# HYPERLOCAL ZONING: ENABLING GROWTH BY BLOCK AND BY STREET

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#### **About the Author**



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#### **Executive Summary**

Many policymakers, mayors, and advocates want more housing and other construction, but political obstacles frustrate planning staff trying to achieve those goals. Residents understandably fight against change when they think that it puts their home or community at risk. Proponents of density, therefore, often push for the state or even the federal government to impose it. So far, this strategy has resulted in only limited additional construction, compared with the potential.

A large body of evidence suggests that the opposite tactic—devolving down to a very small-scale supplementary power to allow more housing—should have more success. In this report, I suggest that local governments should allow far smaller groups of residents the option to upzone their own area, via a "street vote" of residents of a single street segment, or a "block vote" of residents on a single city block. The key is to use the strong economic incentives for infill growth to solve political problems by enabling bargaining at highly local levels. Votes by street or by block would give residents a way to negotiate to share the benefits of new development and ensure that it will suit them.

This report considers the many areas across the U.S. with high potential growth but where there has been little new housing development for decades. Street and block votes should prove a popular means of increasing development in lower-density areas with high housing costs, while respecting existing rights and without disrupting existing successful processes for upzoning. Hyperlocal zoning builds on Donald Shoup's proposals for pricing parking, which have been adopted in various places. His proposals succeeded by ensuring that everyone shares the benefits of the reform, which helps overcome the political obstacles to parking reform by creating a broad coalition in support of Shoup's ideas. According to Shoup, "Assembling support for parking reform is like opening a combination lock: each small turn of the dial seems to achieve nothing, but when everything is in place the lock opens." The aim is to repeat that success with zoning.

## HYPERLOCAL ZONING: ENABLING GROWTH BY BLOCK AND BY STREET

#### **Political Obstacles to Development Are Hurting Growth**

Over time, housing has become much less affordable in many successful cities. Housing supply has become less responsive to prices, as zoning rules have increasingly constrained what can be built. One study estimated that 40% of the buildings in Manhattan could not legally be rebuilt today because of tighter zoning rules.<sup>3</sup> In many parts of the U.S., house prices have risen far above the minimum level at which building more housing would be profitable in the absence of severe regulatory constraints. The lack of resulting supply of new homes is primarily due to zoning.<sup>4</sup>

Efforts by mayors and planners to increase housing supply often meet fierce political resistance. Homeowners worry about changes to their neighborhoods and about their most expensive asset: their home. They worry about congestion, disruption, and crime, and they fear that they will lose daylight, parking, beauty, and peace and quiet. The traditional process whereby a city changes its zoning plan attempts to mitigate some of those concerns but is not designed to address all of them.

Often, proposed upzonings—changes to the zoning code that allow for a greater density of residences in a given area—would not benefit most affected residents. That may be because the upzoning is proposed over a wide area that might reduce property values overall. Sometimes the upzoning is not ambitious enough to make it economic to demolish and redevelop most existing buildings, meaning that only some of the property owners in the area would benefit. Some owners may be subject to historic preservation or covenants that stop them from building more, leaving them with nothing but inconvenience. Apartment owners or rent-controlled tenants may also see disadvantages rather than benefits in an upzoning. In other cases, residents are concerned that rapid change will damage local amenities. Each voter who perceives a potential harm, rather than a benefit, from upzoning increases the political resistance.

#### A New Way Forward: Ultralocal Zoning

If broad upzoning often fails because the area across which the decision is made encompasses enough people who will likely not benefit from it, the solution is to allow for more localized decision making. Under "street votes," cities would allow the registered voters resident on each single length of street between two intersections (a "face block") to choose more intensive zoning by supermajority vote—perhaps 60%. "Block votes" would do the same for residents on each single city block (surrounded by streets). Different jurisdictions might choose different rules regarding who is eligible to participate in the street or block vote. That will give those residents a way to negotiate to share the benefits of new development and ensure that it will suit them. To reduce spillover effects on residents of other blocks or streets, the city can restrict the range of available options by setting maximum allowable heights and other limits.

Street and block votes would be a minor supplement to existing zoning procedures, requiring minimal amendments to local law. The goal is to make change as easy and as popular as possible. This proposal may be put forward by planners, beyond the realm of politics, but it should ideally receive political support and, indeed, is structured to maximize political upside.

For certain defined areas, each government would simply set out a narrow range of zoning changes from which resident eligible voters who wish to upzone their street block or city block could collectively choose. That choice could be made by verified petition,<sup>7</sup> or by referendum using normal ballot processes.<sup>8</sup>

The menu given to the residents might include simply reducing the minimum lot size for single family homes<sup>9</sup> or allowing one or more "granny flats" or auxiliary dwelling units (ADUs) per parcel. The most ambitious options might be to allow townhouses or multifamily housing up to six floors. Residents who fear deterioration of the neighborhood's character can choose a more reassuring option, such as townhouses rather than apartment blocks. And residents who wish to avoid changes altogether can choose to adopt none of the proposals.

Even with street and block votes, local governments would still retain full power over zoning because they would control the options (if any) from which local residents could choose. The benefit of ultralocal zoning is that the city need not choose a single zoning rule for each area, as at present. That will let residents choose win-win outcomes, in order to solve the political obstacles to more intensive zoning. Street and block votes will simply supplement current mechanisms to upzone, which will remain otherwise unchanged. That means that trials of these bottom-up procedures would not interfere with existing processes to upzone. Any resulting upzoning will be purely additive.

#### **Upzoning Springfield**

To see how this would work in practice, consider the fictional town of Springfield, which is frustrated by slow growth and budget challenges. Average wages are healthy, but renters complain about the cost of living and employers grumble that high costs prevent expansion. The mayor would like to allow more development to address those problems and increase property-tax receipts, but he faces too much political resistance. When zoning changes do allow construction, renters and community groups complain about disruption and gentrification.

Suburban homeowners, concerned about effects on schools, traffic, and parking, have successfully blocked growth in the suburbs.

The city's planning staff identifies four areas of suburban housing near downtown that would be suitable for gentle densification if the political obstacles could be overcome. They estimate that the typical house value could be increased by 75% by allowing three additional ADUs, replacement townhouses, duplexes, or triplexes on each lot. City attorneys advise that Springfield has power under state law to allow street votes.

The mayor publishes a proposal to allow street votes in each of those suburban areas if there is support in that area. The residents can select one or more options: halving the minimum lot size; allowing up to three additional ADUs per lot; or allowing replacement townhouses, duplexes, or triplexes. They can also opt to halve the existing setback rule from the street. The city publishes a supplemental report illustrating how much value homeowners can add to their properties through each option.

The proposal has safeguards to protect other residents. The pilot suburban area would become a controlled parking district, with free parking stickers for residents and short-term stickers for their guests. When each street votes to upzone, it becomes its own separate parking district, with stickers valid only on that street, so more housing on that street will not affect parking on other streets.

Development on each upzoned street will be subject to height restrictions to ensure that homeowners on other streets have access to sunlight. Each lot would remain subject to a setback rule, which could be waived by the adjacent homeowner to allow traditional townhouses that would add more value for each owner. Parcels on street corners would remain subject to the old zoning limits until both streets opt to upzone.

The zoning amendment provides that the residents of each block can opt to upzone by filing a verified petition with signatures of 60% of the resident registered voters on that face block. Because design is a concern for some residents, they can add an optional design code to their petition, which new construction would be required to meet. To address concerns from homeowners about jumps in property taxes immediately after upzoning, the city agrees to assess each property's value based on the original zoning, more housing is built, or for a maximum of 10 years. The support of the resident registered voters on that face block and an optional design code to their petition, which new construction would be required to meet. The address concerns from homeowners about jumps in property taxes immediately after upzoning, the city agrees to assess each property's value based on the original zoning, more housing is built, or for a maximum of 10 years.

The first area to opt in sees three street votes within the first year. The residents of the first street opt to allow

duplexes with an ADU in the long backyards behind. They choose a design code for the fronts facing the street to resemble traditional townhouses. After five years, many of the original homes remain—considerably increased in value by the potential for adding more housing—but the new duplexes blend well into the neighborhood. Property-tax receipts from the street have risen, without the need for major road or sewer upgrades. More professionals have moved to Springfield's growing economy, and local schools are not harmed by the organic increase in numbers. Some residents sold after upzoning and used part of their profits to move to another suburban part of Springfield, or to pay for private schooling. Many of the new residents are opting to commute downtown with taxi pooling or scooters and bicycles, so no one has noticed an increase in congestion.

The newly reelected mayor decides to allow street votes in more of suburban Springfield and to give a few areas adjacent to downtown the additional option of five-story apartment buildings, if they wish.

#### **Addressing Concerns**

Residents have reasonable concerns about adverse change to their area. Development has spillover effects—and not all of them are good. Care should be taken to minimize effects on residents outside the street or block. Street votes will require careful rules, as suggested above for Springfield, to address parking, traffic, and other effects. Block votes could be coupled with a requirement that existing building fronts onto the surrounding streets should be retained, so that residents on the surrounding blocks will be unaffected. Light planes could be set to rise at an angle from the surrounding streets, limiting the height of new buildings within the block.

More ambitiously, a developer who negatively affects an adjoining landowner could be required to pay compensation in a limited range of cases, both for loss of property value and for inconvenience. But such votes will pass only where there is a broad consensus among residents that such upzoning will benefit them. Homeowners will each gain from the increased value of their property because of the upzoning (as will be demonstrated shortly), so compensation may not be needed.

Other spillover effects might be addressed with impact fees, tax increment local transfers, <sup>13</sup> community benefit agreements, and other methods, such as auctions—all of which are meant to share any financial benefits from upzonings with relevant neighbors, with an eye toward

engendering their support.<sup>14</sup> Some localities might allow the upzoning to create transferable development rights, so that homeowners who do not wish to develop could sell some of their additional permitted floor area to another owner on the block; inter-street transfers might also be permitted.

Many residents will not want to leave the area immediately after upzoning, if ever, so it will be hard to assemble a supermajority for a proposal that would damage the neighborhood. If a proposal seems risky, 60% of residents are unlikely to agree to it, given how concerned homeowners generally are about change. To win a street vote, the advocates will have to pick options and possibly a design code that will clearly make the street better in the eyes of existing residents. Winning proposals will tend to improve their areas.

#### Why Ultralocal Zoning Should Improve Housing Supply

The economic benefits from upzoning can be enormous,<sup>15</sup> but current mechanisms to upzone make it all but impossible for residents to negotiate deals that would benefit most of them.

Although residents often fear upzoning, upzoning just a small area of houses will often substantially increase the values of those properties. Opposition arises because current zoning proposals often leave many homeowners with a risky and unattractive choice. Faced with a different set of options, many might choose to allow controlled change.<sup>16</sup>

Given the choice, many individual landowners would choose to upzone their own lot without changing the zoning of nearby properties, even if more housing might only be added by a subsequent buyer, many years later. Otherwise, there would be no need for zoning rules. The same is true for many groups of a few landowners. But at the scale of hundreds or thousands of landowners—the scale at which zoning decisions are often made—negotiation and agreement become much more difficult. Agreeing to upzone, like anything else, gets harder as more people are involved: the costs of reaching agreement substantially increase. As we have seen, that leads to highly restrictive zoning and political near-gridlock in many places where politicians face thousands or millions of voters.<sup>17</sup>

But it is not necessary to impose upzonings on home-

owners. Given the powers to do so easily, many will negotiate among themselves to find upzonings that will suit them.

### **Decisions by Streets and Blocks Are Easier**

Various commentators have suggested devolution of zoning powers to smaller scales, <sup>18</sup> in order to ease the negotiation of win-win outcomes. <sup>19</sup> Robert Nelson, for example, suggested devolving zoning and other powers to individual neighborhoods. <sup>20</sup> Instead of devolving to neighborhoods, I suggest allowing opt-ins at even smaller scales: street segments or single blocks, following proposals from zoning scholars Robert Ellickson<sup>21</sup> and George Liebmann. <sup>22</sup>

Street votes and block votes were recently recommended by economist Tyler Cowen<sup>23</sup> and are gaining ground in the U.K.: in August 2020, a government white paper supported the concept,<sup>24</sup> after trials of "microdemocracy" were endorsed by the U.K.'s Royal Town Planning Institute<sup>25</sup> and Centre for Cities, among others.<sup>26</sup>

Streets and blocks have two main advantages over neighborhoods: they have clear, natural boundaries; and they are smaller.

#### Natural Boundaries

There is often little consensus over the boundaries of a "neighborhood," particularly for residents who live near a proposed boundary. The process of precisely demarcating the boundaries of a given neighborhood, in order to allow that neighborhood to vote on zoning proposals, will itself be politically contentious and would only add more friction to the process.

Furthermore, residents are most affected by activities on their own face block. Changes on other streets tend to affect them less. That makes face blocks a natural candidate for modest reforms where the spillover effects are mainly contained within that length of street. They are a natural unit for housing upkeep and for control of crime.<sup>27</sup> The intersections create two natural endpoints to each segment of street. Similarly, if the street frontages of the buildings around all four edges of a city block are preserved unchanged, new development within a city block mainly affects residents within that city block, and not residents of other blocks—particularly if congestion effects are controlled. The streets bordering the block form another natural boundary.<sup>28</sup>

My focus on areas smaller than neighborhoods partly stems from experience in England, where planning policy is set by the national government. But English housing supply is among the least responsive in the world. Bigger is not always better.

In 2010, the English Localism Act gave individual neighborhoods the power to vary the land-use rules in their neighborhood. Early evidence suggests that it may have resulted in additional housing, mainly in rural areas. In cities, it has failed to produce significant amounts of new housing, albeit with some exceptions.<sup>29</sup> The general idea behind the Localism Act—to devolve decision making to smaller jurisdictions—is well supported theoretically. James M. Buchanan and Gordon Tullock, for example, have argued that "one means of reducing ... costs [of reaching agreement] is to organize collective activity in the smallest units consistent with the extent of the externality that the collectivization is designed to eliminate."<sup>30</sup>

But towns and neighborhoods-which can contain thousands of residents—are not nearly small enough for the benefits of devolution to manifest. George Liebmann pointed out that "efforts at devolving some powers over zoning and planning to large neighborhood councils with populations of thirty to a hundred thousand have not been conspicuously successful."31 That is why I suggest devolution of supplementary powers to upzone to the smallest feasible levels: the residents of each individual street segment or block. Not only are streets and blocks the "smallest units consistent with the extent of the externality" that zoning seeks to regulate; but the interests of the residents living next door to each other are more likely to be aligned. And even when interests are not perfectly aligned, their very small size allows for face-to-face interaction,<sup>32</sup> making negotiation easier, in a way that is not possible in groups of many thousands.

Allowing these decisions to be made street by street, or block by block, may also promote the eventual widespread adoption of reform. As one commentator pointed out, in the context of automobile restrictions:

New policies that can be adopted and implemented incrementally, rather than all at once, are less visible and less likely to evoke opposition. Successful implementation of the first step, moreover, helps to allay public concern about the potential impact of subsequent steps, which become easier to adopt and implement.<sup>33</sup>

Donald Shoup has made a very similar observation about the implementation of parking meters:

If residents on one block agree to this arrangement, residents on other blocks will be able to see the effects and then decide if they too would like their block to have these benefits. In this way, permit districts can be converted to benefit districts one block at a time.<sup>34</sup>

It could be seen as an application of the principle of subsidiarity.<sup>35</sup> Decisions by single streets or blocks should also be easier because the interests of the residents are likely to be more similar than across a wider neighborhood.<sup>36</sup>

#### Clarifying Property Rights Makes Them More Valuable

Under the broad definition of property rights used by institutional economists, <sup>37</sup> zoning is an informal property right protecting homeowners. <sup>38</sup> But that property right is poorly defined, insecure, <sup>39</sup> and subject to restrictions on alienability, all of which increase the incentives to oppose change that could be beneficial. <sup>40</sup> When people do not know what their rights are, cannot rely on them, or cannot trade them, they cannot easily agree on welfare-increasing deals, which limits economic growth. <sup>41</sup> Street and block votes clarify and strengthen property rights, creating inscentives to agree to upzoning. As Donald Shoup observed, in the context of parking, the magic of property turns sand into gold. <sup>42</sup>

Giving small areas of residents the clear right to upzone their own area will make it easier to find a supermajority for change. When homeowners worry that new development poses risks to their most important physical asset and their community, fighting against all change is a safer option. Making homeowners' existing de facto powers to block new development more securely alienable means that they will be happier to grant limited consent to upzoning in exchange for clearly defined and secure benefits, confident that they will not be hit with unexpected or unwanted development.

#### Where Street and Block Votes Would Work Best

Edward Glaeser and others have suggested that residents resist upzoning because of concerns about their house price, but owners of houses in metropolitan

areas ranging from Seattle and Los Angeles to Miami and Boston would see large financial benefits if a small area, including their own lot, were upzoned.<sup>43</sup> If apartment blocks four or five floors high are permitted instead of single-family homes, that may increase the value of the current property by a factor of three times or more.

Street or block votes for upzoning are more likely to succeed in any place where large benefits will accrue to homeowners—that is, wherever restrictive zoning has substantially raised the price of land. Where existing upzoning procedures are already working well, there may be no need for such votes.

Recently, Joe Gyourko and Jacob Krimmel listed various metropolitan areas where land costs are high due to restrictive land-use rules. In addition to metro areas well known for restrictive zoning such as Los Angeles, San Francisco, Seattle, and New York City, they include a wide range of cities where restrictive rules have increased land costs within 15 miles of the urban core: Atlanta, Boston, Chicago, Dallas, Miami, Minneapolis, Philadelphia, Phoenix, Portland, Riverside—San Bernardino, San Jose, and Washington, D.C. In Boston, Chicago, Miami, New York City, Philadelphia, and San Jose, they estimate that land costs are still elevated at up to 30 miles from the urban core.

In large portions of those metropolitan areas, attractive infill growth would be highly profitable. There are also likely to be many smaller cities and towns outside those metropolitan areas, not analyzed by Gyourko and Krimmel, where a university, hospital, corporate headquarters, or other factors have increased housing demand but political obstacles have stopped zoning rules from being updated—Princeton, New Jersey, for example. Street votes and block votes should also help growth in those places. Such votes could also work well in cities like Houston that are successfully densifying but where more growth would be economic if the politics of such densification were easier. Of course, Houston does not have zoning, but it does have legal constraints such as minimum lot sizes.

Cities that are in decline or facing economic distress may have expensive areas that could drive growth through street and block votes. In areas where house prices are not significantly elevated above build costs, other street-by-street methods for regeneration may be helpful.<sup>45</sup> Street and block votes as proposed here may be less likely to work in areas of existing apartment blocks—where there are already many more residents with widely differing interests, density is already higher, and coordination is more difficult.

#### **Precedents**

Although the precise idea of street and block votes has not yet been implemented, a wide range of precedents indicate that street votes and block votes should be feasible and desirable.

#### **Parking Reform**

There are many examples of street-level demand for reform in the field of parking, dating back to the first parking meters. In 1976, San Francisco neighborhoods were given an option to petition to restrict parking time for nonresidents but allow residents to buy a sticker for unlimited right to park. It was so popular that before the department had implemented it in the first neighborhood that petitioned for it, another nine neighborhoods had also filed petitions.<sup>46</sup> David Weinter explains: "The Planning Department set criteria and adapted the existing process for establishing two-hour zones, applying them so that neighborhoods could self-select for participation. This facilitated smooth implementation by allowing the most enthusiastic and best organized neighborhoods to elect for early participation."47

If structured to provide significant benefits to those who make the decisions, opt-ins can be a powerful way to encourage voters to do the work of convincing one another that a reform is good and to achieve widespread adoption. This can be seen, for example, in the opt-in process for the adoption of parking benefit districts in Austin, Texas.<sup>48</sup> In parking benefit districts, a city installs parking meters and ensures that some or all of the revenue from those meters is spent on public services in the metered area. By allowing residents of an area the option to become a parking benefit district, cities ensure that residents themselves do the hard work of persuading their neighbors.

#### **Business Improvement Districts**

Business Improvement Districts are often set up in already established areas to provide services such as street cleaning, security, parking facilities, street furniture, signage, and public relations. They may have the power to place small additional levies on each business within the BID.<sup>49</sup> By contrast, street and block votes would have no power of compulsion. People who do not want to change their property will not be forced to do so.

#### Minimum Lot Sizes in Houston

Houston already gives some power over land use to individual blocks or face blocks. Although Houston does not have zoning, it has land-use ordinances governing minimum lot sizes. When the city attempted to lower the minimum lot size in some places, in order to allow more housing, it also allowed residents of individual blocks, face blocks, or other areas to opt via supermajority for larger minimum lot sizes. Unlike the street and block votes proposed in this report, which would allow residents to opt in to more intensive zoning, Houston required residents to opt out. <sup>50</sup> M. Nolan Gray and Adam Millsap argue that this opt-out power made reform easier because dissenting voters knew that they could avoid its effects if they wished. <sup>51</sup>

#### Homeowner's Associations and Condominiums

The Uniform Common Interests Act regulating condominium and HOAs requires an 80% supermajority to terminate an association,<sup>52</sup> which would allow for redevelopment.

Israel, Japan,<sup>53</sup> Australia,<sup>54</sup> Hong Kong, Singapore,<sup>55</sup> and Canada,<sup>56</sup> for example, have laws allowing the redevelopment of an apartment block on approval of a supermajority of the owners. That involves the power to force dissenting residents to sell and move out, a much more drastic provision than street and block votes. In Tel Aviv, according to one source, these provisions led to over one-third of the gross new housing construction last year—a surprisingly high number.<sup>57</sup>

#### Land Readjustment

Land readjustment gives all affected property owners in a redevelopment district the power, by majority vote, to approve or disapprove the transfer of land rights to a self-governing body for redevelopment.<sup>58</sup>

#### Referenda and "Local Option" Laws

Many states allow referenda or ballot propositions on various questions. There are also "local option" laws making the passage of a law subject to a local referendum for certain fields, including liquor licensing, gambling regulation, and new taxes,<sup>59</sup> such as the 1% local option sales tax that Georgia authorized each county to adopt by referendum.<sup>60</sup> Street and block votes can be seen as analogous.

#### **Comparable Principles**

Similar underlying principles have also been deployed in other contexts, times, and places. Before zoning, cities including Chicago adopted "frontage consent rules" prohibiting certain uses or types of development unless consent was granted by a specified proportion of the owners or residents on the same street or block or within a defined radius of the plot in question. These rules are discussed in the **Appendix**.

In the Netherlands, a supermajority of residents can petition to turn their street into a *woonerf*, or pedestrian-friendly "play street," where pedestrians have primary rights over the entire road surface.

Ronald Oakerson and Jeremy Clifton described the successful efforts of individual face blocks to rejuvenate themselves to achieve urban regeneration in Buffalo.<sup>61</sup>

## **Conclusion: A Road Map for Ultralocal Upzoning**

The first step for a mayor interested in ultralocal upzoning is to ask the city's attorney to determine how to do it under state law. The framework rules should be designed so that a successful street vote automatically results in an upzoning, without the need for a later endorsement by city politicians or officials, to avoid political controversy, delay, and expense. Upzonings could be implemented through subsequent discretionary city decisions after each street vote, but that will be much less ideal.

The next step is to ask the city planners to identify areas of suburban homes with good transport links that would be suitable for gentle densification if political obstacles can be overcome. The mayor can then ask planning staff to prepare a proposal with upzoning options and safeguarding rules. The example of Springfield above illustrates the mechanism and various options that the city can offer residents. Planning staff can suggest other options appropriate for each place.

The city can then invite each of those areas to compete to be the first to pilot the street votes approach, by opting in through a petition of, say, 10% of residents in each area, or by less formal means. Homeowners in the first area will see the largest gains in the value of their property, as they start to meet the demand for more homes.

After the pilot areas, additional areas can be included, with additional options and perhaps additional safeguards to ensure that any resident concerns and spill-over effects discovered in the pilot areas are kept to an absolute minimum. The tremendous economic potential means that it should be possible to design upzoning packages to achieve broad consensus.

Street votes and block votes can be a popular new way to allow substantial infill growth, in a wide range of towns and metropolitan areas across the U.S., and restart the type of organic growth that created many beautiful historic places over time.

#### Appendix: Frontage Consents and the Constitution

In 1887, to address the smell, noise, and congestion from livery stables, the City of Chicago adopted an ordinance prohibiting any new livery stables within 75 feet of any "residence street" unless the owners of all property within 600 feet gave their consent in writing. <sup>62</sup> It followed earlier owner-consent provisions in relation to streetcar lines, saloons, and parks.

A wide range of such "frontage consent" laws evolved in Chicago to regulate billboards, hospitals, gas reservoirs, blacksmiths, foundries, packinghouses, rendering plants, tanneries, breweries, distilleries, junk shops, laundries, grain elevators, and soap-making plants. The consents required were variously unanimous, three-quarters, two-thirds, or bare majority; by owners or by householders and owners; and by defined radius, by city block, of one side of the street, or of both sides of the street. They were also adopted in other states to control children's and nursing homes in Washington, mobile homes in Montana, and beer sales in Tennessee. Es

The constitutionality of such laws came into question with the Supreme Court's 1912 decision in *Eubank v. City of Richmond*. A landowner challenged an ordinance that allowed for the owners of two-thirds of the property abutting a street to establish a building line more restrictive than the permit that the landowner had already obtained. The Court held the ordinance invalid because it gave to one set of owners the power to restrict the uses by other owners, with no limits on their caprice: "One person having a two-thirds ownership of a block may have that power against a number having a less collective ownership."

The Court later upheld frontage consents for billboards in *Cusack*, <sup>67</sup> but then created confusion with another case. In *Washington ex rel. Seattle Title Trust Co. v. Roberge*, <sup>68</sup> the trustee of an existing philanthropic home for older people wished to replace it with a larger home for the same use. The applicable zoning ordinance provided that such construction "shall be permitted . . . when the written consent shall have been obtained of the owners of two-thirds of the property

within four hundred feet." After the trustee was denied a permit, he brought suit, and the Supreme Court invalidated the ordinance, citing the lack of constraint on arbitrariness by the owners and the lack of evidence in the record that such use would be a nuisance.

However, street and block votes as proposed here should face no constitutional difficulty from the Supreme Court's decision in this case. First, like the ordinance that the Court upheld in *Cusack*, but unlike those in question in Roberge and Eubank, hyperlocal zoning votes can only expand others' use of their property rights, rather than constraining them. Residents can go no further in restricting use of property than existing prohibitions that are already legally established. Second, this proposal involves a vote of all residents within the relevant area, not just landowners; in that respect, it seems indistinguishable from referenda on zoning in a small municipality.69 There can be no doubt that it is constitutional for very small local governments to set their own zoning. Third, the votes would be purely supplementary to the current zoning system. The municipality retains the power to upzone even where the neighbors do not agree, so concerns in Roberge about arbitrary decisions by neighbors do not apply.

Finally, with street and block votes, the residents are collectively setting zoning for their own area and their own parcels, rather than setting themselves up with quasi-judicial powers over a single third-party land-owner. Where a group of residents decides on a uniform upzone of all their parcels through a street or block vote, they will each be equally affected. Some may disagree with the decision of a supermajority of their neighbors, but, unlike with frontage consents, they cannot have been treated differently. Street and block votes are more similar to residents collectively petitioning the city to establish a building line along their street, a petition for parking controls, or the minimum lot-size petitions in Houston, discussed above.

Furthermore, this proposal follows those of zoning scholars Robert Ellickson and Robert Nelson; neither seemed concerned that there might be constitutional problems.<sup>72</sup> The minimum lot provisions in Houston, described above, have endured for two decades without being overturned.<sup>73</sup> If the many Business Improvement Districts are constitutional, street votes and block votes should be even more clearly so.<sup>74</sup>

#### **Endnotes**

- <sup>1</sup> Donald C. Shoup, Parking and the City (New York: Routledge, 2018).
- <sup>2</sup> Ibid., 65.
- <sup>3</sup> Quoctrung Bui, Matt A. V. Chaban, and Jeremy White, "40 Percent of the Buildings in Manhattan Could Not Be Built Today," New York Times, May 20, 2016.
- Edward Glaeser and Joseph Gyourko, "The Economic Implications of Housing Supply," *Journal of Economic Perspectives* 32, no. 1 (February 2018): 3–30.
- <sup>5</sup> William A. Fischel, *The Homevoter Hypothesis: How Home Values Influence Local Government Taxation, School Finance, and Land-Use Policies* (Cambridge, Mass.: Harvard University Press, 2005).
- <sup>6</sup> Many thanks to Ben Southwood and Sam Bowman for coining the term "street votes" for this proposal.
- <sup>7</sup> As in the parking examples and the Houston minimum lot size example below.
- <sup>8</sup> Or the residents could be required to create an association open to any resident on that street or block, although care must be taken with constitutional rules against delegation to private parties. See George W. Liebmann, "Devolution of Power to Community and Block Associations," *Urban Lawyer* 25, no. 2 (Spring 1993): 335–83, at 343.
- <sup>9</sup> See the Houston example, below, where residents can opt for a larger minimum lot size.
- 10 Design codes have been used for centuries, such as the rules governing the front of buildings in the Royal Crescent in the city of Bath in England and the city of Seaside in Florida.
- 11 Some cities might also consider allowing the additional taxes to be rolled up until the new zoning is used, bearing interest at a margin over the city's cost of funding.
- <sup>12</sup> Or that requirement might be included in the menu for voters.
- <sup>13</sup> David Schleicher, "City Unplanning," Yale Law Journal 122 (2013): 1670–1731.
- 14 Christopher S. Elmendorf and Darien Shanske, "Auctioning the Upzone," Case Western Reserve Law Review 70, no. 3 (Spring 2020): 513–72.
- <sup>15</sup> See, e.g., Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978).
- 16 The adoption of rules allowing auxiliary dwelling units (ADUs) in California, Minneapolis, Portland, Seattle, and elsewhere shows how aligning interests of residents with those who want more housing density can make change much easier. Political resistance to ADUs is lower because homeowners can see the benefits of adding them on their own lots.
- <sup>17</sup> See Michael Heller, *The Gridlock Economy: How Too Much Ownership Wrecks Markets, Stops Innovation, and Costs Lives* (New York: Basic Books, 2008). Donald Shoup cites Heller's gridlock concept in describing parking challenges.
- <sup>18</sup> Liebmann, "Devolution of Power," 343. Liebmann notes that a "number of writers have suggested that small-scale governments or regional community associations be given the power to waive zoning restrictions." George W. Liebmann, *Neighborhood Futures: Citizen Rights and Local Control* (New York: Routledge, 2017), 43.
- <sup>19</sup> For example, evidence from the field of common pool resources founded by Elinor Ostrom suggests that very small-scale solutions may provide a way for small groups of neighbors to share and unlock the financial and other benefits of more density, while improving their area. Ostrom showed that communal resources—such as grazing land or, in this case, space in a city—can be managed effectively in a repeated game where participants communicate with one another, rather than devolving into a tragedy of the commons. See John Myers, "Fixing Urban Planning with Ostrom: Strategies for Existing Cities to Adopt Polycentric, Bottom-Up Regulation of Land Use," Mercatus Center, Mar. 10, 2020.
- <sup>20</sup> Robert H. Nelson, *Private Neighborhoods and the Transformation of Local Government* (Washington, D.C.: Urban Institute, 2005). Nelson proposes that landowners within a particular sub-municipal territory be permitted to create, by petition, a Neighborhood Association in an Established Neighborhood (NASSEN), with the power to vote on any proposed zoning changes within the district. See also Kenneth A. Stahl, "Neighborhood Empowerment and the Future of the City," *U. Pa. L. Rev.* 161 (2012): 939.
- <sup>21</sup> Robert C. Ellickson, "New Institutions for Old Neighborhoods," *Duke Law Journal* 48, no. 1 (October 1998): 75. Ellickson suggests devolving many powers, including some land-use regulation, to landowners, on segments of streets bookended by two intersections. To make reform simpler and easier, I restrict the proposal to limited variations of current zoning.
- <sup>22</sup> Liebmann, "Devolution of Power," 341. Liebmann also proposes that the registered voters resident on any city block whose boundaries are formed by public streets, or on any face block, should be allowed to set up neighborhood associations by approval of two-thirds; those associations would then have the power to allow ADUs and some changes of use, with decision by one vote per person.
- <sup>23</sup> Tyler Cowen, "More Housing? YIMBY, Please," Bloomberg Opinion, July 25, 2019.
- <sup>24</sup> United Kingdom Ministry of Housing, Communities & Local Government, "Planning for the Future," white paper (August 2020), 42.
- <sup>25</sup> Royal Town Planning Institute, "Priorities for Planning Reform in England," Apr. 23, 2020.
- <sup>26</sup> Anthony Breach and Elena Magrini, "Sleepy Suburbs: The Role of the Suburbs in Solving the Housing Crisis," Centre for Cities, Mar. 24, 2020. See also Sam Bowman and Stian Westlake, "Reviving Economic Thinking on the Right," blog post, 2019; Jacob Rees-Mogg and Radomir Tylecote, "Raising the Roof: How to Solve the United Kingdom's Housing Crisis," Institute of Economic Affairs, July 22, 2019.
- <sup>27</sup> Ronald J. Oakerson and Jeremy D. W. Clifton. "The Neighborhood as Commons: Reframing Neighborhood Decline," *Fordham Urban Law Journal* 44, no. 2 (2017): 411–50.
- <sup>28</sup> Andrew J. King, Law and Land Use in Chicago: A Prehistory of Modern Zoning (New York: Garland, 1986), 34. King notes that owners making private agreements sought to protect their block.
- <sup>29</sup> One neighborhood in London seeks to allow densification of existing housing by the addition of an extra story or "mansard roof extension." See Pimlico Neighbourhood Forum, "Pimlico Neighbourhood Plan 2019–2040," July 30, 2019.
- 30 James M. Buchanan and Gordon Tullock, The Calculus of Consent: Logical Foundations of Constitutional Democracy (Ann Arbor, Mich.: University of Michigan Press, 1962),112.

- 31 Liebmann, Neighborhood Futures, 42.
- 32 See Oakerson and Clifton, "The Neighborhood as Commons."
- <sup>33</sup> Arnold M. Howitt, "Downtown Auto Restraint Policies: Adopting and Implementing Urban Transport Innovations," *Journal of Transport Economics and Policy* 14, no. 2 (May 1980): 163.
- <sup>34</sup> Donald Shoup, The High Cost of Free Parking Updated Edition (New York: Routledge, 2011), ebook, chap. 17.
- 35 Charles L. Marohn, Strong Towns: A Bottom-Up Revolution to Rebuild American Prosperity (Hoboken, N.J.: John Wiley, 2020).
- <sup>36</sup> "Since Professor Henry Hansmann published *The Ownership of Enterprise*, it has become a familiar point that institutions controlled by persons with heterogeneous interests in that institution tend to be difficult to govern." Michael Heller and Roderick M. Hills, Jr., "Land Assembly Districts," *Harvard Law Review* 121, no. 6 (April 2008): 1514.
- <sup>37</sup> See, e.g., Aidan R. Vining and David L. Weimer, "Informing Institutional Design: Strategies for Comparative Cumulation," *Journal of Comparative Policy Analysis: Research and Practice* 1, no. 1 (Sept. 1998): 39–60.
- <sup>38</sup> William A. Fischel, "Public Goods and Property Rights: Of Coase, Tiebout, and Just Compensation," in *Property Rights: Cooperation, Conflict, and Law*, ed. Terry Anderson and Fred McChesney (Princeton, N.J.: Princeton University Press, 2002).
- <sup>39</sup> Because it may be removed, i.e., more development permitted.
- <sup>40</sup> If more development would be economically beneficial in a particular place, there must be a possible deal to redistribute the benefits that would win the broad support of the residents. Otherwise, a shortage of housing may be unfair, but it is not economically *inefficient*. See Edward L. Glaeser and Joshua D. Gottlieb, "The Economics of Place-Making Policies," NBER, working paper no. 14373 (October 2008), 47n71:

Why do communities fail to maximize land value? The Coase theorem, after all, suggests that side deals between property owners should lead to maximizing joint wealth. One answer is that property rights are murky and that the democratic process is not geared toward such side payments. In many cases the right of an owner to build is the outcome of a complicated regulatory process that cannot be predicted in advance. In other cases explicit legal impediments prevent such side deals. Since each new development creates a windfall for one owner and a host of inconveniences for everyone else, one can understand why democratic decision making would lead to many restrictions on building.

Street votes and block votes can be seen as a way to make permitting processes simpler and more efficient, as Stephen Goldsmith and Michael Hendrix have suggested. See Stephen Goldsmith and Michael Hendrix, "Unclogging the Permit Pipeline," in *Urban Policy 2018* (Manhattan Institute for Policy Research, 2018).

- <sup>41</sup> Sheilagh Ogilvie and A. W. Carus, "Institutions and Economic Growth in Historical Perspective," in *Handbook of Economic Growth*, vol. 2, ed. Philippe Aghion and Steven Durlauf (Oxford: North Holland Press, 2013).
- <sup>42</sup> Shoup, The High Cost of Free Parking.
- <sup>43</sup> See, e.g., Glaeser and Gottlieb, "The Economics of Place-Making Policies," 47n71. See also Keith R. Ihlanfeldt, "The Effect of Land Use Regulation on Housing and Land Prices," *Journal of Urban Economics* 61, no. 3 (2007): 420–35, which finds that greater regulatory restrictiveness in cities in Florida decreased land prices; and King, *Law and Land Use in Chicago*, 50, who notes that a neighborhood change to business or multifamily use in 1870s Chicago normally meant that land values would rise.
- <sup>44</sup> Joe Gyourko and Jacob Krimmel, "The Impact of Local Residential Land Use Restrictions on Land Values Across and Within Single Family Housing Markets, 2018," working paper, Samuel Zell and Robert Lurie Real Estate Center, Wharton School at the University of Pennsylvania, June 13, 2020.
- <sup>45</sup> See, e.g., Oakerson and Clifton, "The Neighborhood as Commons"; Ellickson, "New Institutions for Old Neighborhoods."
- <sup>46</sup> Arthur D. Fulton and David L. Weimer, "Regaining a Lost Policy Option: Neighborhood Parking Stickers in San Francisco," *Policy Analysis* 6, no. 3 (Summer 1980): 335–48.
- <sup>47</sup> David L. Weinter, "Craft of Policy Design: Can It Be More than Art?" Review of Policy Research 11, no. 3 (September 1992): 379.
- <sup>48</sup> Shoup, Parking in the City, 445.
- <sup>49</sup> Heller and Hills, "Land Assembly Districts." Their proposed Land Assembly Districts would have vastly more power than street and block votes or even business improvement districts: a means to compel dissenting owners to sell their land.
- <sup>50</sup> Similarly, Section 5 of the 1926 Standard Zoning Enabling Act allowed 20% of the included owners by area to object to a change in zoning—in which case, a three-quarters majority of the legislature was required; Advisory Committee on Zoning (1926), "A Standard State Zoning Enabling Act: Under Which Municipalities May Adopt Zoning Regulations" (rev. ed.).
- <sup>51</sup> M. Nolan Gray and Adam A. Millsap, "Subdividing the Unzoned City: An Analysis of the Causes and Effects of Houston's 1998 Subdivision Reform," *Journal of Planning Education and Research*, July 15, 2020.
- 52 Liebmann, Neighborhood Futures, 172.
- 53 Stephen Smith, "En Bloc Condo Redevelopment in Japan and Israel," Market Urbanism, Feb. 7, 2012.
- 54 "Strata renewal" in New South Wales.
- <sup>55</sup> S. Zakiah and H. Khadijah, "The En Bloc Sale Mechanism as a Method of Strata Scheme Termination and Urban Renewal: A Review," WIT Transactions on Ecology and the Environment 210 (2017): 381–92.
- <sup>56</sup> Alice Christudason, "Urban Rejuvenation Through Collective (En Bloc) Sales in Singapore: Property Rights or Property Wrongs?" *Journal of Urban Regeneration and Renewal* 5, no. 1 (2011): 51–64.
- <sup>57</sup> Conversation with political scientist Tal Alster and urban planner Alon Kahani, June 11, 2020.
- <sup>58</sup> Yu-hung Hong and Barrie Needham, eds., *Analyzing Land Readjustment: Economics, Law, and Collective Action* (Cambridge, Mass.: Lincoln Institute of Land Policy, 2007).
- <sup>59</sup> George W. Liebmann, "Delegation to Private Parties in American Constitutional Law," Indiana Law Journal 50, no. 4 (1975): 650-719.
- 60 David L. Sjoquist et al., "An Analysis of the Time to Adoption of Local Sales Taxes: A Duration Model Approach," *Public Budgeting & Finance* 27, no. 1 (March 2007): 20–40.
- 61 Oakerson and Clifton, "The Neighborhood as Commons."

- 62 King, Law and Land Use in Chicago, 245-48.
- 63 Fred P. Bosselman, "The Commodification of Nature's Metropolis: The Historical Context of Illinois' Unique Zoning Standards," 12 N. III. U. L. Rev. 527 (1992).
- <sup>64</sup> King, Law and Land Use in Chicago.
- 65 Stahl, "Neighborhood Empowerment," 161.
- 66 Eubank v. City of Richmond, 226 U.S. 137 (1912).
- 67 Thomas Cusack Co. v. Chicago, 242 U.S. 526 (1917).
- 68 Washington ex rel. Seattle Title Trust Co. v. Roberge, 278 U.S. 116 (1928). For extensive discussion, see Stahl, "Neighborhood Empowerment." See also Michael C. Gleba, "Making Zoning Alienable: Property Rights, NIMBYism, and Urban Growth," Ph.D. diss., Northeastern University, 2018. For further discussion, see Robert C. Ellickson and Vicki L. Been, Land Use Controls: Cases and Materials, 3rd ed. (New York: Aspen, 2005), 396–409.
- <sup>69</sup> Liebmann, "Devolution of Power," asserts that the Supreme Court's objections to neighbor-consent provisions do not extend to local referendum requirements.
- <sup>70</sup> In Michael Heller and Roderick Hills's classification, street and block votes would involve repeated dealings (about potential future upzonings), like a business improvement district, a street closing, or an HOA, and not a "one-shot deal" like the frontage consents above. Residents know that they may have to live with one another for quite some time. Heller and Hills, "Land Assembly Districts," 1465, 1512–26.
- 71 Andrew J. Cappel, "A Walk Along Willow: Patterns of Land Use Coordination in Pre-Zoning New Haven (1870–1926)," Yale Law Journal 101, no. 3 (December 1991): "When owners, usually early purchasers on a block, petitioned for a building line, the city usually designated one a few feet behind the line of existing structures in order to ensure larger future setbacks" (631). "The city designated some of these lines on its own initiative, but the majority of these lines appear to have been established in response to petitions of local landowners who desired legally mandated setbacks" (628).
- <sup>72</sup> Gleba, "Making Zoning Alienable," 135–36.
- <sup>73</sup> Gray and Millsap, "Subdividing the Unzoned City."
- 74 Stahl, "Neighborhood Empowerment."

