).

advanced in *Municipal Art Society of New York v. City of New York*, a decision invalidating terms of a contract between a developer and the City of New York concerning the purchase of city-owned property now occupied by the Time Warner Center.¹⁸¹ In this case, the court lectured the City of New York that “government may not place itself in the position of reaping a cash premium because one of its agencies bestows a zoning benefit upon a developer. Zoning benefits are not cash items.”¹⁸²

In the United States, there are two subcategories of legal restrictions that would most likely invalidate the auction proposal described in Chapter 6. The first category encompasses a number of separate but related prohibitions on the ability of local government to enter into certain kinds of contracts, namely those relating to the police power. The second category entails the exactions jurisprudence that imposes limits on the kinds of things local government may legally demand in exchange for preferential zoning treatment. While these concepts are closely related, the two categories are dealt with separately.

Limitations on Contract Zoning

The ability to auction land use entitlements necessarily depends upon the ability of the selling agency (i.e. the local government) to offer an enforceable commitment to the highest bidder. In this instance, any scheme of auctioning zoning necessarily entails some contractual relationship between the local government and prospective developer.

¹⁸¹ *Municipal Art Soc. of New York v. City of New York*, 522 N.Y.S.2d 800, 804 (N.Y.Sup.,1987)

¹⁸² *Id.*

Strictly speaking, such “contract zoning” is deemed invalid, although courts have allowed a form of zoning termed “conditional zoning.”¹⁸³

There are several distinct reasons courts give for invalidating “contract zoning.” In some cases, it is found to violate procedural requirements in state zoning enabling acts.¹⁸⁴ In other cases, it is found to violate requirements in state zoning enabling acts that local governments treat property within a given districts uniformly.¹⁸⁵ Beyond these statutory limitations, there is a deeper source of prohibitions on “contract zoning” in the form of the “reserved powers doctrine.”¹⁸⁶ Because analysis of the reserved powers doctrine exposes most readily the core underlying rationales for banning “contract zoning,” the focus in this paper is on this specific doctrine.

The reserved powers doctrine limit the scope of the Contract Clause of the United State Constitution, which states that “[n]o state shall ...pass any ... law impairing the obligation of contracts”¹⁸⁷ While seemingly straightforward, the application of the Contracts Clause becomes far more difficult when one starts to consider contracts entered into by state and local government, which raise fundamental democratic questions about the extent of the legislature’s power to bind itself and future legislatures to certain acts.

This tension gives rise to the reserved power doctrine under which “a state government

¹⁸³ See ELICKSON AND BEAN, *LAND USE CONTROLS: CASES AND MATERIALS* 318-327 (3d ed. 2005).

¹⁸⁴ See Shelby D. Green, *Development Agreements: Bargained-For Zoning That Is Neither Illegal Contract Nor Conditional Zoning*, 33 *CAP. U.L. REV.* 383, 432 (2004).

¹⁸⁵ See Green, *supra* note 183, at 435.

¹⁸⁶ While the reserved powers doctrine has typically arisen in cases where either the governmental entity or the private contracting party is seeking to enforce a contract, some third-parties have successfully asserted the doctrine to invalidate local land use decision. See, e.g., *Alfred v. City of Raleigh*, 178 S.E.2d 432 (N.C. 1971); *but see, e.g., Durand v. IDC Bellingham* 440 Mass. 45, 58 (Mass. 2003) (Spina, J, concurring) (arguing that third-parties do not have standing to challenge contracts made by local governments under the reserved powers doctrine). Regardless of whether or not third-parties have standing, however, the necessity of having an enforceable contract under an auction scheme descends from the purchasing party’s need to have some certitude that what he is buying will be worth something in the future.

¹⁸⁷ US Constitution, art I, §10.

[or local government] may not contract away ‘an essential attribute of its sovereignty.’”¹⁸⁸ While on general principle one should question whether zoning is “an essentially attribute of [state] sovereignty,” the legal answer to this question is actually quite straight forward. This is because zoning and other land use controls have always been understood as an exercise of the state’s “police power,”¹⁸⁹ which has in turn always been regarded as an essential attribute of state sovereignty that “the legislature cannot bargain away.”¹⁹⁰

To the extent zoning is understood as an exercise of the police power, prohibitions against selling or bargaining it away have a strong intuitive appeal. As Fischel has put it, “[s]elling zoning, *as long as this rationale persists*, is analogous to selling health inspections to restaurants, elevator safety certification to apartment houses, and licenses to speed to automobile operators”¹⁹¹ (emphasis added). Echoing this sentiment, a New York court once likened a New York City program that accepted substantial donations to homeless housing funds in exchange for expedited and preferential treatment in processing applications to demolish single-room occupancy units to “Chaucer's Pardoner selling indulgences.”¹⁹²

There is really no doubt that bargaining between landowners and local governments has long played an integral part in the land use entitlement process, and that

¹⁸⁸ United States v. Winstar Corp., 518 U.S. 839, 888 (1996) (quoting United States Trust Co. v. New Jersey, 431 U.S. 1, 23).

¹⁸⁹ Village of Euclid, Ohio v. Ambler Realty Co., 272 U.S. 365, 387 (1926) (stating that “[t]he ordinance now under review, and all similar laws and regulations, must find their justification in some aspect of the police power, asserted for the public welfare.”);

¹⁹⁰ Stone v. Mississippi, 101 U.S. 814, 817 (1880); *see also* United States v. Winstar Corp., 518 U.S. 839, 888 (1996).

¹⁹¹ William A. Fischel, *Equity and Efficiency Aspects of Zoning Reform*, 27 PUB. POL’Y 301, 327 (1979).

¹⁹² City of New York v. 17 Vista Associates, 599 N.Y.S.2d 549, 552 (1993),

often even cash is exchanged. Writing in 1985, Fischel noted that some of his colleagues thought bargaining between developers and local government was so pervasive and deep that zoning could be regarded as a fungible commodity that was regularly “sold,” albeit through less direct means than an auction.¹⁹³ More recently, some have asserted boldly that “the raw material of most land use planning is the process of negotiation.”¹⁹⁴ Hence, given the apparent incongruity between the courts’ command that governments cannot “bargain away” the zoning power and reality on the ground, it is apparent that some finer distinctions are being made as to what does and what does not constitute a “bargain.”

A recent case from Massachusetts sheds light on the tenuous nature of the line drawn and how close some courts have actually come to accepting situations that arguably appear to be actual zoning sales. In *Durand v. IDC Bellingham*, the Massachusetts Supreme Judicial Court upheld a rezoning that allowed a power plant expansion where there were strong indications that the power plant owner’s offer to donate \$8 million to the town if the rezoning was approved was the determinative factor in the town’s decision to grant the rezoning.¹⁹⁵ Finding that the town followed all the proper procedures and that the rezoning could rationally be justified as a valid exercise of the police power (independent of the promise of \$8 million), the court refused to find that the \$8 million inducement invalidated an otherwise permissible act. On the issue of “bargaining away the police power,” the court noted that:

The town *merely acted on an offer* by [the power plant]; its power to approve or reject the proposed zoning amendment remained

¹⁹³ FISCHEL, *ECONOMICS OF ZONING LAWS*, *supra* note 179, at 70.

¹⁹⁴ Erin Ryan, Student Article, *Zoning, Taking, and Dealing: The Problems and Promise of Bargaining in Land Use Planning Conflicts*, 7 HARV. NEGOTIATION L. REV. 337, 348 (2002).

¹⁹⁵ *Durand v. IDC Bellingham, L.L.C.*, 440 Mass. 45 (Mass. 2003).

unencumbered, as did its power to rezone the property in the future if circumstances made it necessary for the protection of the public health, safety, or general welfare to do so¹⁹⁶ (emphasis added).

The court's analysis highlights the importance many courts have placed on a distinction between bilateral and unilateral promises.¹⁹⁷ The critical issue in making this distinction seems to be the *timing* of when a local government agrees to a rezoning. So long as the local government does not attempt to bind itself to a rezoning prior to a procedural compliant rezoning process, it is "merely" acting on the landowner's unilateral promise (to donate \$8 million in the case of *Durand*). The *sin qua non* of "contract zoning" under this view is the presence of a bilateral contract and some affirmative commitment by the local government to make a particular decision. Considering the proposal for auctioning densification rights, one must remember that in order for a developer to be willing to purchase densification rights, he needs to have some future assurance that the local government will not renege on its promise. If the local government is unable to offer such a commitment, or the developer knows he cannot enforce it, the densification rights could only be sold at a considerable discount.

One might question whether timing should be so critical. The importance assigned to timing in determining what constitutes a bargain or sale of the police power certainly does not comport with ordinary understanding of "bargains" or "sales." Under the *Durand* court's approach, a homeowner who sells their house does not sell or bargain away their property rights so long as they do not make any promises to sell the property

¹⁹⁶ *Durand* 440 Mass. at 53 n. 15.

¹⁹⁷ See also MANDELKER, *supra* note 173, at § 6.62; *Chrismon v. Guilford County*, 370 S.E.2d 579 (N.C. 1988) ("valid conditional zoning features merely a unilateral promise from the landowner...while illegal contract zoning anticipates a bilateral contract in which the landowner and the zoning authority make reciprocal promises.")

prior to actually transferring the title. Returning to Fischel's restaurant safety inspection analogy, one might also say the court's position in *Durand* would also sanction a scenario in which (1) a restaurant owner tells an inspector that they will have \$500 waiting for them if the restaurant passes the inspection; (2) the inspector notes the offer but does not give any affirmative indication that the restaurant will pass; (3) the inspector completes the inspection using all the proper procedures and gives the restaurant a passing score; and (4) the inspector returns to the restaurant a day later and collects \$500 from the restaurant owner. Since the logic behind the restriction on "bargaining away the police power" rests on some concern about the how such bargaining may induce local governments to take actions not in the interest of the public, it should seem irrelevant when an inducement is acted upon, so long as it is acted upon.

In *Durand v. IDC Bellingham*, three justices, who concurred in the decision on standing grounds, dissented from the majority's above-described determination that the town had not sold or bargained away its police power. According to these justices, the record was clear that "the town meeting improperly agreed to exercise its power to rezone land in exchange for a promise to pay money."¹⁹⁸ This certitude seemed to derive from the fact that discussion of the \$8 million had "dominated" the town meeting and that "[t]he same request for a zoning change had failed two years earlier, and the only change in circumstances was the \$8 million offer."¹⁹⁹ Rejecting the majority's unilateral/bilateral distinction, the concurring justices seemed to offer a different distinction on the basis of whether the proffered \$8 million was (1) an "extraneous consideration" or (2) "intended

¹⁹⁸ *Durand*, 440 Mass. at 59.

¹⁹⁹ *Durand*, 440 Mass. at 60.

to mitigate the impact of the development upon the town.”²⁰⁰ This mode of analysis focuses more on the motives involved rather than the procedural form of the bargaining.²⁰¹ This shift in emphasis is not, however, any more helpful for a scheme of auctioning densification rights. As the foregoing chapter should have made clear, a primary motive for local governments and neighborhoods in adopting incremental densification is assumed to be the financial rewards of pursuing this policy. Therefore, if the presence of these financial rewards would be deemed “extraneous consideration” (which it seems they would), the concurring justices approach would invalidate the densification auction as well.

On principle, the concurring justices’ attention to motive seems more defensible than the majority’s formalistic distinction between unilateral and bilateral promises. If one imagines the reserved powers doctrine as descending from a concern about local governments being bribed to take positions contrary to the public health, safety and morals,²⁰² outlawing considerations extraneous to the specific zoning action might be justified as a prophylactic rule. In the case of *Durand*, one could say that the concurring justices thought broader interests would be served by preventing the town from making their rezoning decision under the shadow of \$8 million. By way of analogy, while some health inspectors could very well continue to protect the public health vigilantly despite receiving a \$500 reward from restaurant owners, we simply do not trust people to behave properly when such inducements are offered.

²⁰⁰ *Durand*, 440 Mass. at 60. It should be noted that the court’s analysis here bleeds naturally into the kinds of questions explored in the exaction’s context.

²⁰¹ The majority’s position, incidentally, seemed to eschew any questioning of the legislative motives, finding in essence that the court could not properly discern them.

²⁰² I have intentionally omitted the fourth element of the standard police power formulation (“the general welfare”) for reasons that become apparent in the next paragraph.

Now is an appropriate time to question the analogy between zoning and health inspections. Some have asserted that the police power justification for zoning is really just an “ad hoc rationalization” and that “[l]and use regulations are quite different from traditional exercises of police power.”²⁰³ Indeed, thinking rationally about most zoning regulations, and especially those that limit residential densification, it is hard to conceive of any reasonable connection between these regulations and traditional ideas of public health, safety, or morals. Rather, they may only be couched within the final and extremely expansive element of the police power: the “general welfare.” The notion of the “general welfare,” however, seems incompatible with the kind of compartmentalized approach suggested by the concurring justices’ “extraneous consideration” rhetoric. Was it not better for the “general welfare” of Bellingham for it to have received \$8 million from the power plant owners rather than nothing at all? Likewise, in the case of incremental densification, is not the general welfare better served where the community captures land value appreciation as opposed to having the bulk of benefits flows only to a single property owner?

The recognition of the true underlying policy reasons diverging from traditional police power notions have led some commentators to suggest that zoning should be looked at through the lens of “property entitlements held by the community.”²⁰⁴ Fischel is a leading proponent of this conceptualization of land use regulation, and he and others have argued forcefully that prohibitions like the reserved powers doctrine “retard

²⁰³ Lee Anne Fennell, *Hard Bargains and Real Steals: Land Use Exactions Revisited*, 86 IOWA L. REV. 1, 26 (2000).

²⁰⁴ Fennell, *supra* note 203, at 26.

exchanges that would be mutually beneficial to the parties involved.”²⁰⁵ A clear example of how a more stringent interpretation of the reserved power’s doctrine can “retard” such exchanges can be seen in *Durand*, where the town’s people and the power plant operator both clearly preferred outcome achievable only through the \$8 million in “extraneous consideration.” While one could argue that there is a precautionary need for restrictions on bargaining where development might endanger the public health, this rationale does not seem transferable to effective bans on the use of auctions to promote the process of incremental densification.

Limitations on What Local Governments May Collect: The Exactions Jurisprudence

In addition to the problems posed by the jurisprudence on “Contract Zoning,” the idea of auctioning development rights must contend with the limitations imposed on the ability of local governments through the exactions jurisprudence. The twin pillars of this jurisprudence are the famous Supreme Court decisions of *Nolan v. California Coastal Commission* and *Dolan v. City of Tigard*.²⁰⁶ In the past decade, these decisions have been written about extensively and therefore the author will spare a detailed description of either. Together they have been interpreted as requiring that “when a municipality requires an exaction as a condition for a development permit, the condition must bear an ‘essential nexus’ to the reason for requiring the permit, and the condition must also be ‘roughly proportional’ to the impact of the development project.”²⁰⁷

²⁰⁵ William A. Fischel, *The Economics of Land Use Exactions: A Property Rights Approach*, 50 LAW AND CONTEMPORARY PROBLEMS 101, 104 (1987).

²⁰⁶ 483 U.S. 825 (1987); 512 U.S. 374 (1994).

²⁰⁷ Jane C. Needleman, Note, *Exactions: Exploring Exactly When Nollan and Dolan Should Be Triggered*, 28 CARDOZO L. REV. 1563, 1564 (2006)

Nolan and *Dolan* both dealt with physical dedications of land. Thus, the extent of their application to monetary exactions (e.g. impact fees) remains an open question.²⁰⁸ The Supreme Court has yet to weigh in on this matter but state courts have split on the issue. While some state courts have applied *Nolan* and *Dolan* to monetary exactions, others have suggested that it should not apply to monetary exactions.²⁰⁹ A frequently discussed opinion on this matter is *Ehrlich v. City of Culver City*.²¹⁰ In this case, the California Supreme Court advanced a distinction between discretionary and non-discretionary monetary exactions. With respect to monetary exactions imposed “neither generally nor ministerially,” the *Ehrlich* court held that *Nolan* and *Dolan* applied fully. On the other hand, with respect to “legislatively formulated development assessments,” the court found that *Nolan* and *Dolan* did not apply (at least fully). In *San Remo Hotel v. City and County of San Francisco*, the lesser scrutiny applied to “legislatively formulated development assessments” was flushed out as requiring that there be a “reasonable relationship between the fee and the deleterious impacts for mitigation of which the fee is collected.”²¹¹ Interestingly, in *San Remo Hotel* the court had the occasion to discuss how this lesser standard of scrutiny would apply to a hypothetical zoning sales scheme:

Plaintiffs' hypothetical city could only “put [its] zoning up for sale” in the manner imagined if the “prices” charged, and the intended use of the proceeds, bore a reasonable relationship to the impacts of the various

²⁰⁸ See, e.g., Ellickson and Bean, *supra* note 183, at 667; Nick Rosenberg, Comment, *Development Impact Fees: Is Limited Cost Internalization Actually Smart Growth?*, 30 B.C. ENVTL. AFF. L. REV. 641, 664 (2003) (stating that “[s]everal subsequent state cases and a number of scholars have questioned whether the heightened two-prong test articulated in *Nollan* and *Dolan* is applicable where the exaction at issue is a true impact fee—a monetary payment required under an ordinance passed by the legislative body.”).

²⁰⁹ Compare *Home Builders Ass'n of Dayton & the Miami Valley v. City of Beavercreek*, 729 N.E.2d 349, 356 (Ohio 2000), with *McCarthy v. City of Leawood*, 894 P.2d 836, 845 (Kan. 1995); *Krupp v. Breckenridge Sanitation Dist.*, 19 P.3d 687, 697 (Colo. 2001); *Homebuilders Ass'n of Metro. Portland v. Tualatin Hills Park & Recreation Dist.*, 62 P.3d 404, 411 (Or. Ct. App. 2003).

²¹⁰ *Ehrlich v. City of Culver City*, 12 Cal. 4th 854 (Cal. 1996).

²¹¹ *San Remo Hotel v. City and County of San Francisco*, 27 Cal. 4th 643, 657 (Cal. 2002).

development intensity levels on public resources and interests. While the relationship between means and ends need not be so close or so thoroughly established for legislatively imposed fees as for ad hoc fees subject to Ehrlich, the arbitrary and extortionate use of purported mitigation fees, even where legislatively mandated, will not pass constitutional muster.”²¹²

One should bear in mind that the above quote discussion was meant to pertain to the lesser standard of scrutiny rather than the more exacting review under *Nolan* and *Dolan*. Hence, because the densification auction proposed in Chapter 6 seeks to capture land value appreciation that far exceeds the identifiable “deleterious impacts” caused by densification, there seems to be little chance that this proposal would “pass constitutional muster” under either *Nolan* and *Dolan* or the more relaxed test possibly applied to some kinds of monetary exactions.

Turning now to the question of whether this result is justified, the most apparent concern underlying the exaction jurisprudence seems to be a concern about local governments using their power to regulate land use to extort money (or property) from private landowners. In *Nolan*, the Court endorsed this concern in insinuating that an exaction that failed to pass the “essential nexus” test it set forth would constitute “an out-and-out plan of extortion.”²¹³ Likewise, the court in *San Remo Hotel* spoke of the true zoning sale schemes as being “arbitrary and extortionate.”²¹⁴

This all begs the question, of course, whether or not the proposed densification rights auction is indeed “extortion.” In addressing this question, it seems useful to lay out the applicable dictionary definition of “extort,” which is “to obtain from an unwilling or

²¹² *San Remo Hotel v. City and County of San Francisco*, 27 Cal. 4th 643, 671 (Cal. 2002).

²¹³ *Nolan*, 483 U.S. at 837.

²¹⁴ *San Remo Hotel*, 41 P.3d at 106.

reluctant person by physical force, intimidation, or the abuse of legal or official authority.”²¹⁵ Considering first the prospective buyers of densification rights, there seems to be no colorable argument that they are being extorted. They are assumed to be willing and indeed eager participants in the process. They are free from any compulsion to participate and could easily ignore the entire process altogether if they so desired.

The homeowners present a more complex question. Roughly speaking, the argument that homeowners would be extorted asserts that they are being *forced* to repurchase densification rights that already rightfully belong to them. Thus, the best “extortion argument” against the densification auction centers on the impropriety of the actual severance of densification rights from land, not the actual process of the auction. One might be tempted at this point to initiate a discussion of the Taking Clause, as this “extortion argument” could easily double as an argument that local governments have “taken” the densification rights from the homeowners without just compensation. I will avoid this path, however, because ultimately I feel that its discussion would lead back to the same place as this one. Either way it is constructed, the concern about the severing development rights from land engages a debate that seems very fundamental to both Takings Clause jurisprudence and objections to selling zoning. This debate is essentially whether development rights should be viewed as privately- or collectively-owned. It has long been clear that “[t]he conventional view of property rights and land-use control in America is that the landowner owns the right to develop” and also that “[i]n a candid sale-of-development permission system, the underlying concepts are different.”²¹⁶

²¹⁵ MERRIAM-WEBSTER UNABRIDGED DICTIONARY ONLINE.

²¹⁶ See Glickfeld, *supra* note 178..

A full philosophical exposé of this issue is far beyond the scope of this paper. It may be noted that the argument that the local government is somehow “taking” or “extorting” homeowners by auctioning densification rights seems belied by the strong likelihood that these rights only exist because of the government’s intervening action. One might say that the government is intervening to help the homeowners capitalize on the development rights. Allegorically, one could liken this to digging a well to tap an underground aquifer. Another conceptual way of approaching this issue that suggests that one should allow densification auctions is derived from one of Fischel’s proposals regarding regulatory takings. Roughly speaking, Fischel thinks that compensation need only be offered to landowners when regulations “require[] a landowner to exceed prevailing social standards of behavior” but not when it simply requires them to conform to “normal behavior.”²¹⁷ According to Fischel, this formulation is based on a broader idea that landowners should only be compensated for regulations “if the landowner [has] a reasonable expectation that he would be able to use his land in a certain way but the community used its police powers to stop him.”²¹⁸ When applying these concepts to densification auctions, it certainly seems that under the status quo homeowners do *not* have any “reasonable expectation” of engaging in densification. Thus, it stands to reason that they do not need to be compensated. A final nail in the coffin may be added to the concerns that densification auctions might constitute “extortion” or “takings” by pointing out that under the proposed scheme homeowners actually do receive compensation.

²¹⁷ FISCHEL, *THE ECONOMICS OF ZONING LAWS*, *supra* note 179, at 161.

²¹⁸ FISCHEL, *THE ECONOMICS OF ZONING LAWS*, *supra* note 179, at 158 (incidentally, Fischel relates this rule to the “investment-backed expectations prong of the *Penn Central* regulatory takings test)

Majoritarian Problems and Selling Out the Collective Commons

Two final overall concerns with respect to “contract zoning” warrant discussion. This first concern is essentially that local governments might allow developers to impose extreme externalities on abutters in exchange for whatever goodies developers offer. This might be summarized as a concern about majoritarian decisionmaking. At the outset, it should be noted that there is no legal rule that directly prohibits this from happening. While the uniformity requirements and spot zoning doctrine discussed later in this chapter partially serve this functions, they do not go so far as to suggest that local governments must give some special or determinative weight to how a particular land use decision will effect abutters or particular neighborhoods. The densification auction, however, seems to avoid this problem to the extent funds derived from selling zoning are sent back to the affected neighborhoods. A problem might persist at the sub-neighborhood level when one considers special abutters, although they could get special compensation as well. Where the site of densification would not be determined until after the auction, however, no group of homeowners would have any special incentive to sell excess density because they could not be certain that it would not end up next door.

Another more nuanced objection to selling zoning comes in the form of an idea that selling zoning would encourage short-term thinking in land use decision-making. In dismissing the idea of selling zoning, Bradley Karkkainen has argued that:

Compensating individuals in cash for their willingness to sacrifice community resources may be utility-maximizing in the short run. In the long run it reinforces norms of individual gain at the expense of shared

community resources, which ultimately may be destructive of the sense of community that zoning aims to protect.²¹⁹

The basic concept is that people have a consumer surplus in their homes that is not easily monetized but is caught up in the “character” of their neighborhood. Zoning that alters this character may simultaneously raise property values while decreasing the consumer surplus and the above cited critic seems to see zoning as protecting this consumer surplus against an economic system that would fail to recognize it. This view seems to share much in common with arguments commonly advanced in the context of environmental law against cost-benefit analysis. While Karkkainen later proposes that zoning “should not attempt to freeze a neighborhood in time,” it is hard to see how he envisions this not happening given his later conclusion that the best way to decide what changes should be allowed in the neighborhood is to look to “what currently exists in the neighborhood.”²²⁰ The point that the value of “neighborhoods character” should be considered as a factor in land use regulation is well taken, but it seems that society has to balance this interest (just as it does in environmental protection) with other considerations, such as controlling sprawl or promoting consumer choice. Where neighborhoods are given some control over whether or not to “sell out” the “neighborhood common” (as they would in the densification auction scheme through setting the reservation price), it seems awfully paternalistic for someone like Karkkainen to restrict their ability to do so. Lastly, Karkkainen’s concern about being “utility-maximizing [only] in the short run” might more aptly apply to a program of strict neighborhood preservation as opposed to a program like the densification auction

²¹⁹ Bradley C. Karkkainen, *Zoning: A Reply To The Critics*, 10 J. LAND USE & ENVTL. L. 45, 77 (1994).

²²⁰ Karkkainen, *supra* note 219, at 79.

program proposed in Chapter 6 that seeks to balance the interests of current homeowners with the interests of a wider universe of potential homeowners (i.e. those that would choose to live in housing providing through incremental densification).

RULES REQUIRING UNIFORM TREATMENT

A complex body of law imposes requirements for some degree of uniformity in the treatment of similarly situated properties. Because incremental densification entails gradual increases of density within existing residential neighborhoods and the density is spread throughout the neighborhood, legal questions could arise under these various uniformity requirements. The core of this body of law seems to be the “spot zoning” doctrine and thus this is made the focus of this chapter. After exploring the convoluted doctrinal framework, the question of the various rationales underlying the spot zoning doctrine relate to incremental densification is engaged.

Spot Zoning Doctrine

The spot zoning doctrine is commonly invoked yet not fully understood.²²¹ There is a lack of clarity about the legal source of ‘spot zoning’ challenges, with the major candidates being provisions in state zoning enabling acts that require zoning to be “uniform,” and the due process and equal protection clauses of both state and federal constitutions. There is a largely inconsequential debate about whether ‘spot zoning’ is a conclusion of law or simply a ‘red flag’ for heightened scrutiny.²²² For simplicity sake, I

²²¹ MANDELKER, *supra* note 173, at § 6.28 (“Probably no term in zoning jurisprudence is used more frequently by the courts and is less understood than ‘spot’ zoning.”)

²²² In jurisdictions where “spot zoning” is seen as a trigger for heightened scrutiny, court must then make a determination as to whether it constitutes “illegal spot zoning.” Jurisdictions that see “spot zoning” as a conclusion of law, essentially conflate these two steps into one. It does not seem to make much of in terms of overall analysis or outcomes how one parses a court’s reasoning and thus this distinction seems

have chosen to equate “illegal spot zoning” and “spot zoning”; thus, all references to “spot zoning” imply an illegal action on the part of the local government.

“Spot zoning” is broadly understood to be “the process of singling out a small parcel of land for a use classification different and inconsistent with the surrounding area, for the benefit of the owner of such property and to the detriment of the rights of other property owners.”²²³ To understand how the spot zoning doctrine might play out with respect to incremental densification it may be useful to refer to a specific case in which the doctrine was applied to a rezoning that would have (if upheld) allowed a property owner to basically engage in incremental densification.

Calabrese v. Board of Appeals

This Pennsylvania case concerned the legality of a city council decision to upzone a single lot in a single-family area to allow the property owner to construct townhouses.²²⁴ The lot measured 82 x 155 (approximately 12,000 square feet).²²⁵ The proposal did not initially generate any community opposition, but some neighbors came forward after it was approved to challenge it. An appeals court affirmed the trial court’s finding that this constituted spot zoning. In doing so, the appeals court seem to think this was a quite an easy case flowing naturally from its finding that:

It is well-settled that an ordinance cannot create an ‘island’ of more or less restricted use within a district zoned for a different use or uses, where there are no differentiating relevant factors between the ‘island’ and the district. Thus, singling out of one lot or a small area for different treatment from that accorded to similar surrounding land indistinguishable

irrelevant. For simplicity sake, I have chose to refer equate “illegal spot zoning” with “spot zoning” and thus references to “spot zoning” imply an illegal action on the part of the local government.

²²³ MANDELKER, *supra* note 173, at § 6.28..

²²⁴ *Calabrese v. Board of Zoning Appeals*, 291 A.2d 326 (Pa. 1972).

²²⁵ *Calabrese*, 291 A.2d at 327.

from it in character, for the economic benefit of the owner of that lot or to his economic detriment, is invalid 'spot' zoning.²²⁶

Applying that understanding of the law, it is perhaps not surprising that the appeals court found this to be "a classic instance of spot zoning." Despite the ease by which the court made its decision, it may be useful to inquire deeper into the specific facts the court looked to in making its decision as certain aspects of this mirror what one might expect in a typical case of incremental densification. In arriving at its decision, the appeals court relied upon the following ten factual findings made by trial court:

1. That all of the other property in the immediate area is zoned R-1, low density residential and consists of single family dwellings.
2. That the property in question, consisting of but a single lot 82 ft. by 155.77 ft. constitutes but a small part of the zoned area.
3. That the ordinance changing a lot in question to R-3, high density residential, would result in a detriment to the neighborhood as now constituted.
4. That there is nothing to distinguish this lot from the other property in the area.
5. That there is no evidence of need for multiple family dwellings in the area.
6. The record discloses that the property has been and can in the future be used for a one-family residence.
7. The record fails to disclose any basis for special or different treatment from that accorded the similar surrounding land.
8. That the ordinance has no relation to the public health, safety, morals or general welfare.
9. That the proposed rezoning would be solely for the economic benefit of the lot owners, David Schneider and Janice A. Schneider.
10. That the amendment was not within the spirit and intent of the 'Erie City Plan for the Future.

At the outset, it should be noted that at least half of the above cited facts (#1, 2, 4, 6, and 7) are likely to exist in just about any single-family neighborhood where

²²⁶ *Calabrese*, 291 A.2d at 457 (citing E. MCQUILLIN, MUNICIPAL CORPORATIONS § 25.83 (3d ed. 1965)).

incremental densification is being considered. Most of the remaining factors (#3, 5, 8, and 10) might be said to constitute legislative policy judgments on which courts are ordinarily quite deferential. While it is not clear why the court chose not to defer to the implied judgment of the legislature on these issues, this does expose an important issue with respect to the application of the spot zoning doctrine. In fact, my reading of the case law suggests that the general disposition of a particular judge towards the integrity of local land use processes can be an important factor in determining whether or not a given zoning decision is invalidated as spot zoning. Returning to the ten articulated factual findings in *Calabrese*, it seems arguments could be constructed to counter all four of the policy-based factors cited by the court if they were advanced with respect to the incremental densification. For example, a carefully considered plan for incremental densification that included specific design standards, pacing and dispersion would seem to mitigate the conclusion that it would be “detriment to the neighborhood as now constituted.” Likewise, one can certainly imagine more judicial sympathy for the claim that there is a need for more housing today in a place like San Francisco, Houston or Boston than there was in 1970s Erie, Pennsylvania. Lastly, it might be noted that the ability to capture land value increases could be critically important to rebutting the ninth “fact” articulated by the *Calabrese* court (“[t]hat the proposed rezoning would be solely for the economic benefit of the lot owners”).

Factors Considered in Making a Spot Zoning Determination

Among the specific *factors* courts look to in determining whether a particular rezoning constitutes spot zoning are:

1. The size of the area rezoned
2. The character of the surrounding neighborhood
3. Whether the rezoning primarily benefits a single owner²²⁷ or the general public
4. Whether there is anything special about the parcel that justifies differential treatment from other parcels
5. Any harm the rezoning would inflict on other landowners
6. Conformity to a comprehensive plan or the surrounding land uses
7. Whether there have been any changes in the surrounding area that justify a change in zoning

While these criteria are “flexible and provide guidelines rather than rigid rules,”²²⁸ examining how the proposed densification auction would fare under each may be helpful in terms of understanding how this proposal might fare with respect to a spot zoning challenge.

The size of the area rezoned: While the size of the area rezoned is not “determinative,” it does seem to carry significant weight. It bears mentioning that I did not uncover a single reported case that upheld a rezoning that applied only to an individual lot within a true single-family neighborhood. The closest an affirmative ruling came to this context was a Louisiana decision upholding the rezoning of a 1.1 acre parcel wholly contained within a single-family zone to would allow for multi-family building.²²⁹ A key factor in this decision, however, appeared to be the presence of several nonconforming uses in the vicinity that made the characterization of this area as a true single-family neighborhood somewhat dubious. Even here, however, the court seemed reluctant in approving this rezoning, noting that “[r]ezoning on a piecemeal basis is highly suspect.” On the other side of the ledger, there are cases like *Calabrese*, which it

²²⁷ Greater Yellowstone Coalition, Inc. v. Board of County Com'rs of Gallatin County, 305 Mont. 232, 25 P.3d 168 (Mont. 2001).

²²⁸ MANDELKER, *supra* note 173, at § 6.29.

²²⁹ Decuir v. Marksville, 426 So. 2d 766 (La. Ct. App. 1983).

may be remembered invalidated a rezoning applied to a single 12,000 square foot lot in the midst of a single-family neighborhood.²³⁰

The character of the surrounding neighborhood: As judges seem most concerned with protecting the character of single-family neighborhoods, this factor also seems facially problematic. On the other hand, some judges have displayed sympathy for the argument that modest increases in residential densities do not truly change the character of a neighborhood.²³¹

Whether the rezoning primarily benefits a single owner or the general public: The impact of this factor may depend largely on whether or not the local government is able to capture and distribute the land value appreciation attributable to incremental densification. If the above-described prohibitions against “selling zoning” are applied, rezonings incident to densification might seem to be primarily for the benefit of individual property owners rather than the general public.

Whether there is anything special about the parcel that justifies differential treatment from other parcels: In *Calabrese*, the court held that spot zoning existed “[i]n the absence of evidence of either a necessity for the rezoning or of relevant differentiating facts between the 'island' and the land immediately adjacent thereto.” This would likely remain a troubling factor for schemes of incremental densification since most single-family neighborhoods built in the last century are relatively homogenous in terms of lot sizes and characteristic. Similarly, the Iowa Supreme Court has stated that “[t]he factor

²³⁰ *Calabrese*, 291 A.2d 326.

²³¹ *Fallin v. Knox County Bd. of Comm'rs*, 656 S.W.2d 338, 343 (Tenn. 1983).

of primary importance is whether the rezoned tract has a peculiar adaptability to the new classification as compared to the surrounding property.”²³²

Any harm the rezoning would inflict on other landowners: One would hope that harm could be kept to a minimum. To the extent compensation is available for abutters, this concern could be further reduced. Extreme and demonstrable devaluations would probably not be tolerated but there is case law suggesting that mere speculation about the harmful effects of density should not be a deciding factor.²³³

Conformity to a comprehensive plan or the surrounding land uses: Having a comprehensive plan (if there is one) amended to contain and endorse incremental densification would certainly be helpful.

Whether there have been any changes in the surrounding area that justify a change in zoning: In some states this factor is looked at separately in the form of a separate rule known as the change and mistake doctrine (discussed briefly below). In the case of most single-family neighborhoods, the static nature of land uses in these areas would seem to make it hard to find a justifiable change in the surrounding area. As with the previous factor, however, it may be possible to appeal to something like regional housing needs.

²³² Little v. Winborn, 518 N.W.2d 384, 388 (Iowa 1994) (emphasis added); but see *Hermann v. City of Des Moines* at 895 (court set forth a basic rule that “one *property owner* should not be favored over his neighbors in the absence of a good reason therefore”) (emphasis added)

²³³ See *Rodgers v. Tarrytown*, 302 N.Y. 115, 126 (N.Y. 1951) (“Whether it is generally desirable that garden apartments be freely mingled among private residences under all circumstances, may be arguable. In view, however, of Tarrytown’s changing scene and the other substantial reasons for the board’s decision, we cannot say that its action was arbitrary or illegal. While hardships may be imposed on this or that owner, “cardinal is the principle that what is best for the body politic in the long run must prevail over the interests of particular individuals.”)

It must be remembered that the previously discussed spot zoning criteria are “flexible and provide guidelines rather than rigid rules.”²³⁴ While the rules generally seem to tilt against allowing incremental densification, it may be hard to predict how a specific judge might rule. Because of the uncertainty it engenders, it seems that this unpredictability may be problem in and of itself.

Cases dealing with how broader social policies may justify otherwise invalid spot zoning

One key difference between the rezoning at issue in *Calabrese* and hypothetical rezonings for the purpose of accomplishing incremental densification is that the latter could be justified in terms of some broader social policy (e.g. one of the arguments for densification discussed in Chapter One). Interpreting the importance of this distinction is aided by analysis of some cases that dealt with the impact of regional housing needs on the spot zoning analysis.

The contrasting approaches taken in these cases may be best illuminated by a discussion of a single case in which two courts arrived at opposite conclusions. *Weaver v. Ham*, concerned a San Antonio City ordinance that authorized the rezoning of a 45,000 square foot tract from a single-residence zone to an apartment house zone.²³⁵ The trial courts opinion is not available but we do have the contrasting opinions of the intermediate appellate court and the Texas Supreme Court.

The intermediate court’s opinion, which reversed the trial court, held that there was sufficient evidence in the record that the rezoning would further the public welfare to

²³⁴ MANDELKER, *supra* note 173, at § 6.29.

²³⁵ *Ham v. Weaver*, 227 S.W.2d 286, 288 (Tex. App. 1949).

invoke the “strong presumption” in favor of legislative enactments (i.e. substantial deference).²³⁶ Chief among the evidence the court looked to in determining that the rezoning to allow for apartment house uses would further the public welfare was the fact that the population of San Antonio had doubled over the preceding ten years (1938-1948).²³⁷ From the intermediate appellate court’s perspective, this “tend[ed] to justify the inference that there must be an increased demand in the city for housing.”²³⁸ The court noted that there were other suitable locations for apartment housing, but also that this particular parcel might be more suitable for apartment housing than single residences.²³⁹ In the end, however, this decision seem to rest its weight on legislative deference with the court stating that upholding the trial courts decision would be “an infringement on the legislative power and in excess of the power conferred upon the judicial department by our Constitution.”²⁴⁰

The Texas Supreme Court overturned this decision and reinstated the trial courts decision finding that spot zoning had occurred. On deference, the court found (as others have) that the rezoning of a small parcel did not deserve the same deference given to other legislative acts. On the issue of being in the interest of the public welfare, this court focused narrowly on the immediate neighborhood stating that there were no “changed conditions to justify” a rezoning. Lastly, the Texas Supreme Court put a lot of emphasis on the need to protect the reliance interests of neighbors who had built single-family

²³⁶ Ham v. Weaver, 227 S.W.2d at 293.

²³⁷ Ham v. Weaver, 227 S.W.2d at 293.

²³⁸ Ham v. Weaver, 227 S.W.2d at 293.

²³⁹ Ham v. Weaver, 227 S.W.2d at 291.

²⁴⁰ Ham v. Weaver, 227 S.W.2d at 293.

homes in the area, quoting from Justice Sutherland's infamous passage in *Euclid* where he describes apartment buildings as "mere parasites."²⁴¹

Several other courts *have* accepted the reasoning that a regional "housing shortage" justifies what might otherwise be considered spot zoning. The District of Columbia, for example, cited a "housing shortage" in summarily rejecting a spot zoning challenge to the rezoning of a 57,000 square foot parcel to allow for townhouse development, stating that "zoning decisions which allow the erection of apartments in districts previously classified for construction of detached residential dwellings only are not disturbed by appellate courts when a need for housing exists and injury to the land is minimal."²⁴² Likewise, in *Decuir v. Town of Marksville*, a Louisiana court denied a spot zoning challenge to the rezoning of a property in a single-family zone to allow for multi-family housing citing a need to apartments in a town where all the land zoned for apartments was inaccessible for a variety of reasons including "[being part of a] proposed shopping center, unavailable for sale either due to a multitude of heirs or lack of reasonable pricing, lack of sewerage, water, drainage or access."²⁴³ In contrast to the D.C. opinion, however, the court in *Decuir* seemed reluctant in reaching its decision, noting that "[r]ezoning on a piecemeal basis is highly suspect."

On the other hand, other courts have not been so willing to accept housing shortage arguments. In *Hermann v. City of Des Moines*, the Iowa Supreme Court invalidated a rezoning that had been justified partly on the basis of enrollment growth at nearby Drake University. In response to the purported need for more multi-family

²⁴¹ *Weaver v. Ham*, 232 S.W.2d 704, 709 (Tex. 1950).

²⁴² *Lee v. District of Columbia Zoning Commission* 411 A.2d 635, 642 (1980).

²⁴³ *Decuir v. Marksville*, 426 So. 2d 766, 768 (La. Ct. App. 1983).

housing, the court stated essentially that while the growth of the university could justify rezoning the entire district it could not serve as the basis for discrimination between different properties.²⁴⁴ The specific rezoning, it might noted, would have allowed a sorority house use on a street *zoned* exclusively for single- or two-family use but *occupied* primarily by legally nonconforming uses used as fraternity houses and other multi-family structures.²⁴⁵

Thus, there seem to be two basic approaches to the question of how broader social needs should influence the determination of whether a rezoning constitutes spot zoning. One approach is deferential to the legislature's decision regarding housing needs and its decision to remedy that need through what might otherwise constitute piecemeal zoning changes. The other approach focuses on the specific neighborhood context and how allowing piecemeal changes would affect that area. Harkening back to the ten factors cited by the court in *Calabrese*, the approach a court takes to the issue of broader social needs could prove determinative as to whether incremental densification violates the spot zoning doctrine. As five of the ten factors already seem weighted heavily against incremental densification as they constitute the factual realities of most single-family neighborhoods, convincing a court to take account of the broader social goals of a scheme for incremental densification seems critical.

²⁴⁴ *Hermann v. City of Des Moines*, 97 N.W.2d 893, 897 (1959). There was a vigorous dissent by a justice who was not only a big fan of sorority girls ("To trade a large family home, which perhaps housed the parents and several children of varying ages, for a house with 8 to 10 studios, and no doubt high type, sorority college girls, is an asset to the property on any street") but also of judicial deference to legislative decisions under the existing doctrine, despite his personal "doubt [about] the wisdom of spot zoning."

²⁴⁵ *Hermann*, 97 N.W.2d at 893.

Floating zones

A “floating zone” is essentially a zoning classification that exists on paper before it is assigned a specific geography. Floating zones are seen as a reasonable accommodation of the need for flexibility in zoning.²⁴⁶ While the spot zoning doctrine does not formally have any special application to floating zones, some unique considerations arise because of the procedure it utilizes. Understanding how the use of these procedures impacts the spot zoning inquiry is helpful because the same procedure, one might argue, is utilized in incremental densification. At the outset, however, it should be known that “[f]loating zones are usually limited to major nonresidential uses, such as multifamily, industrial, and commercial development”²⁴⁷ and that I am aware of no precedent for using floating zones for small-scale residential development.

A good example of floating zones in the residential context comes from an early case out of Connecticut, *Rodgers v. Village of Tarrytown*. In this case, a village utilized a floating zone after it perceived a need for garden apartments but was not sure where this development should take place. After adopting an ordinance setting out dimensional and design requirements but no specific geography, the village waited for property owners to submit application for rezoning under the garden apartment ordinance, which the planning board would then evaluate. In addressing the issue of spot zoning, the court thought it significant that the ordinance “applied to the entire territory of the village and

²⁴⁶ *Sheridan v. Planning Bd. of Stamford*, 159 Conn. 1, 21 (Conn. 1969) (“This legislative function meets the need for flexibility in modern zoning ordinances since the exact location of the new zone is left for future determination, as the demand develops, and applications are granted which meet all conditions specified by the board.”)

²⁴⁷ MANDELKER, *supra* note 173, at § 6.61.

accorded each and every owner of ten or more acres identical rights and privileges.”²⁴⁸ In the eyes of this court, this broad application undertaken without reference to any specific person belied any conclusion that the zoning was primarily for the benefit of an individual property owner as opposed to the community at large. A slightly different rationale was integral to upholding the use of a floating zone to allow a weapons manufacturing facility in a mostly rural residential area in *Huff v. Board of Zoning Appeals of Baltimore County*.²⁴⁹ In this case, the court found it appropriate to defer to a legislative determination that “it was desirable and in the public interest that there be scattered about the undeveloped areas of the County tracts of five acres or more on which very light and inoffensive manufacturing operations would be permitted.”²⁵⁰ What is noteworthy is that the court deferred not only to the legislative determination that these uses would be compatible with the surrounding environs but also the determination that these uses should “be scattered about the undeveloped areas of the County.” Both of these cases seem to have obvious implications for the analysis of how incremental densification might fare under the spot zoning doctrine.

Change or mistake doctrine

In some states, the spot zoning doctrine’s bias towards uniformity is supplemented by a “change or mistake doctrine.” This rule was adopted first by the Maryland courts and then codified by statute in 1970.²⁵¹ Its impact is coherently summarized by Daniel Mandelker:

²⁴⁸ *Rodgers v. Tarrytown*, 302 N.Y. 115, 124 (N.Y. 1951)

²⁴⁹ *Huff v. Board of Zoning Appeals*, 214 Md. 48 (Md. 1957).

²⁵⁰ *Huff*, 214 Md. at 59.

²⁵¹ *Ellickson and Bean*, *supra* note 183, at 317; MD. ANN. CODE art. 66n, § 4.05.

This rule stabilizes existing zoning by making it more difficult to secure piecemeal changes. Although the change-mistake rule does not mean that existing zoning classifications are immutable, it clearly gives objecting neighbors much greater leverage when they object to piecemeal amendments to a zoning ordinance.²⁵²

The Maryland Statute limits the power to rezone to situations where there has been either a “substantial change in the character of the neighborhood where the property is located” or a “mistake in the existing zoning classification.” This paper is only concerned with the “substantial change” part of the equation and specifically how the courts have delineated the relevant “neighborhood.”²⁵³ In *Rockville v. Stone*, a neighbor challenging a rezoning sought to define “neighborhood” as the two blocks immediately surrounding the property subject to the rezoning where there had been little changes. In defining the rezoning, the city argued that the “neighborhood” was a larger area that had experienced residential growth and other changes that constituted a change in the character of the neighborhood. The court’s decision rested solely of deference to the city’s judgment. The Maryland courts have, however, imposed some limits on how broadly a local government may choose to define a ‘neighborhood.’ For example, in *Pattey v. Board of County Commissioners*, a county tried to argue that the entire county was essentially a “neighborhood.” The court said it was doubtful that changes taking place two miles away would qualify as “in the neighborhood” and held that “the neighborhood in any area must be an area which reasonably constitutes the immediate environs of the subject property.”²⁵⁴

²⁵² MANDELKER, *supra* note 173 § 6.31.

²⁵³ *Rockville v. Stone*, 271 Md. 655, 661 (Md. 1974)

²⁵⁴ *Pattey v. Board of County Comm'rs*, 271 Md. 352, 363 (Md. 1974) (emphasis in original).

A special place for single-family residential

Zoning has long protected the homogeneity of single-family neighborhoods.

Substantial change to land use patterns in these places seem rare, as if they are frozen in time. Jonathan Levine recognizes this trend stating that:

The presumption is that once a neighborhood is developed, its form is set, and future transformations are largely precluded. This view, which seems true enough under the current land-use regime, is a major break with centuries of urban history, during which cities grew through both territorial expansion and densifying redevelopment. But with current land-use regulations constraining this manner of growth, the capacity of already-developed areas to respond to economic changes through densification is severely limited.²⁵⁵

While Levine is correct in his analysis of how change seems precluded in single-family neighborhoods, he does not address why a similar static condition does not necessarily befall urban areas or industrial or commercial zones. If “future transformation” were universally precluded, there would be no Soho, Pearl District, or Santana Row. The answer may lie in how legal rules such as the spot zoning doctrine operate differently in areas of diverse uses and densities as opposed to areas of homogenous use and density. Where diversity exists in urban areas it is much easier to argue for a change in treatment that will only affect a small area on the grounds that either that specific area is unique or that the new treatment roughly matches what is already there. By way of contrast, grounds that a parcel is unique or that a proposed change in use matches some nearby use seems much harder in homogenous single-family neighborhoods. This situation seems to burden homogenous zones with an unattractive choice. Either these neighborhoods remain “as is” indefinitely or the floodgates of change must be opened.

²⁵⁵ LEVINE, *supra* note 35, at 79.

A functional approach to interpreting the spot zoning doctrine

While the preceding discussion of the spot zoning doctrine exposes a number of important issues that would be instrumental in determining whether or not a scheme of incremental densification constitutes spot zoning, a precise understanding of how the doctrine would actually be applied seems elusive. The decision in *Calabrese* holding that the rezoning of a single parcel within an existing single-family neighborhood constituted “a classic instance of spot zoning” seems to imply a high probability that incremental densification would be susceptible to spot zoning attacks. On the other hand, the line of cases finding that a regional housing partly justifies some piecemeal changes seems helpful but one cannot tell how helpful. The issue of boundaries—as exposed the Texas and Iowa Supreme Court cases as well as the Maryland Change or Mistake Doctrine—also seems important but one is not sure which way it will cut. In sum, the “classic” understanding of spot zoning would seem to invalidate incremental densification, but there are countervailing interests that could possibly justify this piecemeal approach.

Another way of approaching the spot zoning doctrine is offered by law professor Osborne Reynolds, Jr., who asserts that the doctrine is animated by three separate and distinct concerns.²⁵⁶ According to Reynolds, these concerns are (1) that spot zoning decisions exceed a local government’s police power because they do not bear any substantial relationship to the public health, safety, welfare, morals, or general welfare; (2) that spot zoning is the antithesis of the ideal of comprehensive planning enshrined in state zoning enabling acts; and (3) that spot zoning represents unequal treatment between

²⁵⁶ Osborne M. Reynolds, Jr., “Spot Zoning”—A Spot That Could Be Removed From the Law, 48 WASH. U. J. URB. & CONTEMP. L. 117 (1995).

citizens, impermissibly favoring and enriching one citizen, often at the expense of another.

Examining the densification auction idea on these bases, it seems that none of these concerns justifies invalidation. First, with respect to concern of exceeding the government's police power, one might refer to any of the arguments for densification advanced in Chapter 2 for an understanding of why incremental densification is not without relation to the "general welfare."

Second, with respect to the argument of being the antithesis of comprehensive planning, there is no reason to think that a well-considered scheme of incremental densification could not comport with the ideal of comprehensive planning. This ideal has evolved substantially since *Euclid* and judges have readily accepted various flexible zoning schemes--such as floating zones and planned unit development--that would seem to violate a strict interpretation of the spot zoning doctrine. Moreover, the best thinking in planning no longer endorses rigid uniformity but rather seems against it.

Lastly, where land value increases are captured and pooled for the broader neighborhood's benefit (as they are under the auction scheme), there seems to be no basis for concluding that it favors or enriches any one citizen. Conversely, the program is conceived of one to combat these precise ills, which would seem to naturally arise under the more traditional means of allocating densification rights. It should be clear by this point how closely connected the question of whether local governments may "sell" zoning is to the question of whether uniformity of treatment should be required in the context of incremental densification.

Chapter 8. Conclusion

One could say that the core challenge posed in this paper is how to balance an interest in preserving what the current system does well with an interest in reforming the current system to remedy its problems. More specifically, while the current system of land use regulation seems to do a very good job of protecting property owners from unforeseen and damaging changes in surrounding land uses, it does a very poor job of allowing our cities to evolve and adapt to a changing and growing population. In thinking about how to manage this tension, it seems imperative that regulatory systems (and the legal rules that constrain them) be molded to fit the variable dynamics of context. Thus, while I propose that land value increases incident to incremental densification should be collectively captured and distributed, I am not sure this would be a good idea in other contexts, such as urban development or greenfield development.

While the basic idea of pacing change or capturing land value is not new, I believe this paper approaches these concepts from a different perspective. Whereas the idea of pacing change has been implemented in various growth management schemes,²⁵⁷ the concept has not seemed to gather much momentum in the context of infill or redevelopment. Instead, the prevailing mindset with respect to the retrofitting of the urban environment seems to be “get in and get out.” With respect to the idea of capturing land value increases, I might position the motive underlying the proposal for densification auctions as nearly opposite of the motive underlying traditional proposals for land value recapture. Traditional proponents of land value recapture have justified

²⁵⁷ See, e.g., *Construction Industry Association v. City of Petaluma*, 522 F.2d 897 (9th Cir. 1975).

their proposals partly on the idea that landowners do not deserve to reap the benefits of land value increases.²⁵⁸ In contrast, I think of my proposal as being about empowering homeowners to be more like traditional landowners in giving them a way to actually profit from the land. In other words, I am not seeking to abolish the class of the land profiteer but rather to broaden the base of this class to include the typical homeowner who under the current system seems to be constrained by regulation and collective action problems from realizing the full benefits of land ownership.

In concluding this paper, I would like to reflect briefly about what the next steps might be in terms of implementing a system of densification auctions. I should say that while my analysis in Chapter 7 leads me to the conclusion that the black letter law basically precludes densification auctions, I do not find it inconceivable that doctrine could be reinterpreted to allow for them where the case would be argued by a talented team of lawyers to a sympathetic judiciary. The bigger problem might be finding a test case. This seems problematic for two reasons. First, there is the reluctance of local governments to take actions for which they have questionable legal authority.²⁵⁹ Second, there is a structural problem owing to the value of densification rights being highly

²⁵⁸ The other primary argument rests on the theoretical finding that a tax on land rent is the most efficient tax possible. See, e.g., Dean J. Misczynski, "Efficiency and Equity," WINDFALLS FOR WIPEOUTS 142, 165 (1978) (quoting Henry George in arguing that one should tax away all economic "rent": "If the land belongs to the people, why continue to permit landowners to take the rent, or compensate them in any manner for the loss of rent? Consider what rent is. It does not arise spontaneously from land; *it is due to nothing that the landowners have done. It represents a value create by the whole community.*") (emphasis added).

²⁵⁹ See, e.g., David J. Barron and Gerald E. Frug, *Defensive Localism: A View of the Field From the Field*, 21 J. L. & POLITICS 261, 274 (2005) ("This excessive cautiousness stemmed in part from a fear of litigation, which might be explained by the lack of professional legal capacity in some smaller towns. Many of these communities rely on outside counsel, but are hesitant to actually call upon them for fear of running up large bills.").

dependent upon legal certainty in their enforceability. Where there is a question about the legitimacy of the densification auction (as there would be at first), one would reasonably expect fewer participants and lower bids for the rights. This in turn would reduce the viability of the system itself because the incentives to actually embrace this policy (i.e. the payouts from the auctions) would be severely diminished. Thus, it seems a 'test case' might require a very enterprising and self-sacrificing local government. Furthermore, one might need fifty such test cases because these cases would implicate state law. Pondering this point, I am heartened somewhat by comments I have received from some who think Massachusetts communities looking for an alternative to Chapter 40B might be interested in this proposal. One might also consider the possibility of having a special statute crafted at the state level to legitimize this process. This latter possibility, however, is made less attractive by the implication of federal constitutional issues in the context of the reserved powers doctrine and exactions jurisprudence.

In sum, the legal limitations restricting the ability of local governments to craft creative solutions to the issue of densification in existing single-family neighborhoods seem both consequential and unfortunate. There is no evidence of a conscious decision to manufacture a system of land use regulation so impervious to evolution and such a system is not justified. These seem, however, to be the unintended consequences of a system developed and bounded by judicial decisions not always informed or concerned with the finer points of how cities must grow and evolve.

Bibliography

Books

- AFFORDABILITY AND CHOICE TODAY DEMONSTRATION PROJECT, CASE STUDY: SMALL-LOT SINGLE FAMILY INFILL HOUSING IN THE CITY OF VICTORIA (1997)
- CAMPOLI, JULIE AND ALEX S. MACLEAN, VISUALIZING DENSITY (2007)
- DiPASQUALE, DENISE AND WILLIAM C. WHEATON, URBAN ECONOMICS AND REAL ESTATE MARKETS (1996)
- ELICKSON, ROBERT AND VICKI BEAN, LAND USE CONTROLS: CASES AND MATERIALS (3d ed. 2005)
- FISCHEL, WILLIAM A., THE ECONOMICS OF ZONING LAWS: A PROPERTY RIGHTS APPROACH TO AMERICAN LAND USE CONTROLS (1986)
- _____ THE HOMEVOTER HYPOTHESIS (2001)
- Glickfield, Madelyn, "Sale of Development Permission: Zoning on the Auction Block," WINDFALLS FOR WIPEOUTS 376 (1978)
- LEVINE, JONATHAN, ZONED OUT: REGULATION, MARKETS, AND CHOICES IN TRANSPORTATION AND METROPOLITAN LAND USE (2006)
- LUCY, WILLIAM H. AND DAVID L. PHILLIPS, CONFRONTING SUBURBAN DECLINE: STRATEGIC PLANNING FOR METROPOLITAN RENEWAL 198 (2000)
- MANDELKER, DANIEL R., LAND USE LAW (2003)
- Dean J. Misczynski, "Efficiency and Equity," WINDFALLS FOR WIPEOUTS 142 (1978)
- Jon Shure, *Forward* to HENRY A. COLEMAN, FISCAL STRESS: IT'S NOT JUST A BIG CITY PROBLEM (2002)

Articles

- Barron, David J. and Gerald E. Frug, *Defensive Localism: A View of the Field From the Field*, 21 J. L. & POLITICS 261, 274 (2005)

- Evenson, Bengte and William C Wheaton, *Local Variation in Land Use Regulations*, BROOKINGS-WHARTON PAPERS ON URBAN AFFAIRS 221, 224 (2003)
- Farris, J. Terrence, *The Barriers to Using Urban Infill Development to Achieve Smart Growth*, 12 HOUSING POLICY DEBATE 1, 26 (2001)
- Fennell, Lee Anne, *Hard Bargains and Real Steals: Land Use Exactions Revisited*, 86 IOWA L. REV. 1, 26 (2000)
- Fischel, William A., *Equity and Efficiency Aspects of Zoning Reform*, 27 PUB. POL'Y 301, 327 (1979)
- _____*The Economics of Land Use Exactions: A Property Rights Approach*, 50 LAW AND CONTEMPORARY PROBLEMS 101, 104 (1987)
- _____*Voting, Risk Aversion, and the NIMBY Syndrome: A Comment On Robert Nelson's "Privatizing The Neighborhood,"* 7 GEO. MASON L. REV. 881, 891-892 (1999)
- Fisher, Lynn, *Chapter 40B Permitting and Litigation: A Report by the Housing Affordability Initiative* 1 (2007).
- Fulton, William, *Comment on J. Terrence Farris's "The Barriers to Using Urban Infill Development to Achieve Smart Growth"*, 12 HOUSING POLICY DEBATE 41 (2001)
- Glaeser, Edward L. and Joseph Gyourko, *The Impact of Building Restrictions on Housing Affordability*, 9 ECONOMIC POLICY REVIEW 19, 35 (2003)
- Green, Shelby D., *Development Agreements: Bargained-For Zoning That Is Neither Illegal Contract Nor Conditional Zoning*, 33 CAP. U.L. REV. 383, 432 (2004)
- Karkkainen, Bradley C., *Zoning: A Reply To The Critics*, 10 J. LAND USE & ENVTL. L. 45, 77 (1994)
- Kapur, Teddy M., *Land Use Regulation in Houston Contradicts the City's Free Market Reputation*, 34 ENVIRONMENTAL LAW REPORTER 10045 (2004)
- Kremzner, Mark T., *Managing Urban Land In China: The Emerging Legal Framework And Its Role In Development*, 7 PAC. RIM L. & POL'Y 611 (1998).

- Needleman, Jane C., Note, *Exactions: Exploring Exactly When Nollan and Dolan Should Be Triggered*, 28 CARDOZO L. REV. 1563, 1564 (2006)
- Pierce, Kate, *One Man's Crazy Dream: Despite the Naysayers, One Family Turned 325 Neglected Acres Into a Haven For Families and Texas Tech Students*, 30 UNITS 34 (2006)
- Reynolds, Jr., Osborne M., "*Spot Zoning*"--*A Spot That Could Be Removed From the Law*, 48 WASH. U. J. URB. & CONTEMP. L. 117 (1995)
- Rosenberg, Nick, Comment, *Development Impact Fees: Is Limited Cost Internalization Actually Smart Growth?*, 30 B.C. ENVTL. AFF. L. REV. 641, 664 (2003)
- Rosenthal, Stuart S., *Residential Buildings and the Cost of Construction: New Evidence on the Efficiency of the Housing Market*, 81 The Review of Economics and Statistics 288 (2003)
- Ryan, Erin, Student Article, *Zoning, Taking, and Dealing: The Problems and Promise of Bargaining in Land Use Planning Conflicts*, 7 HARV. NEGOTIATION L. REV. 337, 348 (2002)
- Szold, Terry S., *Mansionization and Its Discontents*, 71 JOURNAL OF THE AMERICAN PLANNING ASSOCIATION 189 (2005)
- Sandoval, Juan Onésimo and John Landis, *Estimating the Housing Infill Capacity of the Bay Area* (Working Paper 2000-2006, on file with author).
- Tiebout, Charles M., *A Pure Theory of Public Expenditure*, 64 JOURNAL OF POLITICAL ECONOMY 416 (1956)
- Turnbull, Geoffrey K., Jonathan Dombrow, and C.F. Sirmans, *Big House, Little House: Relative Size and Value*, 34 REAL ESTATE ECONOMICS 439 (2006)
- Whitman, Dale A., *Chinese Mortgage Law: an American Perspective*, 15 COLUM. J. ASIAN L. 35, 78 (2001)

Newspaper Articles

- Graves, Rachel, *Council to Consider a Minimum Lot Size*, HOUSTON CHRONICLE, December 11, 2001, at A23
- Editorial, *Neighborhood Threat: Planning Commission's Rejection of Sunset Heights Lot Size Petition Needs Swift Reconsideration*, HOUSTON CHRONICLE, January 18, 2006, at B8
- Friedberg, Jennifer, *Home Builders Wary of Rule Changes*, HOUSTON CHRONICLE, May 3, 2007, at TW3
- Hagee, Chuck, *Twentieth Century Subdivision Wrestles with 21st Century Growth*, MOUNT VERNON GAZETTE, MARCH 9, 2006
- _____*Hollin Hall Village Debates Storm Drainage*, MT. VERNON GAZETTE, December 21, 2006
- _____*Hollin Hall Demolition Begins: Developer Makes a Pre-Emptive Strike on Hollin Hall Village*, MOUNT VERNON GAZETTE, JUNE 15, 2006.
- Manning, Tom, *Residents Briefed on Changing Rules: Officials Suggest that Heights Group Seek More Support From Its Neighbors*, HOUSTON CHRONICLE, March 9, 2006, at 3
- _____*Sunset Heights Split On Minimum Lot Issue: Supporters Opt to Focus Efforts on Smaller-Scale City Ordinances*, HOUSTON CHRONICLE, January 26, 2006, at TW1
- Sarnoff, Nancy, *Houston-Area Home Prices Continue to Climb: Despite the Good News, Prices Lost Steam and Early 2007 Sales Were Down*, HOUSTON CHRONICLE, April 15, 2007
- Schwartz, Matt, *Revised Subdivision Ordinance Sent To Panel: Areas Would be Tagged as Urban Or Suburban*, HOUSTON CHRONICLE, September 8, 1998, at A13
- Snyder, Mike, *Condos Approved with Displeasure: Sunset Heights Project Follows Letter, Not Spirit, Of Lot-Size Law*, THE HOUSTON CHRONICLE, November 10, 2006, at B1

_____*Reshaping Neighborhoods: Communities Inside The Loop Suffer Growing Pains: City Is Devising Policies To Accommodate Population Density And Quality Of Life*, HOUSTON CHRONICLE, March 4, 2007, at A1

Rein, Lisa, *Zoning Quirk Radically Altering Neighborhood: Builders Razing Old Fairfax Houses to Erect Two in Each Place*, THE WASHINGTON POST, JULY 24, 2006, at B1

Interviews and Correspondence

Abbott, Carl. Electronic Mail, Professor of Urban Studies and Planning at Portland State University (March 24, 2007).

Emrich, Jerry K. Telephone Interview, Attorney for the Developers at Hollin Hall (February 21, 2007)

Ben-Joseph, Eran. Electronic Mail, Professor of Landscape Architecture and Urban Planning, MIT (May 11, 2007)

Hagee, Chuck. Telephone Interview, Reporter, Mount Vernon Gazette (February 14, 2007)

Holoubek, Jason. Telephone Interview, Planner City of Houston Department of Planning & Development (May 11, 2007)

Hyland, Gerald. Telephone Interview, Mount Vernon District Supervisor (February 22, 2007)

Sterling, Mark. Telephone Interview, Member of The Neighborhood Preservation Subcommittee of the Houston Planning Commission, March 2, 2007

Statistical Reports and Governmental Reports

CALIFORNIA STATE BOARD OF EQUALIZATION, SANTA CLARA COUNTY ASSESSMENT PRACTICES SURVEY 28-29 (2003), *available at* <http://www.boe.ca.gov/proptaxes/pdf/43apsr.pdf>

CENTER FOR DISEASE CONTROL, TABLE 1-1. LIVE BIRTHS, BIRTH RATES, AND FERTILITY RATES, BY RACE: UNITED STATES, 1909-99

CITY OF HOUSTON DEPARTMENT OF PLANNING AND DEVELOPMENT, MINIMUM LOT SIZE APPROVALS, *available at*

<http://www.houstontx.gov/planning/DevelopmentRegs/PLS.htm>

CITY OF HOUSTON, NEIGHBORHOOD DEMOGRAPHIC DATA FROM 2000 CENSUS, *available at* http://www.houstontx.gov/planning/suprnbhds/2001_demog/15_greaterheights.htm

FAIRFAX COUNTY DEPARTMENT OF PUBLIC WORKS AND ENVIRONMENTAL SERVICES, BUILDING PERMIT RECORDS, *available at*

http://66.179.23.21/DP1/Metroplex/FairfaxCounty/permit/WIZ_SELECTPLAN.asp

FAIRFAX COUNTY DEPARTMENT OF TAX ADMINISTRATION, REAL ESTATE ASSESSMENT INFORMATION SITE, *available at* <http://icare.fairfaxcounty.gov/Main/Home.aspx>

Metropolitan Council, Press Release, Metropolitan Council Releases Land Use Data (July 10, 2006)

MULTNOMAH COUNTY, OREGON, ONLINE VOTERS' PAMPHLET MAY 2002 PRIMARY ELECTION: MEASURE NO. 26-11, *available at*

http://www.co.multnomah.or.us/dbcs/elections/2002-05/26_11.shtml

MULTNOMAH COUNTY, OREGON, ONLINE VOTERS' PAMPHLET MAY 2002 PRIMARY ELECTION: MEASURE NO. 26-29, *available at*

http://www.co.multnomah.or.us/dbcs/elections/2002-05/26_29.shtml.

NATIONAL ASSOCIATION OF HOME BUILDERS ECONOMICS GROUP, CHARACTERISTICS OF NEW SINGLE FAMILY HOMES COMPLETED, 1970-2005 (2006)

SUPREME COURT OF VIRGINIA CASE INFORMATION SYSTEM, *available at*

<http://208.210.219.132/solar/select.jsp>

THE NATIONAL CENTER FOR PUBLIC POLICY AND HIGHER EDUCATION, STATE SPENDING FOR HIGHER EDUCATION IN THE NEXT DECADE 7 (1999)

US CENSUS BUREAU, 2000 CENSUS SUMMARY FILE 3

US CENSUS BUREAU, DEMOGRAPHIC TRENDS IN THE 20TH CENTURY 11, 56 (2002)

US CENSUS BUREAU, GEOGRAPHIC MOBILITY: 2004 TO 2005 TABLE 3 (2006)

US CENSUS BUREAU, GEOGRAPHIC MOBILITY: 2004 TO 2005, TABLE 31 (2006)

U.S. CENSUS BUREAU, INTERIM STATE POPULATION PROJECTIONS TABLE 7 (2005),

US CENSUS BUREAU, SELECTED HISTORICAL DECENNIAL CENSUS POPULATION AND
HOUSING COUNTS TABLE 27 (1995); US CENSUS BUREAU, 2000 CENSUS
SUMMARY FILE 1

US Census Bureau News, Press Release, School Enrollment Surpasses 1970 Baby-Boom
Crest (June 1, 2005), *available at* [http://www.census.gov/Press-
Release/www/releases/archives/education/005157.html](http://www.census.gov/Press-Release/www/releases/archives/education/005157.html)

U.S. CENSUS BUREAU, U.S. INTERIM PROJECTIONS BY AGE, SEX, RACE, AND HISPANIC
ORIGIN TABLE 2A (2004),

Legislative Materials

CALIFORNIA CONSTITUTION, art. XIII, § 9 (2007)

CALIFORNIA CONSTITUTION, art. XIII A, § 2 (2007)

FAIRFAX COUNTY ZONING ORDINANCE § 2-405(1)

HOUSTON, TEX., CODE OF ORDINANCES §§ 42-183 – 42-185 (2006)

HOUSTON, TEX., ORDINANCE NO. 01-1100 (amended and replaced in 2007 by § 42-213)

MARYLAND ANNOTATED CODE ART. 66N, § 4.05

METRO CHARTER, CH. 2, §4-B (2003)

US CONSTITUTION, art I, §10

Cases

Alfred v. City of Raleigh, 178 S.E.2d 432 (N.C. 1971)

Boca Raton v. Boca Villas Corp., 371 So. 2d 154, 155 (Fla. 4th DCA 1979)

Calabrese v. Board of Zoning Appeals, 291 A.2d 326 (Pa. 1972)

Chrismon v. Guilford County, 370 S.E.2d 579 (N.C. 1988)

- City of New York v. 17 Vista Associates, 599 N.Y.S.2d 549, 552 (1993)
- Construction Indus. Ass'n of Sonoma County v. City of Petaluma, 522 F.2d 897 (9th Cir. 1975)
- Decuir v. Marksville, 426 So. 2d 766 (La. Ct. App. 1983)
- Durand v. IDC Bellingham, L.L.C., 440 Mass. 45 (Mass. 2003)
- Euclid v. Ambler Realty Co., 272 U.S. 365, 394 (1926)
- Fallin v. Knox County Bd. of Comm'rs, 656 S.W.2d 338, 343 (Tenn. 1983)
- Dolan 512 U.S., 374 (1994)
- Durand v. IDC Bellingham 440 Mass. 45, 58 (Mass. 2003)
- Ehrlich v. City of Culver City, 12 Cal. 4th 854 (Cal. 1996)
- Greater Yellowstone Coalition, Inc. v. Board of County Com'rs of Gallatin County, 305 Mont. 232, 25 P.3d 168 (Mont. 2001)
- Ham v. Weaver, 227 S.W.2d 286, 288 (Tex. App. 1949)
- Hermann v. City of Des Moines, 97 N.W.2d 893, 897 (1959)
- Home Builders Ass'n of Dayton & the Miami Valley v. City of Beavercreek, 729 N.E.2d 349, 356 (Ohio 2000)
- Homebuilders Ass'n of Metro. Portland v. Tualatin Hills Park & Recreation Dist., 62 P.3d 404, 411 (Or. Ct. App. 2003)
- Huff v. Board of Zoning Appeals, 214 Md. 48 (Md. 1957)
- Lee v. District of Columbia Zoning Commission 411 A.2d 635, 642 (1980)
- Krupp v. Breckenridge Sanitation Dist., 19 P.3d 687, 697 (Colo. 2001)
- Little v. Winborn, 518 N.W.2d 384, 388 (Iowa 1994)
- McCarthy v. City of Leawood, 894 P.2d 836, 845 (Kan. 1995)
- Municipal Art Soc. of New York v. City of New York, 522 N.Y.S.2d 800, 804 (N.Y.Sup.,1987)

Nolan 483 U.S. 825 (1987)

Pattey v. Board of County Comm'rs, 271 Md. 352, 363 (Md. 1974).

Rockville v. Stone, 271 Md. 655, 661 (Md. 1974)

Rodgers v. Tarrytown, 302 N.Y. 115, 126 (N.Y. 1951)

San Remo Hotel v. City and County of San Francisco, 27 Cal. 4th 643, 657 (Cal. 2002)

Sheridan v. Planning Bd. of Stamford, 159 Conn. 1, 21 (Conn. 1969)

Stone v. Mississippi, 101 U.S. 814, 817 (1880)

Village of Euclid, Ohio v. Ambler Realty Co., 272 U.S. 365, 387 (1926)

Weaver v. Ham, 232 S.W.2d 704, 709 (Tex. 1950)

United States v. Winstar Corp., 518 U.S. 839, 888 (1996)

Case Briefs

Petition for Appeal by Concerned Citizens of Hollin Hall Village, *Concerned Citizens of Hollin Hall Virginia v. Board of Zoning Appeals of Fairfax County* (Va. 2007) (No. 07-0058)

Brief in Opposition for BZA of Fairfax County at 6, *Concerned Citizens of Hollin Hall Virginia v. Board of Zoning Appeals of Fairfax County* (Va. 2007) (No. 07-0058)

Other Materials

MERRIAM-WEBSTER UNABRIDGED DICTIONARY ONLINE

Save the Bungalows, Frequently Asked Questions, *available at*
<http://savethebungalows.org/FAQs.html>.

Teardown Trend Altering Historic Neighborhoods, National Public Radio Morning Edition, September 26, 2006, *available at*
http://www.nationaltrust.org/teardowns/NPR_Teardown_Trend_26Sept06.pdf