

# BUILDING COALITIONS OUT OF THIN AIR: TRANSFERABLE DEVELOPMENT RIGHTS AND “CONSTITUENCY EFFECTS” IN LAND USE LAW

Roderick M. Hills Jr.\* and David Schleicher\*\*

## ABSTRACT

Transferable Development Rights (TDRs) were supposed to be a solution to the intractable problems of land use, a bit of institutional design magic that married the interests of development and preservation at no cost to taxpayers and with no legal risk. Under a TDR program, development is limited or barred on properties targeted for preservation or other regulatory goals, but owners of those lots are allowed to sell their unused development rights to other property owners. In theory, this allows the same amount of development to occur while preserving favored uses without tax subsidies or constitutional challenges. Reviewing their use over the past fifty years, this Article shows that the traditional justifications for TDRs do not work. In practice, TDRs are not necessary to avoid takings litigation, are not costless to taxpayers, and do not balance the interests of preservation and development. Instead, they serve as yet another growth control in metropolitan areas where such controls have caused housing crises and major harms to the national economy. Assessed as a technocratic tool for solving problems in land use, TDRs are a failure.

But this Article shows that there is a case for TDRs not as a technocratic but rather as a political tool. By giving valuable development rights to some popular or otherwise politically influential owners of regulated property, a city can build a coalition for re-zonings that might otherwise be politically impossible. The effect of TDRs on politics can be positive to the extent that TDRs strengthen constituencies or land use goals that local politics systematically undercounts, as we show through an analysis of New York City's Special District Transfer TDR program. In particular, TDRs could help break Not In My Back Yard opposition to new housing by building a competing pro-growth coalition.

\* William T. Comfort III Professor of Law, New York University Law School. Email: roderick.hills@nyu.edu. Special thanks to the Filomen D'Agostino Research Fund at NYU School of Law.

\*\* Professor, Yale Law School. Special thanks to Nathaniel Donahue, Laura Lynn Liptrap-Sandoval, Keshav Poddar, and Jake Van Leer for genuinely terrific research assistance. Thanks very much also for comments from Robert Ellickson, Chris Elmendorf and John Mangin; from attendees at the State and Local Government Law Works-in-Progress conference at Fordham Law School and the Zoning Reform Roundtable at Suffolk University Law School; and from participants in workshops at the University of Michigan and the University of Texas. All mistakes are non-transferable and entirely our fault

More generally, using TDRs as an example, the Article shows how land use law is the creator as well as creature of local politics. Existing property law helps cement anti-development coalitions, but savvy leaders could use moments in power to create stable pro-growth coalitions by enacting new laws that help mobilize new pro-growth constituencies. Understanding these “constituency effects” of land use law allows policymakers to redesign entitlements like TDRs to produce a healthier land use policies.

## 1. INTRODUCTION: TRANSFERABLE DEVELOPMENT RIGHTS AND LAND USE POLITICS

The politics of land use, always fierce,<sup>1</sup> have in recent years become even more intense as a result of huge increases in demand for housing in our richest and most productive cities and metropolitan areas. Incumbent residents have pushed back hard against proposals for new development (Raskin 2018; Schleicher 2013, 2017; Scruggs 2018). Although homeowners, the traditional source of NIMBY (Not in My Backyard) politics, are the most important opponents of new construction (Fischel 2005), renters in big cities are also frequently join the opposition, motivated by concerns about displacement or the externalities associated with new construction. (Been 2018, pp. 242–243; Been, Gould, & O’Regan 2019, pp. 25–26). Debates between supporters of new development—not only developers, but also newly-christened pro-development “YIMBY” (Yes in My Back Yard) groups—and anti-development groups are legion and increasingly angry (Levin 2018; McCormick 2017).

Despite a few policy changes and the rapid growth of YIMBY groups, it is clear that the NIMBYs are winning these fights at least in the aggregate and so far (Schleicher 2017, pp. 114–132). Limits on home building in hot markets have predictably created housing crises. Prices and rents have soared, outstripping even rising wages in several of the most economically vibrant areas in the country. That landowners in these areas receive a large share of the gains from productivity growth helps explain their incentives to fight new development tooth and nail (Hsieh & Moretti 2017; Schleicher 2013, 2017). In these high-demand metropolitan areas, the inability of both cities and suburban towns to overcome “NIMBY” opposition to development has limited the extent to which Americans can move into the best job markets. This constrained mobility has substantially reduced both the size and growth rate of the national economy.<sup>2</sup> Furthermore, these limits have meant that incoming migration has been biased

1 As land-use scholar Richard Babcock wrote more than a half-century ago, such “battles between landowner and neighbors are where we get the epithets of ‘government by screaming’ and ‘trial by neighborism.’” (Babcock 1966, p. 141).

2 The exact amount is highly debated. See Albouy and Ehrlich (2018); Bunten (2017); Glaeser & Yourko (2005); Hsieh & Moretti (2017); Turner, Haughwout, & van der Klaauw (2014).

towards the rich, leaving less wealthy workers out of booms in areas like Silicon Valley and New York, contributing substantially to economic inequality (Ganong & Shoag 2017; Rognile 2016; Schleicher 2017). Contemporary land use politics is more than a street fight: it is a national catastrophe.

The housing crisis created by local growth controls has motivated bipartisan political support for zoning reform from both the Obama and Trump White Houses (Carlisle 2018; Furman 2015; Kahlenberg 2018; Smith 2018) and in several state legislatures, leading to some important legal changes in a few states, most notably in California and Oregon (Elmendorf 2019; Infranca 2019). But inside most local governments, still the central regulators of land use, the story is very different. The political power of homeowners and other anti-growth locals have proven difficult to overcome (Fischel 2016; Schleicher 2013).

Transferable development rights (TDR) programs were originally designed to transcend the acrimony of growth control politics. Under these programs, regulated property owners (owners of “sending” lots) are given a “TDR,” the ability to sell the right to build higher or at greater densities than otherwise allowed under current zoning regulations to the owners of designated properties (“recipient” lots) (Nelson, Pruetz, & Woodruff 2012). Since the early 1970s, advocates have claimed that TDR programs can make partners out of the seemingly-incompatible constituencies of preservationists and developers, regulators and free marketeers (Costonis 1974; Merriam 2012, p. xiii). Such programs have mushroomed, with programs around the country providing TDRs to owners of landmarked historical buildings, open space, farm land and a variety of other targets for preservation. By allowing specific landowners to trade development rights that are severed from parcels, TDRs are supposed to achieve the ends of both preservationists and pro-growth activists while avoiding direct fiscal outlays and Takings Clause challenges (Nelson, Pruetz, & Woodruff, 2012, pp. 95–96).

This Article examines whether TDR programs actually achieve any of these ends. We will argue that most TDR programs do not overcome or even balance the competing needs of development and preservation, do not avoid challenges under the Takings Clause, and do not achieve much political support for preservation. In practice, they usually just limit growth. Instead of being free, TDRs starve local governments of resources by removing their capacity to charge impact fees or impose benefit-producing mandates on new development. Many programs die of their own restrictiveness, generating few actual transfers. Others only “succeed” because city or state buys TDRs itself, or increases interest in them by downzoning potential recipient lots (and thus restricting development further).

Instead of balancing interests, most often TDRs serve as just one more tool for limiting development. They are growth controls hiding behind the sheen of a market-friendly mechanism.

There is, however, potentially a brighter side to TDRs. This Article will argue that, at least in certain circumstances, TDR programs could help supporters of new construction overcome obstacles to collective action. The key to this is reconceptualizing TDRs not as a technocratic tool for establishing markets for development rights but rather as a political tool for organizing pro-development coalitions. Used strategically, the schemes can provide TDR recipients who have political influence or electoral popularity with an incentive to lobby for otherwise unachievable rezonings. Such TDR-motivated constituencies, ranging from churches to theaters to park supporters, could conceivably counteract the power of influential neighborhood groups that oppose new development.

Our more general analytical point is that land use laws are not only the product but also the producer of political coalitions. Laws have what political scientists call “constituency effects.” The benefits generated by the laws help beneficiaries organize themselves as an effective interest group capable of defending the laws from attempts to repeal them (Brubaker 2004; Campbell 2003; Mettler 2005). The breadth of Medicare’s benefits, for instance, mobilizes a broad political coalition—doctors, hospitals, patients—in favor of continuing those benefits. More generally, lawmakers seeking to entrench a law frequently design that law to bestow benefits on constituencies with the power to prevent the law’s repeal (Levinson & Sachs 2015, pp. 435–40).

Land use policies have similar constituency effects. In previous work, we have shown that the most-commonly used zoning procedure gives organizational advantages to the neighbors and homeowners who tend overwhelmingly to oppose proposed developments by encouraging changes to be made through *ad hoc* neighborhood-specific zoning map amendments. (Hills & Schleicher 2011, 2015; Schleicher 2013). This seemingly-neutral procedure creates a political imbalance: individual zoning disputes are usually not big enough to encourage employers, municipal unions or other citywide groups that care about the overall housing stock to participate, but are very specific in their effects on neighboring homeowners, rallying the opposition.

The ever-increasing restrictiveness of zoning law in big cities is not a pure representation of local preferences. Instead, the constituency effects of property and zoning law help make homeowners, who have powerful incentives to exclude new construction, into the most powerful players in land use politics.

TDRs can have an opposite constituency effect, as illustrated by New York City’s Special District Transfer program. By giving TDRs to constituencies with political clout or popularity (for instance, owners of Broadway theaters at risk

of closure or the Catholic Diocese), New York City recruited powerful allies for new, taller buildings (Been & Infranca 2013; Stevenson 1998, pp. 1345–1347). In effect, TDRs allocated public resources to a particularly attractive local benefit and linked the achievement of that benefit to rezoning other areas for more density. This meant that opponents of the new density had to not only win the argument about their specific neighborhood, but to defeat interests that support the popular benefit.

Awareness of zoning’s constituency effects can insure that TDRs are designed to ameliorate rather than exacerbate the housing crisis. In contrast to New York City’s Special District Transfers, most TDR programs generate a politics of restriction. Recipient zones are often in areas where existing land use rules and/or politics of development are not otherwise particularly restrictive. Under these circumstances, those who favor preservation and the owners of regulated “sending” properties will have an incentive to push for stricter zoning in the recipient zone, because doing so will increase the value of their TDRs. These types of TDR programs—very common for TDR programs meant to preserve open space or farmland—do not transcend the difficulties of land use politics but rather pit development against preservation, just as other policies do.

By focusing on TDRs as constituency-promoting devices rather than technical planning tools that sidestep politics, one can get some traction on the nitty-gritty of TDRs’ design. In the vein of providing an example of such nitty-gritty detail, we propose “the constant ratio TDR” as a valuable constituency-promoting device. The value of a TDR—that is, the amount of new density it allows a purchaser to add—should be denominated by reference to the ratio of the zoning treatment of sending and receiving lots at the time the TDR is issued. That is, any downzoning of recipient lots should automatically reduce the value of TDRs, reducing the interest of preservation interests and sending lots to support downzonings of recipient areas.<sup>3</sup> The policy would work in reverse as well—any upzoning in a recipient area would automatically lead to TDRs’ being worth more density to purchasers—giving preservation interests insurance against the possibility that subsequent zoning changes would devalue their TDRs.<sup>4</sup>

“Constant ratio” TDRs are an example of how property rights can be engineered to protect housing production. The housing crisis besetting the USA today is the result of extraordinary power wielded by incumbent residents

3 To be clear, what we suggest should change if the recipient area is rezoned after the TDR system is created is that the amount of density the TDR is worth. We are not suggesting a price regulation.

4 This is a real concern, and the subject of litigation. See sub-Section 3.3 *infra*.

against new construction. That power, we suggest, is itself the product of property and zoning law. Different arrangements of property could create different sorts of constituencies that could wield powers towards different ends, by marshaling interest groups into a pro-development coalition.

The idea that property rights create constituencies points to a more fundamental point about property law scholarship: only a unified theory of public and private law focused on institutions can make sense of how property rights in land are actually bundled and transferred (Hills & Schleicher 2015, pp. 134–136). Hoary common-law doctrines limiting the divisibility interests in land, for instance, are largely irrelevant to the actual slicing and dicing of such interests by devices like zoning and TDRs. Likewise, despite formal doctrine declaring that landowners have no property interest in the maintenance of restrictive zones, constituency effects created by zoning insure that neighbors enjoy de facto “property” in the zoned status quo (Fischel 1985, p. 136). Thinking about TDRs in terms of engineering political coalitions provides another example of how property law can take an “institutional turn” familiar from other areas of the law.

Here is a quick roadmap of what follows. Section 2 will discuss the history of TDR programs. Section 3 will discuss the cases for and against TDRs. Section 4 will lay out a theory of the “constituency effects” of land use policy and argue that the best case for TDRs is as a system for creating constituency effects that rival those now empowering incumbent homeowners and renters to defeat the construction of new housing.

## 2. WHAT IS A TDR? HISTORY AND PRACTICE

What are TDRs and why do they exist? TDR programs are extremely varied in form, method, and goals. Abstracting from the details, there are three basic elements in most contemporary TDR programs. First, in theory, TDR programs allow for the permanent protection of certain lots—such as landmarks, open space, or farmland—against development at no direct cost to the taxpayer. Second, they compensate regulated property owners. This compensation theoretically has the legal benefit of reducing the likelihood of successful Takings Clause challenges. Compensation also transforms a contentious question about how to value and fund the public good of preservation into a seemingly-uncontroversial policy that appears to be a win-win for all involved. Third, TDRs allow development to happen in places where there is demand for it, thereby appearing to be the friend of new construction.

TDRs have the appeal, therefore, of moderation: they allow supporters *not* to choose between political opponents in land use. Instead, TDRs are designed to

transcend conflicts between “police power enthusiasts” and “private marketeers,” between “land socialists” and “Chicago School economists,” between preservationists and developers. (Berger 1976, p. 815; Costonis 1975, p. 1024). TDRs are not seen as a compromise between conflicting interests but rather as a move beyond the unnecessary conflict generated by the false consciousness of those trapped in the limited view of “Anglo-American real property system” or “traditional view of property” (Nelson, Pruetz, & Woodruff, 2012, p. xv).

But a look at the history of TDRs suggests they are not a break from the conflict-ridden history of zoning but are in fact part of that history. Furthermore, TDRs are not best understood as some kind of technical wizardry transcending politics but rather as a political tool to pay off some private interests for the sake of some public goal. To say that the conventional narrative around TDRs is misleading is not necessarily to criticize the idea itself. But to move past the conventional narrative, it is important to review the history and current practice of TDRs.

### 2.1. The Invention of the Modern TDR: John Costonis and the Chicago Plan

While TDRs in practice preceded his work, particularly in New York City,<sup>5</sup> John Costonis’s “Chicago Plan,” which was developed in a series of law review articles in the early 1970s and his book *Space Adrift*, served as the theoretical basis for modern TDR programs.<sup>6</sup> While government practice has changed substantially

5 New York City created the first two major TDR programs, both of which pre-date Costonis’s work. The first was part of the first zoning code in 1916 and then changed and revived by the 1961 zoning code: the “zoning lot merger,” (ZLM). ZLMs allow contiguous properties to “merge” their lots for the purpose of calculating density or lot coverage limits without anyone actually buying or selling the underlying land if the allowable density on both lots is the same. (NYCDPC 2019, p. 5; Marcus 1984, p. 875). This means that owners can sell density across these contiguous properties, allowing developers to acquire enough rights to density to build large skyscrapers among other things. The ZLM is the warhorse of New York air rights transfers to this day, constituting a majority of all transfers, and have been the tool through which buildings like the Empire State Building, Trump World Tower and the new “super tall” along 57<sup>th</sup> Street were built. (Finn 2013; Lo 2018; Nonko 2019; NYCDPC 2019, p. 5). The other is New York’s Section 74-79 landmark transfer program, which gives owners of landmarked buildings the power to sell unused rights to build floor area to “adjacent” properties, meaning not only contiguous properties on the same block but also those properties directly across the street (NYCDPC 2015, p. 9). The 74-79 program thus provides landmarked properties a little more leeway than ordinary properties by expanding the universe of possible purchasers, but is rarely used because it is not much more liberal. From the passage of Section 74-79 in 1966 through 2015, there were only 11 successful landmark transfers (NYCDPC 2015, p. 12).

6 Although Costonis’s ideas were central, related ideas were in the air in the 1960s and 1970s. New York City created its 74–79 program in 1965. The American Society of Planning Officials dedicated a 1964 report to the concept of “air rights” but they meant something different from TDRs (Goldschmidt 1964). The report was about situations in which the owner of land sold the right



over time, the underlying justifications used to justify TDRs today are still rooted in his work. Costonis understood TDRs as a kind of magic solution to the otherwise-insoluble problems of land use politics—the exact view that this article argues is wrong. Reviewing his plan, it is pretty clear that Costonis based the design features of his plan on some particular features of the politics of Chicago of the time but that he mistakenly took the conditions of downtown Chicago as eternal verities rather than context-specific contingencies.

Costonis, a professor at the University of Illinois, was inspired to re-conceptualize TDRs by the failed effort to save the Old Stock Exchange in Chicago from demolition (Costonis 1972, p. 578 n.18). Many municipal preservation laws at the time could delay the demolition of designated landmarks, but did not allow permanent injunctions against demolition unless the city used eminent domain to take the property (*id.*, pp. 581–582). Costonis saw these laws as incapable of achieving the end of saving major municipal landmarks for several reasons. There was unrelenting demand to develop underbuilt landmarked buildings in dense downtowns; limited municipal tax revenues to acquire landmarked buildings; a perception that cities lacked the power to block the redevelopment of a single structure; and a belief that there was constitutional need to compensate owners of landmarks if the city wanted to both deny them the right to knock down such buildings and force them to keep the landmarks in a state of repair (*id.*, pp. 582–584). His “Chicago Plan” was designed to save landmarks while solving these seemingly intractable problems.

The “Chicago Plan” drew on two insights. The first, familiar to legal scholars, was that property rights could be understood as consisting of a “bundle of sticks,” meaning a set of rights that could be owned by different parties (Costonis 1997, p. 81). Costonis argued that the regulatory treatment of land uses was just another stick in the proverbial bundle. Cities regularly designate the “Floor Area Ratio” (FAR) for a particular zone. FAR regulates the amount of buildable space on any lot through a ratio, where the numerator is the total floor area of the building and the denominator is the square footage of the lot. A FAR of 1 allows a one-story building on the entirety of a single lot, a two-story

to build a new building on the same lot on top of the property of the seller. This was used most often by public (and private) transportation venues like train stations. Of course, the ideas are intertwined, as building a 2<sup>nd</sup> tower above Grand Central Station is exactly what Penn Central wanted to do, and was prevented from doing, by New York’s landmarks law, leading to the *Penn Central* case and judicial focus on TDRs in takings inquiries. See section Second, there were other, earlier versions of ideas similar to those advocated by Costonis, including proposals put forward by Gerald Lloyd (1961) and Budd Chavooshian and Thomas Norman (1973). There were, of course, many other antecedents. See Carmichael (1974) (discussing the relationship between TDR programs and early American land use rules like the Milldam Acts). (Rose 1975, pp. 6) (discussing relationship between TDRs and the British Town and Country Act of 1947).



building on half of the lot, or a four-story building on one-quarter of the lot; A FAR of 2 allows a two-story building on the whole lot, a four-story building on half, and so on.

A city could allow the owner of a piece of property to sell the regulator-granted “right to develop” floor area to some other owner of property who would then exercise that right on some other lot (Costonis 1973, pp. 86–87). Making this conceptual move, he argued, allowed cities to avoid the conflicts that dominated land use (Costonis 1972, p. 599). He also urged courts to adopt a similar move, and to find a middle space for severe limits on development where compensation in the form of TDRs would be a sufficient “accommodation” for these impositions (Costonis 1975, p. 1066).

Second, Costonis reasoned that changes in zoning law allowing custom-tailored regulation of particular lots opened the door for TDRs. While land use laws traditionally required uniform limits on use and densities in particular zones, then-recent innovations had allowed for differential treatment of property inside single-use zones. Most importantly, “bonus” or “incentive” zoning, which had been most notably used in the 1961 New York City zoning reform and then spread around the country, allowed developers to build higher and more densely if they provided certain public goods, like public plazas (Kayden 1991, p. 5). TDRs provided an analogous mechanism for subjecting individual lots to custom-tailored land use regulations.

Under the “Chicago Plan,” after a landmark was designated, its owner would have two choices. First, the owner of such a “sending site” could sell any of its excess development rights to any lot in a designated recipient zone, usually the same downtown area where landmarks were located (Costonis 1972, p. 594). The lots would then be combined and the recipient lot could build based on the amount of floor area allowed under the recipient site’s zoning on a now-much-larger lot (minus, of course, the floor area used by the landmarked building) (*id.*, p. 592).

This receiving zone would be large, constituting most of downtown and allowing for taller buildings in high-demand areas where developers wanted to build them. Receiving sites could buy TDRs to build as much as 15 percent more density than allowed under the existing zoning, just as they might had they built a plaza or engaged in some other activity that would give rise to zoning bonus (*id.*, p. 596).<sup>7</sup> Many potential uses of TDRs under the Chicago

7 Also, bonus and TDR-enabled density could be stacked together. That courts seemingly had blessed bonus or incentive zoning, and other tools like planned unit developments, made TDR-enabled density legally safe against challenges that differential zoning treatment of lots inside a single zone violated the terms of zoning enabling acts, which generally state that “regulations shall be uniform for each class or kind of buildings throughout each district.”

Plan would be as of right, with no additional discretionary review (although other iterations of the idea included post-transfer discretionary review by local officials of specific buildings using TDRs) (*id.*, p. 599). Furthermore, additional payments or benefits may be made by the city in order to compensate the landmark owner for the upkeep of the landmark, including property tax relief and direct payments (*id.*, pp. 592–593).

Importantly, transfers could be made to lots that were not adjacent to the landmark, making the TDRs more marketable (*id.*, p. 594). At the time, New York’s landmark laws provided for TDRs, but they had not yet led to any successful transfer of development rights, Costonis argued, because they permitted the transfer of air rights only to contiguous properties (*id.*, pp. 586–587).<sup>8</sup>

Under the Chicago Plan, if the landmark owner alternately chooses not to sell her TDRs, the city would acquire a preservation restriction (or the whole property) through eminent domain. The city would finance these acquisitions by selling the TDRs itself after it acquired the landmarked building. Giving the local government itself the extra development rights, Costonis argued, would avoid most need for additional sources of public money (*id.*, pp. 590–591).

The local government would also act as a broker in TDRs. Given the relatively large number of landmark sites and the few large developments that occur each year in a particular zone, Costonis was worried that there would be mismatches between the timing of sales of TDR and their need by developers. He proposed creating a “Municipal Development Rights Bank” to act as a middleman (Costonis 1974, pp. 56–57, 105–106). Such a bank would acquire rights when owners wanted to sell and also rights from landmarked public buildings,<sup>9</sup> and collect donations from owners of landmarks (who would get federal, state, and

8 Costonis noted that New York City landmark transfers could happen across city streets, but he argued that this was not enough to make them marketable, or better than ZLMs. Costonis 1972, at 586–587.

9 This is an under-discussed aspect of TDR programs. Some TDR programs give TDR rights to the city government itself, either for being similarly situated to private entities or for owning other property deserving of TDRs. Such programs—for instance, the New York City Hudson Yards special district transfer rezoning, or in San Francisco’s changes to its TDR program in 2004—are simply ways of “zoning for dollars” (Kayden 1991; NYCDCP 2015, pp. 28–31; Sider 2013, p. 1). In theory, a city can change zoning above its own property, creating whatever amount of development rights it wants to sell. As a result, such programs look a great deal like simply selling to “recipient sites” the right to build taller and more dense buildings. Courts traditionally look askance at efforts to sell zoning rights outright. See, e.g., *Municipal Art Society v. City of New York*, 522 N.Y.S.2d 800 (N.Y. Sup. Ct. 1987). And state laws traditionally put relatively strict limits on the use of development impact fees, limiting the conditioning of building permits on payments to situations in which the payments are for a need for public services created by the development itself (Bruening 2008, p. 434; Leitner & Schoettle 1993). Selling TDRs from above public properties is quite similar to these practices. Perhaps as a legal matter they can be saved from a zoning-for-dollars challenge if the money

local tax breaks). The bank could hold such rights until a developer wanted to build and then sell the rights, allowing the city to shape development, ease land assembly problems, and reduce transaction costs (*id.*). TDR banks of one form or another have been used in a number of TDR programs, even those that do not require the public to purchase preservation restrictions, and have been described as a “good idea” by leading TDR practitioners (Nelson, Pruetz, & Woodruff 2012).

Aside from acting as a TDR broker, the local government could affect the value of TDRs through regulatory decisions, because TDRs will be more valuable if the underlying zoning in the recipient area is stricter (*id.*, pp. 11, 144). The original Chicago Plan suggested that the recipient area be the same downtown area in which most landmark buildings would be located. Downzoning these already-densely built areas would be both politically unfeasible and legally difficult, Costonis argued (Costonis 1973, p. 89). But Costonis soon shifted to thinking that other areas might be proper recipient zones, particularly areas that were likely to develop soon but had not yet done so (*id.*, pp. 88–89). For these new, separated recipient areas, Costonis argued the baseline zoning should be strict so as to make TDRs valuable (*id.*, pp. 89–91).

To understand the Chicago plan, it is important to recognize that Chicago in the 1970s was one of our most loosely zoned big cities (at that were not in the South or the West). This relaxed zoning led Costonis to believe that it would be difficult, both as a legal and political matter, to restrict development on historic sites without providing a generous form of compensation. Although it did not face the severe fiscal crisis of New York in the 1970s, Chicago was quite fiscally pressed (like all cities at the time), leading him to believe that preservation needed to be “free” on the balance sheet of the government. Further, although some innovations around density bonuses had been developed, the rich set of modern exactions—affordable housing requirements and community benefits agreements, for instance—were far away. His greatest concern in addition to the Takings Clause was insuring developers’ interest in buying TDR credits, not whether it would be an excessive tax to ask developers to pay a fee to build.

from selling TDRs above public property is used for a density-ameliorating public benefit. But conceptually they are quite similar.

That said, there is a long debate over whether “zoning for dollars” should be limited at all (Ellickson 1998; Fischel 1978; Nelson 2005, pp. 171–172). Whether it is beneficial to restrict exactions ends up depending substantially on what would happen in their absence, whether the city would simply allow development without exactions or would it ban such development absent such payment. As will be a theme throughout this paper, this scholarship rarely looks at the question of how different institutional arrangements affect the political power of different groups and thus the answer to that question.

None of these characteristics of Chicago are universal truths about cities in general. And the effect of TDRs on land use and land use politics turn crucially on how different jurisdictions face varying conditions in regulatory stringency.

## 2.2. TDR Programs in Practice

The Illinois legislature gave the City of Chicago authorization to try the Chicago Plan, but the City refused (Merriam 1978, pp. 97–99). Nevertheless, the idea took off like wildfire elsewhere. Proposals by people like Costonis, B. Budd Chavooshian, Thomas Norman, and Jerome Rose suggested the use of TDRs to preserve landmarks, open space, and farmland (Rose 1975, p. 9). The American Society of Planning Officials made TDRs the feature subject of discussion at their annual conference. Audrey Moore, a Virginia planning official who later ran and won an election for the Fairfax County Board of Supervisors on a “Stop-the-Growth” platform, described TDRs as “an idea whose time has come” (*id.*, p. 3).<sup>10</sup>

Today, 35 states and the District of Columbia either have TDR-enabling legislation or TDR programs established by some other means (Nelson, Pruetz, & Woodruff 2012, p. 107).

TDR programs quickly followed the development of the idea. One of the early and famous examples was New Jersey’s Pinelands TDR program (Beetle 2003; Pruetz 2003, pp. 215–221). The New Jersey legislature passed the Pineland Protection Act in response to encroachments on the forest and farms of New Jersey’s Piney Barrens by development from Atlantic City. The Act theoretically allows development at very low densities if the owner receives a conditional use permit from a city, but in practice such development is impossible. Instead, owners are given the option to deed-restrict their lands from future development in return for which they are granted Pinelands Development Credits, which can be sold to developers of land in “regional growth areas” (Pruetz 2003, p. 215). The number of credits given to each participating property owner depends on the special state agency’s determination of the development potential and the environmental sensitivity of the site.<sup>11</sup> Cities in the receiving areas can designate how much extra density can be used on any given site, but bonus density is a matter of right. Local land use laws have to comply with the state general plan for the Pinelands. The state later added a TDR bank to act as a middleman and buyer of last resort, with localities issuing bonds to purchase

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10 Moore won an election to become Chair of the Fairfax County Board of Supervisors on a “Stop-the-Growth” platform (Jordan 1988).

11 The credits were designed to be generous, with each credit being “worth” four additional dwelling units.

and retire development rights (Beetle 2003, p. 536). Although the program has deviated from a pure TDR system into one in which governments have had to inject substantial funds, the program is considered a success, measured by the amount of land preserved and number of deals struck to allow new construction (Pruetz 2003). (Landowners in the Pinelands, by contrast, have viewed the program as extremely onerous, not compensating them for the cost of the regulation (Beetle 2003, p. 549)).

Today, TDR programs vary widely (Nelson, Pruetz, & Woodruff 2012). They are usually programs at the local level, but often are conducted through inter-governmental agreements between local governments, allowing transfers from non-urban to urban areas (*id.*, p. 114). Some include TDR banks that serve as middlemen; others do not (*id.*, pp. 116–117). Some transfer development rights “one to one” (i.e. allowing recipient sites to build whatever sending sites cannot under the program), while others multiply the value of TDRs to make them more marketable. Some tax TDR transfers, while other do not. Some require new buildings built with TDRs to pass a discretionary review by local zoning officials after purchase; some do not. Most make preservation permanent, but use a variety of tools to do so—from the transfer of a property interest to the donor site to the creation of a conservation easement in return for TDRs.

TDR programs vary in how voluntary they are. Some TDR programs are purely voluntary in that they allow potential “sending” sites to develop at reasonable levels if owners do not opt in. But the New York landmark act, which preceded Costonis’s plan, does not give property owners any realistic options to build on top of landmarked structures. Other programs are formally voluntary but often include very restrictive zoning or other restrictions on potential donor sites, making participation very likely.<sup>12</sup>

TDR programs also vary widely in their goals. State statutes enabling local TDR programs around the country explicitly approve of at least ten different goals for TDR programs: open-space preservation, wildlife habitat protection, preservation of agricultural land uses, preservation of forest, protection of environmentally sensitive lands, management of infrastructure capacity, historic preservation, low income housing; recreation, and renewable energy

12 Costonis argued these barely-voluntary or involuntary regulations tied to grants of TDR were not exercises of eminent domain, but rather a product of what he christened the “accommodation power,” or a power between the powers of eminent domain and ordinary regulation that required some but not full compensation (Costonis 1975). As Curtis Berger pointed out, though, Costonis did not really explain the legal source of such a rule or how it would work, as figuring out what required compensation and how much to offer under such a rule would be difficult (Berger 1976). That said, while the Supreme Court’s opinion in *Penn Central* does not follow Costonis’s reasoning, it did allow TDRs to play some role in determining whether a taking had taken place. See section 3.1.

(*id.*, pp. 109–110). As of 2014, there were 247 TDR programs around the country (*id.*, p. 132).

TDRs are most commonly used for environmental protection and farmland preservation. There are at least 76 TDR programs that combine both farmland and environmental protection as explicit goals. An additional 120 programs aim at one or another of these goals in some form (*id.*). In big cities, historic preservation is the most common goal with cities like New York, San Francisco, Denver and Seattle using TDRs to preserve landmarks and shape development (*id.*, pp. 207–212, 223–225).

While TDR programs have grown substantially, a creeping discontent about how they work has emerged in recent years. Many TDR programs, including big city programs like the ones in Portland and Denver, just do not result in many or even any trades of TDRs or do not create much revenue to support preservation even when trades do occur (Nelson, Pruetz, & Woodruff 2012, pp. 88, 212; Roddewig 2015). Donor sites frequently choose not to opt into TDR programs. Potential recipient sites often either just build what they can under current zoning rules or seek rezonings that allow them to build higher without buying TDRs (Pruetz 2003). Furthermore, TDR transfers to recipient sites create political opposition from neighbors who do not want the new, dense projects, and therefore fight to hold them up where it is discretionary review of the projects.

Supporters of TDRs, undeterred, have nonetheless identified several traits they associate with “successful” TDRs, by which they mean programs that preserve land and occasion many transfers. These predictors of “success” can be divided into two categories.

First, supporters suggest that there should be more active government involvement in managing TDR programs, including governmental purchase of development rights and the creation of a TDR bank. Involving government as a financier, of course, limits one of the major benefits Costonis saw for TDR programs—the lack of a need for direct governmental funding. That this is seen as necessary for the operation of successful TDRs shows that TDRs cannot costlessly preserve land, even if “cost” is defined narrowly in purely fiscal terms.

Second, supporters argue that the underlying zoning rules for both donor and recipient sites should be tightened to encourage property owners to opt into TDR programs. Programs in the Pinelands or Montgomery County, Maryland, which sharply limited what property owners of potential donor site could do with their property if they did not opt into the TDR program. Because the number of TDRs is not necessarily based on the amount of FA available on the donor site, developer lobbies generally support or do not care about these changes.

Even more important are decisions to tighten the zoning treatment of recipient sites. Such changes buoy the value of TDRs because they ensure that developers on recipient lots need to buy TDRs to build at all. This is increasingly important to the “success” of TDR programs.

Both of these changes, though, undermine Costonis’s claim that TDR programs simply “move around” rather than reduce the total amount of development. Instead, TDR programs premised on more restricted zoning become just one more tool to cut back on development.

### 3. JUSTIFYING TDRS: WHY TRADITIONAL EXPLANATIONS FOR TDR DO NOT MAKE SENSE

Proponents of TDR programs have always viewed them as somehow mystically circumventing the fundamental tradeoffs between environmental quality produced by regulation and housing supply produced by deregulation. In this account, TDRs allow planners to preserve publicly beneficial land uses while also allowing an optimal amount of new development, simultaneously compensating those who are harmed by the regulation without spending any public money at all. Clever institutional design and the magic of market mechanisms can somehow make the pesky problems that normally plague land use policy and politics disappear.<sup>13</sup>

This section will argue that this optimistic account is mostly smoke and mirrors. TDRs are neither necessary nor usually particularly effective at achieving any of their stated ends. The compensation they provide is neither legally necessary to avoid Takings Clause challenges nor politically necessary to build support for landmark or other development restrictions. TDR market mechanisms do not “price” public goods, nor are they fiscally costless. And more often than not, TDRs serve as just one more inefficient and inequitable restriction on new development. As technocratic tools for avoiding conflicts in land use, TDRs are a bust.

The best case for TDR programs ends up looking less like the technical “alchemy” or “magic” that can transcend the difficulties of land use politics and more like another tool for achieving a justifiable political compromise.<sup>14</sup> But even this more measured case for TDR programs has considerable weaknesses, given the actual design of modern TDR programs.

13 “Private-market TDR programs appear to promise a way to preserve historic buildings, to keep open space in its original state, to improve land planning and management, all at no cost to a community.” (James & Gale 1977, p. 19).

14 The language of alchemy and magic come from Merriam (2012, p. xiii).



Underlying the debates over TDRs are differing baseline assumptions—sometimes in the open but more often implicit—about how land use politics would operate in their absence. But even the best scholarship on TDRs usually ends its inquiry with assumptions about local politics that are neither justified nor explained. In Section IV, we will show that TDR programs can change local politics, giving some interest groups political incentives to push aside other groups that normally shout everyone else. TDRs should be judged by their likely effects on the future politics of land use as well as their present effects on the market for development.<sup>15</sup>

But before we can discuss political possibility, we need to analyze how TDRs function in practice, measured against their defenders' usual theoretical justifications. TDRs have been given to owners of property containing open space, environmentally important uses, farmland, or landmarks in partial compensation for restricting development on these lots (Nelson, Pruetz, & Woodruff 2012, pp. 141–215). One question to ask—although we will largely leave it to the side—is whether such preservation or compensation are good ends to pursue.<sup>16</sup> But a second question is whether TDRs are a good way to achieve these policy ends.

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15 A little throat clearing is necessary. Our analysis does not extend to “purchase of development rights” or PDR programs. Daniels (1991). Under such programs, a government will give money to a landowner in return for the landowner giving up the right to develop her property. *Id.* We discuss these as deviations from TDR programs, but not analyze them independently.

Furthermore, we will not discuss programs that require developers to purchase development rights but do not allocate these development rights as compensation to other landowners in compensation for regulatory restrictions. Under these programs, the government is effectively selling the right to develop, “zoning for dollars.” (Kayden 1992). Again, we discuss these when discussing elements of TDR programs, but will not analyze them independently.

We also exclude from our analysis policies that permit cities to trade obligations imposed by the state. After the second *Mt. Laurel* decision, New Jersey gave a state agency the power to determine each community's “fair share” of affordable housing and required each community to allow and/or encourage the development of that amount of affordable housing (Hills 2013). Under some iterations of the legislation, local governments were allowed to buy their way out of part of their obligation by making a deal with another local government that would provide the required affordable housing in exchange for monetary compensation (Anderson 1991). While fascinating, deals between local governments are theoretically quite distinct from TDRs involving private property holders.

16 Although it is not the subject of this article, our cards-on-the-table answer to this question is that it depends, both on the subject and scope of the policy. For instance, preserving specific historically important properties seems to us like a reasonable policy, as these properties create important externalities for the rest of the city and create an important historical record for future generations. That said, we have argued elsewhere that most urban historic preservation policies are wildly excessive, particularly the preservation of neighborhoods. (Hills and Schleicher 2015). 16% of Manhattan south of the 96<sup>th</sup> street and 20% of Washington D.C. are historically preserved. (Byrne 2012, p. 670). This extensive preservation limits how much housing and office space can be built in these cities, to the extent that zoning regulations have not already done so on the same lots, driving up prices and ensuring that many residents and workers cannot locate in prime

### 3.1. Are TDRs Good Ways to Protect Regulations from Takings Challenges?

The original TDR plans were designed to avoid challenges that regulations amounted to exercises of eminent domain. But TDRs are not needed to avoid Takings liability. Courts have mostly allowed jurisdictions to protect landmarks, agricultural land, and open space through regulations

locations that would make them more productive and happier.

Responding to criticisms of this sort, Peter Byrne argues that most historic preservation laws allow some construction, either on site where appropriate, or just on other properties (if 16% is covered, he notes, 84% is not) (*Id.* p. 670). Further, he notes, historic preservation increases demand for property, creating economic value. The first argument is pretty weak tea. Even if historic preservation laws allow some building, they surely restrict much more, and make it more costly, increasing the cost of development and thus housing and office space. And historic preservation must be understood as part of a web of land use constraints—other kinds of land use laws apply to much of the 80% of Washington D.C. not covered by historic preservation. Those limits, like historic preservation, both protect public values and create demand among some populations. Virtually everything Byrne says about historic preservation, for instance, could be said about the Height of Buildings Act, limiting the height of buildings in all of Washington D.C. Abstracting from some of the specifics, the same type of arguments could be made about single-family zones with large minimum lots—they preserve open space, encourage historical modes of living (suburbia is part of our history!), and inspire demand for property among some people who could not coordinate to create the zones without legal intervention.

What Byrne's argument does not do is provide any limiting principle for historic preservation or explain when preservation is too much. His second argument relies on the existence of such an idea—it is a claim that historic preservation makes properties more valuable and is thus justified in cost-benefit terms. But Byrne does not provide any evidence that the legal system is likely to take the cost of such programs and their distributional effects into account. As Alexander Kazam argues, such programs seem ripe for the application of a rigorous system of cost-benefit analysis (Kazam 2017). Further, we agree with Lior Strahilevitz that landmark and historical preservation laws generally create a weird form of historical record, one very sensitive to the lived experience of the very rich, and profoundly distortive of how cities actually functioned in the past. (Strahilevitz 2017). Finally, there is the historic cost of buildings that are not built. For instance, take the original Waldorf-Astoria Hotel, once the largest hotel in New York and a classic design by Henry Hardenbergh, the architect who built the Dakota Apartments and, later, the Plaza Hotel (Tauranac 1995, pp. 111–116). The Waldorf was knocked down in order to build a giant new tower, as developers needed to assemble a large lot in a dense and attractive area of the city, a nearly impossible task at the time (*id.*, p. 119). Had we had our current set of historical preservation policies in 1930, the Waldorf-Astoria would almost surely have been protected from redevelopment. But we would not have access to the building that replaced it, that most iconic New York City landmark—the Empire State Building.

In contrast, we think there is almost no case for using TDRs to preserve farmland. To start, there's lots of it—over 50% of American property is used for agricultural purposes. (Bigelow & Borchers 2017). Federal and state public policy—in the form of taxes, subsidies and trade benefits—provides lots and lots of benefits to farmers. The case that it provides positive externalities is questionable (and it surely provides many negative externalities, like smells, that require special legislative exemption through things like “right to farm” laws). And the common justification that farmland preservation is necessary for food security in a country like the U.S., which exports huge amounts of agricultural products, just seems odd.

For the purposes of this article, though, we are simply going to assume that preservation is an important local policy goal.

unaccompanied by any TDRs.<sup>17</sup> Even assuming that TDRs could be defended as insurance against legal liability, there are other tools that provide such insurance more effectively, like tax breaks and changes to nuisance laws.

First, consider why TDRs are unnecessary to avoid legal liability. The belief that the compensatory nature of “air rights” is of constitutional significance is rooted in the Supreme Court’s opinion in *Penn Central*, when the Court rejected an argument made by owners of Grand Central Station that a decision by New York’s Landmarks Preservation Commission to bar the construction of a fifty-five-story tower above Grand Central constituted a taking of property entitling the owner to just compensation (*Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 116–119 (1978)). The Supreme Court identified three factors to weigh in determining whether limits on the right to use land constituted a “regulatory” taking: the character of the governmental action, the degree of interference with the owners’ investment-backed expectations, and the economic impact on the owner (*id.*, p. 124). Because the landmark restriction did not interfere with the current use of the building that, according to the Court, defined the owner’s “primary expectation” and because that current use allowed the owner to earn a reasonable return, the Court found that the character of the action and degree of interference did not amount to a taking. (*id.*, p. 138). In assessing the economic impact, the Court also noted, however, that the law permitted allowed some construction above the terminal (if approved by the Landmarks Preservation Commission) and also allowed the owners to transfer air rights to contiguous properties.

While the meaning of *Penn Central* and later takings cases has remained a “muddle” (Baron 2007, p. 638), perhaps the most confusing of all of the aspects of the case is the treatment of transferable air rights. After all, if the air rights were sufficiently valuable as to compensate the owners of the terminal for harm caused to them by landmarking, the city would have paid compensation already. The Court in *Penn Central*, though, states explicitly that this payment of compensation had not occurred (*Penn Cent.* at 137). Instead, the ability to transfer air rights “mitigate[d] whatever financial burdens the law has imposed,” reducing the economic impact of the regulation, and thus the willingness of the Court to treat the regulation as a taking (*id.*). But how much TDRs matter in determining whether or not a regulation is a taking was left in doubt.

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17 That said, it is sometimes asserted that regulatory takings cases never win (Dowling 2002, pp. 73–75), but there is some evidence that this is false or at least overstated. (See Jacobs 2007, pp. 1522–1539, surveying state expansions of partial regulatory takings restrictions). Nevertheless, as discussed below, many of the types of regulations for which TDRs are given have been approved by courts without regulated properties receiving TDRs.

Twenty years later, in a concurrence in *Suitum v. Tahoe Regional Planning Agency*, Justice Scalia (following Justice Rehnquist's dissent in *Penn Central*) argued the transferability of air rights should only matter as in assessing whether or just compensation had been paid, not in assessing whether or not land had been taken (*Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 747–750 (1997) (Scalia, J., concurring)). In attempting to harmonize his view with the decision in *Penn Central*, Justice Scalia noted that transferability of development rights would be relevant to determining whether or not a taking had occurred only if the owner of the regulated property could move development rights to other parts of the lot she already owned (some of the “receiving” lots to which the Grand Central air rights could have been transferred were owned by the same entity that controlled the terminal) (*id.*, p. 749). Even so, the adoption of Justice Scalia's view would dramatically limit the importance of air rights transfers in takings cases. Where the doctrine will go is far from clear.

At best, the Supreme Court treats TDRs as a kind of “plus factor” for the government's argument that the challenged regulation was not significant enough to constitute a regulatory taking. But the central part of the Court's analysis focused on whether or not the landmarked property could still be put to some economically productive use. In *Penn Central*, the property still had such a use as a railway station and (short) office building, making the discussion of TDRs superfluous. After Justice Scalia's concurrence in *Suitam*, it seems possible that the Court in the future will find that TDRs are irrelevant to the determination of whether or not a regulation is severe enough to amount to a taking.<sup>18</sup>

Despite the uncertain state of Supreme Court doctrine, in practice, most preservation policies—whether for farmland, historic purposes, or open space—are passed without granting TDRs to regulated properties. And legal challenges to them are rarely successful.

For instance, almost all farmland preservation is done without granting TDRs to owners of farmland (Cordes 1999, p. 1035; Duncan 1984). States and localities provide all sorts of benefits to farmers to encourage them to preserve land for farming. They provide some subsidy for forgone non-farming uses by assessing valuation for property taxes not at the market value of the property's highest and best use but rather at the (lower) value of the property as a farm (Cordes 1999, p. 1045). They also regularly provide other, additional tax benefits to encourage farms to remain farms (*id.*, pp. 1045–1046). Furthermore, all states have some version of “right to farm” laws that limit or bar nuisance suits against farms in designated areas (*id.*, p. 1046). Some places simply buy the

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18 *Suitam v. Tahoe Regional Planning Agency*, 520 U.S. 725, 745 (1997).

right to develop from landowners without making those development rights tradable among landowners (*id.*, p. 1047).

A number of jurisdictions also require land to be used for farming with zoning laws without providing any compensation whatsoever. They either use non-cumulative agricultural zoning that directly limits the use of land exclusively for farming and accessory buildings and nothing else, or they require extremely large minimum-lot size requirements that require large open spaces on large lots. These regulations can sometimes come with TDRs as compensation, but they usually give the farmers nothing in return for lost non-farming uses.

In theory, agricultural zoning without TDR compensation might constitute a taking. But because farms retain some economic viability, such zoning does not constitute a *per se* taking under *Lucas v. South Carolina Coastal Council*.<sup>19</sup> And thus far, the standard for determining whether these zoning laws constitute a regulatory taking has been quite hard to meet in this context. Courts reviewing takings challenges to agricultural zoning cases have almost always ruled in favor of local governments, even when such zoning did not come with TDRs, except in situations in which the regulated land is not suitable for farming. There have been a few strange cases that have gone the other way, but the general rule is that localities can preserve farmland using zoning restrictions without granting TDRs as long as the land is currently used for farming and/or the land is suitable for farming (Cordes 1999, pp. 1051–1069).<sup>20</sup>

The same is true for landmark preservation. Nowadays almost all landmark and historic preservation statutes do not give TDRs to regulated property owners (Byrne 2004). And almost all of these laws have survived challenges under the Takings Clause, largely because such buildings generally retain a reasonable economic use, even if reduced by landmark restrictions on changing or demolishing an existing structure (*id.*, p. 321). There are a few exceptions, situations where preservation laws impose undue economic hardship by requiring property owners to spend substantially to preserve structures on their property. But as Peter Byrne has noted, courts have become more comfortable finding that properties have a reasonable economic use over time, in part because of federal tax subsidies for preservation (*id.*, pp. 323–324).

19 505 U.S. 1003 (1992).

20 See, e.g., *Christensen v. Yolo Cty. Bd. of Supervisors*, 995 F.2d 161, 165 (9th Cir. 1993); *Hackbelt 27 Partners, L.P. v. City of Coppell*, 661 Fed.Appx. 843, 849-50 (5th Cir. 2016); *Jafay v. Bd. of Cty. Comm'rs*, 848 P.2d 892, 903 (Colo. 1993); *Vanderburgh Cty. Bd. of Com'rs v. Rittenhouse*, 575 N.E.2d 663, 667-68 (Ind. Ct. App. 1991); *Bell River Assocs. v. Charter Twp. of China*, 565 N.W.2d 695, 698-99 (Mich. 1997); *Gardner v. New Jersey Pinelands Com'n*, 593 A.2d 251, 260 (N.J. 1991); *Murray v. Columbia River Gorge Comm'n*, 865 P.2d 1319, 1320 (Or. Ct. App. 1993).

Open space zoning is the most vulnerable to takings claims, making voluntary TDR programs attractive in these contexts. But a huge amount—far too much, actually—of conservation is achieved through federal and state tax benefits like those that exist for conservation easements.<sup>21</sup> TDRs are often only granted to property owners who create such easements, but it is unclear how much work TDRs do to create incentives motivating preservation on top of the tax benefits.

Not only are TDR programs often unnecessary for preservation, they are often counterproductive. By preventing dense development, they often force developers to destroy unprotected open space or historical landmarks in order to accommodate demand for housing. In most cities, there are properties with open space or environmental value that a city will not regulate. Similarly, the universe of designated landmarks does not cover all of a city's built history. As will be discussed below, requiring recipient sites to buy TDRs to build densely (rather than simply allowing them to without purchasing TDRs) makes dense development more expensive. But TDR programs do not remove the desire to live in cities (and, to the extent they preserve public goods, may increase them). As a result, TDR programs encourage *less* dense development.<sup>22</sup> By definition, less dense development increases the risk of a developer's knocking down more unregulated buildings, removing those parts of a city's history not protected by landmark laws, and cover more open space. If compensation to landowners can be justified, it must be justified on grounds other than that it is a necessary tool for achieving preservation without suffering from Takings Clause challenges.

### 3.2. Are TDR Programs Good Ways to Compensate Landowners for Regulatory Losses?

Putting the Takings Clause to the side, proponents of the TDR often argue that providing compensation to regulated property owners is important because it provides a clear way to value public goods or it removes the specific harms created by generally beneficial policies. Furthermore, they argue, using TDRs rather than direct budgetary outlays to provide this compensation saves the local government from having to raise taxes to support preservation. Neither of these arguments, however, can survive much scrutiny.

At a glance, TDRs seem to provide a market mechanism for valuing private providers of public goods, like open space or preserved landmarks. Under a

21 One commentator described the governmental support provided to conservation easements as “unprecedented tax benefits that no other charitable cause enjoys” (Bogdanski 1998).

22 As Ari Bruening notes, this causes development to sprawl, thus destroying open space on non-protected lots (Bruening 2008).

TDR program, regulated property owners receive compensation, but the level is not determined by some government bureaucrat or judge. Instead, the measure of compensation is the revenue that the owner of regulated properties can obtain by selling their rights to build on the market. According to some, this measure of compensation approximates the society's willingness to pay to preserve these public goods.

But any "market" that TDRs create for public goods is deeply flawed. Most beneficiaries of the regulation (e.g., lovers of historic properties, open space, or farmland) do not pay for its costs. Regulated properties often have little choice about whether or not to enter into deals. As a result, there is no reason to believe TDRs efficiently reveal anyone's preferences for local public goods.

Consider, first, the involuntary nature of TDR deals, which uncoupled the value of compensation to the cost of the restrictions for which TDRs are supposed to compensate. In some TDR programs, like New York's landmark TDRs, the regulated entity has no choice to reject receiving TDRs and instead to redevelop their own property. Owners are simply blocked from knocking down existing landmarks and are given the ability to sell floor area. In other programs, the combination of regulation and receipt of TDRs is optional, but the city changes the underlying zoning for the "sending" site to make TDRs particularly attractive. In yet others, use of TDRs is actually optional.

What other options the city provides to potential "sending" sites, and how many TDR credits they are given, will determine the supply of such credits. The harm to the sending landowner from the regulation motivating the TDR program is not a factor. And the demand for credits is determined by how many sites are eligible to be receiving sites, how those sites are zoned, and the underlying demand for new development at such sites. But there is no reason to believe that these factors affecting development at receiving sites bear any relationship at all to the property owners' privately determined value of developing her own property free from regulations.<sup>23</sup> Depending on how these factors interact, TDRs may amount to either under-compensation or a windfall.

Further, owners who buy TDRs are not the full set of beneficiaries of the regulation. After all, in theory *all* residents or people generally may benefit from open space, food security from agricultural land, or landmarks. But most residents do not end up paying for the TDRs that compensate those landowners forced to provide these public goods. As a result, there is no reason to believe

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23 Or to the "proper" amount of development for the site. There is no objective baseline for what the land use treatment of a potential donor site should be, and thus no way to tell whether the decision to opt into TDR programs reflects an optimal payoff for refusing to develop.



that the market mechanism of TDRs sends any price signal to the users of public goods about those goods' marginal cost.<sup>24</sup>

That said, compensating regulated owners may be attractive for reasons other than making whole the owners of regulated properties or providing for an efficient level of public goods. Instead, TDRs may be used to take the edge off a policy that is thought to be socially useful but known to harm a class of individuals. This sort of partial compensation happens all the time in other contexts. For instance, Congress regularly attaches job-retraining funding to trade agreements to partially compensate those who will be harmed by the trade deal and reduce their political opposition to a broadly beneficial policy (Baicker & Rehavi 2004, pp. 240–243).

But justifying TDRs with the goal of providing partial compensation to regulatory losers raises more questions than it answers. TDR programs are offered to some regulated property owners but not to others. In theory, most property owners receive from general zoning regimes a “reciprocity of advantage,” in the Supreme Court’s language from the classic regulatory takings case, *Pennsylvania Coal Co. v. Mahon*.<sup>25</sup> The cost of the regulation to an owner is roughly balanced by the benefit that they receive from their neighbors’ being regulated.

But many properties are clearly losers under zoning regimes, harmed far more by zoning regimes than others. The value lost to the property owner of a small building on University Avenue in Palo Alto, for instance, from not being able to build a tall tower is enormous, because that avenue contains some of the most expensive office space in the country. Those owners suffer losses far in excess of any gain they get from analogous regulations imposed elsewhere in Palo Alto. But TDRs are never offered in this context. No jurisdiction has ever looked at the full set of winners and losers under its land use and other regulations and offered TDRs or other compensation to soften the impacts on the biggest losers.

Instead, TDRs are always part of particular set of regulations, built as part of a package to support a specific political goal. If compensation can be justified, it must be justified for its political benefits rather than its advancement of distributive justice. Put bluntly, TDRs must be justified as a way to grease the skids of the political process, placating interests that might otherwise block a beneficial program. Whether or not one thinks such side payments are necessary for the passage of a preservation law (and whether such payments are worth it),

24 As James T. Barrese compellingly notes, “[i]t is not clear that those who gain from a regulation have anything to do with those who pay for the compensation of preservation area landowners. Hence, it is not clear that the gains to society from the regulations exceed the loss to the preservation area owners” (Barrese 1983, p. 238).

25 *Penn. Coal Co. v. Mahon*, 260 U.S. 393 (1922).

however, turns not only on how the TDR program functions but also on the outcome of counterfactual politics in a world where TDR programs were not included in the regulatory package. The regulatory benefits used to bribe potential opponents of regulation—for instance, owners of landmarked properties—to relax their opposition could be used to bribe other constituencies. The costs of those regulatory benefits also generate political opposition: Neighbors of receiving sites, for instance, will predictably object to greater density produced by the transfer of new density to their neighborhood. One cannot determine whether or not the political benefits of the TDR bribe outweigh the political costs simply by examining how the TDRs motivate owners who receive this partial compensation.

The idea that TDRs provide political benefits net of costs rests on the idea that TDRs avoid the political costs of raising taxes, because they do not require cities to provide direct funding. But this ignores the real fiscal costs to local governments. Giving development rights to private landowners means the public cannot “sell” them. After all, although there are some substantial legal limits on “zoning for dollars” (that is, directly selling zoning deregulation), governments regularly impose development impact fees, affordable housing requirements, or other exactions on new development. A developer who needs to buy TDRs will have less surplus profit to devote to these government charges. Requiring developers to buy both TDRs and, say, build affordable housing may mean that developments will not “pencil” (that is, be profitable enough to build). Developers who walk away from deals as a result of these cumulative burdens deprive the city of in-kind benefits. On top of this, TDR programs increasingly rely on direct government spending—through purchase of development rights and direct subsidies—to stabilize and strengthen the TDR market.

In practice, governments often recognize that granting TDRs is costly and, as a result, do not offer much TDR compensation to regulated properties. The value of TDRs to “sending” properties is often quite low. Recipient zones are often quite circumscribed, limiting the potential purchasers of TDRs. Governments often require discretionary review of projects using TDRs, making them even less valuable. Many TDR programs have resulted in few or no transactions, as there are not really any buyers in the designated zones for the TDRs. And cities can always reduce the value of these TDRs by upzoning nearby properties.<sup>26</sup> In these cases, TDRs are not particularly costly because they are not achieving anything at all other than increasing administrative cost.

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26 Or can they? Christopher Serkin argues that the answer to this question depends substantially in what form the city created the TDRs (Serkin 2016). Serkin analyzes litigation filed by the current owner of Grand Central, who made an effort to sell the Grand Central TDRs at issue in *Penn Central*.

In sum, TDRs are not a fiscally cheaper way for governments to compensate regulated property owners. Furthermore, this compensation cannot be justified as a means of providing optimal levels of public goods or for making regulated property owners whole. If the cost of TDRs can be justified, that justification lies in TDRs' political benefits. But demonstrating such benefits requires some focused discussion of the sorts of interest group influence that the law should promote. Defenders of TDRs have provided no such discussion.

### 3.3. Are TDRs Good Ways to Regulate Development on Recipient Sites?

Because TDR programs were created to protect landmarked properties or open space, they tend to be defended solely in terms of the goal of preservation. To the extent that “receiving” sites are discussed, it is usually with respect to the question of whether there is sufficient demand for development on such sites for TDRs to generate revenue. In order to analyze whether TDRs are a good policy, however, one needs to look beyond preservation to the more general welfare of users of development (i.e. residents, home buyers and renters, workers and businesses, customers of retail land uses, etc.), and at the effect of TDRs on the broader economy.

TDR systems have potentially harmful effects on the market for land, because they require development at “receiving” sites to be regulated more stringently than such sites would be regulated if TDRs did not exist. The eligibility of “receiving” sites to purchase more development rights, after all, presupposes that new development at such sites is not harmful to neighbors. Why not, then, simply allow such development unconditionally without obligating the owner to purchase TDRs?<sup>27</sup> The regulations waived by the purchase of TDRs are only

Before it could do so, the city changed the zoning on a neighboring piece of property to allow a much taller building. The current owners—Midtown Ventures—sued the city, claiming that the city's decision to upzone the property constituted a taking of the Grand Central TDRs, as the upzoning reduced their value. The case settled, seemingly on terms that were not favorable to the owners of Grand Central, suggesting the claim was relatively weak.

Despite this, Serkin argues that such an upzoning could in theory constitute a taking of TDRs if the city intended to be bound, but that New York City never expressed a clear desire to limit its regulatory authority. The question of how to treat regulatory changes that diminish the value of “regulatory property” like TDRs has become a major political issue in a number of dimensions, perhaps most notably with respect to the question of whether city must or should compensate owners of taxi medallions for allowing companies like Uber or Lyft to operate (Wyman 2017). That said, we know of no TDRs that fit the clear statement rule proposed by Serkin, and are skeptical that a court would enforce such a right (which would effectively constitute a contract to give the owners of the TDRs the right to determine the regulatory treatment of a third party).

27 It is notable how distinct support for TDRs is from the traditional justifications for land use regulation. Since the 1916 New York City zoning code and then the Supreme Court's decision in *Village of Euclid v. Amber Realty*, there have been two prominent types of justification for land use: nuisance

necessary to make developers pay for the preservation of historic or environmental amenities elsewhere. Requiring these developers and their new tenants—as opposed to the population as a whole—to pay for the public goods provided by landmarks or open space can discourage new construction in ways damaging to the local economy.

The danger that TDR systems might inefficiently deter new construction is often ignored by TDRs' defenders, because those defenders just do not care about the effects of over-regulation at "receiving" sites. Early in the history of TDRs, for instance, Jared Shales argued in a piece entitled "Who Pays for Transfer of Development Rights?" that TDRs imposed no costs on anyone (Shales 1975, p. 336). Developers who buy TDRs are not harmed, according to Shales, because they opted to buy TDRs and, therefore, must value the additional air rights more than the price demanded by the "sending" sites' owners. New tenants were not harmed because the rents charged by the TDR-based development were determined by market prices of land: The tenants must have benefited from the purchase of the TDRs, because they were willing to pay the

reduction and planning. The ability to develop and use land is restricted because the development and/or use of land in some way or another would harm nearby landowners. Or it is restricted because the government/public needs to plan out how both public and private land uses will mix together, and the market will not allow for the orderly, attractive, or popular combinations of land uses.

TDRs deviate substantially from both of these traditional justifications. TDRs can lead to development in excess of what the land use plan suggests for a lot or area, suggesting that limits on development are not necessary for the mitigation of nuisances (or that nuisance mitigation can be traded off for other benefits, like historic preservation). TDRs are thus straightforwardly inconsistent with the idea of zoning as a tool for the mitigation of nuisances. TDRs are better understood as a planning tool, an effort to focus development in one area rather than another. But they are a strange planning tool. The most effective forms of TDR programs, which allow transfers to proceed as-of-right, are at odds with planning principles, as they introduce variability into land use codes that is unreviewable by planning authorities. The government cannot easily plan for how to develop certain areas if it does not know how property will be used. Even when compared to "bonus" zoning, which similarly leads to different treatment of lots in the same area based on what they include, it is harder to predict how and when TDRs will be used because they involve multiple parties. Neither of these arguments themselves prove TDRs to be a bad policy, but rather that their justification has to lie in arguments somewhat attenuated from those used to justify most land use regulations, or as Christopher Serkin argues, as part of a set of tradeoffs in which traditional land use justifications are traded off against local desires for historic preservation (Serkin 2016). Serkin's argument is addressed below.

The conflict between TDRs and planning principles is best seen in fights over whether discretionary review is necessary before receiving sites can build using FA from TDRs. Planners believe they should ensure that new projects fit the broad plans of the city. Discretionary review, though, makes TDRs much less marketable and useful. Developers might reasonably believe that, if they have to go through the rezoning process anyway, they might as well seek a rezoning rather than buying TDRs. This highlights the difference between a market for regulatory property, which is what TDRs are, and traditional forms of planning.

rents charged by the developer who purchased those TDRs (*id.*, p. 333). It had not occurred to Shales, however, that TDRs are part of a set of land use laws that limit construction in total and thus drive up the costs of development. The regulatory costs of TDRs are thus divided up among the persons usually burdened by land use regulations—the owners of regulated land and/or the consumers of the uses supplied by those owners (i.e. renters of office space and housing).

The failure of TDRs' proponents to appreciate TDRs' costs was, in part, a matter of timing and intellectual temperament. The idea of TDRs emerged during the 1970s, simultaneous with the publication of Robert Ellickson's and Bernard Siegan's classic law and economics critiques of zoning as rent seeking by landowners. On Ellickson's and Siegan's accounts, incumbent homeowners use zoning to reduce supply, thereby driving up the value of their homes (Ellickson 1977; Siegan 1972). The original proponents of TDR programs were extremely critical of this literature, arguing that land markets failed to consider real interests in avoiding harms caused by new development like pollution and the destruction of public goods like landmarks. The over-billing of TDRs as "free" reflected this confidence that the costs of land use regulation were outweighed by their environmental and cultural benefits.

Such confidence that TDR regimes would strike the right balance between development and regulation was also influenced by a particular vision of city politics in which local government under-provided such regulatory benefits. In the 1970s, virtually no one thought "homeowner cartels" dominated big city politics where TDRs made their entry into policy conversations. Unlike restrictive suburbs, cities were instead run by "growth machine" coalitions: businesses, unions, and developers who relentlessly pursued growth in construction (Molotch 1976, pp. 309–310; Schleicher 2013, p. 1222). As a result, urban land use was expected to be relatively loose, making worries about urban development seem unimportant (but raising questions for Costonis about whether anyone would buy TDRs).

Since the 1980s or so, it has become clear that many big cities do not work in the way "growth machine" theorists expected. Many American cities—particularly high-demand places like New York, San Francisco, and Washington—restrict development in ways that drive up rents and spur housing shortages. Our richest big cities today are run more by NIMBY coalitions of neighborhood groups than by growth machine coalitions (Schleicher 2013; Been, Madar, & McDonnell 2014). TDR programs acknowledge and indeed are premised on this excessive restrictiveness in some zones, specifically in designated "recipient" zones. After all, that one can build with TDRs undercuts any claim that the

pre-TDR regulations on height and density were essential for neighborhood welfare.<sup>28</sup>

The preservationist regimes of which TDRs are a part impose a tax on development by targeting only new construction while leaving existing developed property untouched. Existing residents will see whatever benefit comes from the TDR program—preservation, open space—but will not pay for it (Costonis 1973). Furthermore, because TDRs are costly, developers will build less, increasing the value of existing property by reducing competing supply.

That new development bears the cost is central to the politics of TDRs. TDR programs—like affordable housing requirements— may seem free to voters, but they actually are taxes that do not go through the ordinary revenue-approval process. “The hope of TDR advocates,” Franklin James and Dennis Gale argued, “is that the public will be more enthusiastic about preservation when the costs of preservation activity are imposed on private developers rather than the community at large” (James & Gale 1977 p. 19).

TDR programs, therefore, encourage politicians to make existing zoning rules stricter to insure that TDRs are marketable. Jurisdictions seeking to compensate recipients of TDRs will strategically reduce “as of right” zoning in potential recipient sites, forcing developers to buy TDRs in order to build (and thus making the TDRs more valuable).<sup>29</sup> Costonis himself suggested that cities lower the baseline zoning to increase TDRs’ marketability, particularly in newly developing areas.<sup>30</sup> TDRs thus do more than allocate some of the monopoly rents that emerge from restrictive land use regime to the owners of donor sites. In order to make the TDR programs work, governments often restrict development further and thus make monopoly rents larger (Barrese 1983).

Advocates of TDR programs justify imposing these burdens on new construction by claiming that only new development endangers the preservation of landmarks or open space, and thus it should be taxed accordingly.<sup>31</sup> But this

28 Early critics of TDR programs, coming from a completely different direction, took aim at this fact. A 1972 note in the *Yale Law Journal* argued that development rights transfers lead to excessive development because the unused air rights above landmarks would not actually be used (Richards 1972, p. 339).

29 Addressing this problem is the major focus of Kayden (1991).

30 Costonis also would have favored downzoning existing developed areas to make TDRs more marketable, but he thought this was politically impossible. Costonis (1974, pp. 102–103).

31 Costonis summarized his argument on this point: “The case for development rights transfer ultimately rests on two propositions which, though independently based, are mutually reinforcing: First, government may properly shift to developers and landowners the cost of resource protection programs initiated to counteract the environmentally harmful effects of their land use decisions; and, second, government may finance these programs by recapturing the increment of the increase in

justification does not explain why the tax for preservation should fall on unrelated new development elsewhere in the city. As Steven Eagle has argued, the absence of any nexus between the development that receiving sites seek and the costs that TDRs seek to mitigate or avert suggests that TDRs are vulnerable to the same legal attacks that have been leveled against other types of exactions, development impact fees, and affordable housing requirements (Eagle 2019): such trades tax new development to pay for public goods that the owners of the receiving property did nothing to threaten and thus violate the Takings Clause.

Supporters of TDR programs respond to these criticisms by noting that the counterfactual assumed by critics is questionable. For reasons of policy and politics, the alternative to a TDR program may not be allowing development to proceed without payments but rather prohibiting it entirely. The willingness of city officials to relax zoning restrictions on receiving sites may depend on the connection between such deregulation and regulatory benefits elsewhere, such as historic preservation or open space. As Christopher Serkin puts it, such decisions “represent[] dynamic tradeoffs,” where the cost of allowing development on a block may be offset by the gain received by providing funds to pay for historic preservation (Serkin 2016, pp. 926–927). On this understanding, TDRs are not a tax on development; they are the price of achieving development in a world where pro-development forces simply cannot win in ordinary politics.

The effects of TDRs on receiving sites, in short, is ultimately defensible only by the desirability of TDRs’ effects on local officials’ political incentives. If cities over-regulate new housing construction because homevoters wield too much power, for instance, then TDRs are defensible if they mobilize interests in favor of new housing that homevoters would otherwise defeat.<sup>32</sup> Whether or not TDRs are justified by their effects on political incentives, in other words, depends on the assumptions one makes about local politics. But those assumptions need to be analyzed rather than stipulated, with an explanation for how

land values attributable to governmental actions and general community growth” (Costonis 1973, p. 115). This acknowledges, though, that the tie between the cost and benefit is somewhat attenuated. Costonis noted that TDRs could not be considered a form of special assessment, which requires that the policy provide a special benefit to those charged, and that the benefit exceed the costs. Instead, he argued that they should be considered simply an exercise of the police power, which would allow a weaker fit between those harmed and those benefited (but still required some connection so that they would not be considered taxes and subject to state constitutional and other limitation on taxing powers). *Id.* at 110–115.

32 To the extent one does not agree with our argument that cities need more housing (and should worry less about the externalities of local development), this argument can be reversed. The case for TDRs for such a wrong-headed analyst would still be based on what the alternative is, but would view TDRs as good only if looser development was the alternative.



TDR programs change local politics, strengthening some groups and weakening others. In Section 4, we will analyze how TDRs change zoning politics.

#### 4. TDRS AS MANAGEMENT OF THE CONSTITUENCY EFFECTS OF PRIVATELY OWNED LAND

As we explain below, the connections that TDRs create between parcels are most persuasively justified as a way to create a coalition that can be effective in local land-use politics by tying constituencies together. In particular, TDRs can counteract the constituency-mobilizing effects of private land ownership by linking the political interests of three different constituencies: the owners of the sending sites, the owners of receiving sites, and the beneficiaries of the regulatory scheme for which TDRs serve as compensation. By giving these constituencies a shared interest in maximizing the value of receiving sites, TDRs can help counteract the powerful coalitions of neighboring homeowners and renters who seek to shut down proposed new construction.

##### 4.1. “Constituency effects” and Privately Owned Land

It is both natural and accurate to think about local land-use laws as the product of local political interests. Homeowners want less development and fewer negative externalities; developers want to build; employers want sufficient housing for employees, and so on. A moment’s reflection suggests, though, that the causal relation runs in both directions. Local interests are also the product of local land-use laws. The reason is that the entitlements created by local land-use law mobilize neighbors and other groups to protect those entitlements.

In this respect, land-use law is no different than any other governmental program. Program benefits give otherwise disorganized voters a single focal point around which to organize themselves as a united lobby. The unity and effectiveness of the elderly as an interest group, for instance, was increased enormously by the New Deal Congress’ creation of the Social Security Program’s Old Age insurance, because the program gave them a policy around which to focus their efforts (Campbell 2003). Social Security is not the only example of a program’s having a constituency-creating effect. Health care laws make both recipients and providers like hospitals and doctors into activists, seeking to protect what’s already theirs. Other governmental programs like veterans’ benefits and anti-discrimination law can make salient aspects of citizens’ identities that might otherwise never become the basis for political organization (Brubaker 2004; Mettler 2005).

The constituency effect of local land-use regulations, however, is especially powerful, because the owners of owner-occupied housing invest such a large

share of their assets in such close physical proximity to each other. As William Fischel has emphasized, households with a down payment invested in housing are highly motivated to participate in local politics to protect that investment, because they cannot otherwise insure it against loss of value from neighborhood change. (Fischel 2005, pp. 1–13). Local land-use laws can have dramatic effects on housing values. With such large and uninsurable stakes riding on local politics, it is in homeowners' rational self-interest to bear the costs of collective action that voters in other contexts tend to shirk. Empirical evidence suggests that homeowners dominate zoning hearings even in communities with large numbers of renters (Einstein, Palmer, & Glick 2018).

Homeowners' investment in owner-occupied housing gives such owners another organizational advantage. By definition, they live close not only to their own but also to other similarly situated landowners' investments. The costs, therefore, of networking with each other, thereby acquiring information about land-use decisions that might affect their down payment, are lower than the costs of networking with people scattered across the nation with similar opinions about, say, nuclear defense policy (or, more relevantly, than people scattered across the city with similar opinions about housing policy) (McCabe 2013).

Local land-use regulations provide a constituency effect that makes homeowners an extraordinarily formidable interest group. Because modern zoning ordinances specify in meticulous detail permissible uses, bulk, and height of structures, they provide a specific focal point around which the home-owning neighbors can rally, playing the same role in enforcement of property rights that judicial doctrine or bills of rights can play in creating self-enforcing constitutional rules (Ginsburg & McAdams 2004; Law 2009; Ordeshook 1991, p. 148). Investing in reliance on zoning restrictions, neighbors will naturally regard those restrictions as a species of collective property, regardless of the blackletter legal doctrine that private landowners have no vested property right in a zoning ordinance's restrictions. The zoning law, therefore, relieves the landowners of coming up with a consensus position about an acceptable level of development.

Furthermore, because land use procedure relies mostly on amendments to existing law as the mechanism for changing land use rules (as opposed to city-wide rezonings), neighbors have a distinct advantage.<sup>33</sup> Citywide interests like employers or municipal unions are largely uninterested in small changes, as individually they will have little effect on the price of housing or the number of public employees (even if they will in the aggregate). Neighbors, by contrast, are

33 This, of course, helps explain why we still rely on amendments. When homeowners are dominant in local politics (i.e. almost all of the time), they support procedural rules that advantage them, the same way we suggest that an elected pro-growth Mayor should attempt to choose her own.

intensely interested in amendments that take place in specific neighborhoods, and mobilize to defeat them.

The constituency effects of zoning law combined with homeowners' built-in incentives and organizational advantages have made homeowners the dominant political force in land-use politics, not only in suburbs where they are numerically dominant but also in large cities (Been et al. 2014; Schleicher 2013). This power comes at a cost to the public interest. Averse to the risks of neighborhood change, homevoters have resisted expansion of the "zoning envelope"—the notional space for new construction permitted by the zoning ordinance—even though a rising population and increasing labor productivity in big cities have increased demand for urban land. In the face of this demand, zoning-induced supply constraints have created a crisis of housing affordability in such high-demand cities (Avent 2011, locs. 860–881; Glaeser, Gyourko, & Saks 2005; Gyourko & Molloy 2015; Hills & Schleicher 2011, p. 85).

If homeowners' dominance over the land-use process ensured that the preferences of the local community were accurately represented, then these costs might not be cause for concern. As Fischel and Robert Nelson have argued, developers seeking to build in high-demand cities could simply purchase the homeowners' collective property right of zoning, exchanging money or in-kind benefits to the neighbors in return for expansion of the right to build (Fischel 1978, pp. 73–76; Nelson 1985). With local officials acting as brokers, such *ad hoc* bargains might theoretically ensure that all and only cost-justified housing was constructed, taking into account the benefits to migrants (e.g. higher labor productivity) and costs of the new housing (e.g. traffic, shadows, loss of community character, etc.) to incumbent owners.

There are, however, at least three reasons to believe that such bargains might not accurately represent the preferences of the local community.

First, the capacity of the local legislature to act as reliable brokers is impeded by the legislature's own barriers to collective action. Legislators can compare the local costs of new construction to a neighborhood to the city-wide benefits of an enlarged housing supply only if the legislators can organize majority coalitions in favor of the latter. Most American cities, however, lack local political parties organized around rival visions of the city's collective good. Lacking such parties, each legislator becomes a part of a majority coalition by deferring to every other legislator's preferences regarding proposed development in that legislator's district. This norm of mutually deferential "aldermanic privilege" tends to be driven by the anxieties of homeowners who are the dominant voice in each legislator's district. The result is that, for the purposes of zoning changes, there is not much difference between Greenwich Village in New York City and Greenwich, CT—in both, local homeowners can veto any new development, despite the fact that Greenwich Village is part of a big city that formally makes

land use policy. Such a process is not well-suited for promoting city-wide benefits from housing—for instance, recruiting new types of employers to broaden the city's economic base (Hills & Schleicher 2015, pp. 111–116).

Second, homeowners simply might not represent the preferences of most city residents. Recent empirical study has confirmed what many previously suspected from informal observation: The participants at local land-use hearings tend to be disproportionately wealthier, whiter, and male homeowners, compared to the community where they reside (Einstein, Palmer, & Glick 2018). Homeowners in high-demand cities might have an interest in limiting the supply of housing to increase house prices, an interest not shared by renters living in the metropolitan areas. Lacking neighboring homeowners' physical proximity to each other, consumers of new housing, whether renters or potential buyers, face higher obstacles to collective action. Such consumers also lack the high-stakes motivation of a sunk investment to motivate them to sit through long, acrimonious hearings in hopes of eventually securing an apartment. Predictably, their voices will be drowned out or not heard at all when speakers line up for their minute at the mike in front of the Planning Commission or Board of Zoning Appeals.

Housing consumers have proxies who are more politically organized and unified than renters or home buyers. The real estate industry, municipal unions, and large employers, organized into associations and possessing a scale sufficient to overcome lobbying costs, all have an incentive to expand development rights. However, the method of bargaining over proposed projects on specific parcels minimizes the incentive of these industry interests to bring their collective influence to bear in local land-use decision-making. Developers with either title to, or options to purchase, a specific parcel have no interest in protecting other developers' rights to build on other parcels. Likewise, employers are not likely to lobby for approval of a particular residential building merely because some of their workers might rent a few units in it. In hearings for zoning map amendments in a particular neighborhood, therefore, only involved developers—rather than the building industry as a whole—generally show up. Confronted with a single developer on one side and a host of angry neighbors from his or her district, the prudent legislator will tend to find that a proposed project's burdens on the neighborhood are too high.

In theory, interest groups favoring more construction might present a grand bargain to the city as a whole. Such a bargain might involve an offer of amenities—plazas and parks, tax revenue, infrastructure improvements, and the like—in exchange for a general expansion of the zoning envelope. All such city-wide bargains, however, run the risk of unraveling at the moment in which a particular developer seeks to construct a specific structure on a specific parcel, leading the use of embedded forms of discretion to block projects or

efforts to downzone areas when interest starts to emerge. The same aldermanic privilege that facilitates deference of all legislators to the preferences of each will ensure that the legislator representing the homeowners abutting the proposed structure will have power to make a parcel-specific amendment to the city-wide bargain. To prevent that city-wide plan from unraveling, therefore, the plan must somehow be entrenched against later piecemeal amendments. Such entrenchment, however, runs up against the constituency effects of the zoning system. Homeowners aggrieved by a proposed tall building in their neighborhood have the incentives and capacity to lobby for a piecemeal amendment from a local legislature, and that legislature, guided by aldermanic privilege, has incentives to defer to the member most responsive to those neighbors' demands. Such ad hoc deals will also increase information costs for investors, further burdening the capacity of the system to invest in housing.

In sum, the constituency effects of the zoning system lead to over-regulation that is difficult to undo through parcel-specific bargaining. Those same constituency effects undermine city-wide plans that balance local costs against general gains. Any solution to the problem of over-regulation, therefore, must reckon with these effects on local politics.

#### 4.2. Counteracting Zoning's Constituency Effects with TDRs

Consider, first, how TDRs can enlarge the coalition favoring development. TDRs tie interests in preservation to interests in construction. The owner who seeks to expand air rights over receiving parcels can justify the development by invoking the benefits of the land use being preserved back at the sending parcel. Those preserved uses of land can include theaters, historical structures, open space, and churches—all structures associated with influential constituencies who can speak in defense of the expansion. Local legislators voting for the TDR program can invoke the support of a popular church leader, historic preservationists, theater companies, environmentalists who support scenic easements, or whichever other constituencies are benefited by the preservation of the sending parcel's original use.<sup>34</sup> To the extent that any of these constituencies are more popular than developers, they can provide the political cover necessary to face down angry neighbors.<sup>35</sup>

In a properly designed TDR system, moreover, the neighbors lose some of the organizational advantages created by property and zoning law. As noted above,

34 See Hills & Schleicher (2015, pp. 125–127) (describing the political effects of New York City's Theater Subdistrict on politicians' willingness to increase heights in receiving zones).

35 There is increasing social scientific evidence for something that anyone who has ever attended a community board meeting already knew: people really, really hate developers and the abstract idea that someone will profit from building houses. See Monkkonen & Manville (2018).

zoning law has several powerful constituency-creating effects: incumbent owners have physical proximity, a clearly defined focal point, and large stakes to motivate and make effective their political action.

Each of these advantages, however, can be undermined with the right sort of TDR. First, if the set of properties eligible to receive TDRs is defined expansively, then the neighbors will be uncertain about when, whether, and to what extent structures in their immediate vicinity will actually be developed. TDRs can thereby neutralize the mobilizing advantages conferred by physical proximity.

Second, if the district eligible to receive TDRs encompasses many city blocks, then the high stakes that motivate neighbors' mobilization are also reduced. People residing near to any particular structure should discount their opposition to TDRs by the likelihood that those air rights will ever be sold and developed. Moreover, the number of people with whom homeowners must maintain ties will increase with the size of the receiving zones, increasing the organizational costs faced by opponents of new construction. One such cost is the possibility that, rather than maintaining a united front against any increase in building heights, neighbors in one part of the receiving zone will encourage or anticipate development in another part, weakening the resolve to resist the expansion of the overall zoning envelope.

Finally, TDRs muddy zoning entitlements by conferring on "sending" sites specific property right, countering the entitlement to zoning restrictions around which neighbors rally. Self-appointed neighborhood defenders often are familiar with and cite the details of the zoning code to justify their opposition to change in land use (Einstein, Palmer, & Glick 2019, pp. 118–120). By giving equally well-defined entitlements to "sending" sites, TDRs undermine the zoned status quo as a rallying point for opposition to new construction.

TDRs, in sum, can enlarge the interests favoring development while eroding the interests opposing it, by bundling together receiving and sending sites with various preservationist interests.

This bundling is effective only so long as the bundle cannot later be unraveled when air rights are sold for particular developments. If review of TDR-based projects is non-discretionary, however, the TDR legislation can confer on TDRs the cultural character, if not the legal status, of vested property rights. It is unlikely that courts would treat legislation repealing TDRs as a deprivation of any constitutionally recognized interest in property, at least absent a substantial investment of "hard costs" into a specific site in reliance on TDRs. The status of the TDRs as as-of-right uses might nevertheless give the legislature sufficient political cover to resist calls to override specific TDR-based projects by citing both the sending and receiving owners' investment-backed

expectations. Again, the re-engineering of the zoning status quo changes the focal points around which neighbors can rally.

Furthermore, TDRs look enough like a planning-based land use regulation—especially when the donor sites are somehow related to the regulated new development—that such system can usually survive court challenges in ways that more explicit transfers might not.<sup>36</sup>

But how TDR programs are designed will determine how their constituent effects work. TDRs can just as easily frustrate development by encouraging owners of sending lots to lobby for downzonings on recipient lots, or simply unravel into nothing.

#### 4.3. Three Guidelines for TDRs Geared Towards Constituency Effects

Balancing constituency effects of property in land are TDRs' best justification. Those constituency effects also suggest guidelines for designing TDR-authorizing legislation that differ from the conventional metrics of compensating landowners or preserving less intense uses of land.

Before suggesting such guidelines, however, a word of caution is in order. Any set of guidelines for TDR legislation is vulnerable to what Eric Posner and Adrian Vermeule call the “inside, outside fallacy” (Posner & Vermeule 2013). Having diagnosed a housing affordability crisis produced by the political power of homeowners, it would be foolish to assume away homevoters' political power and suggest pie-in-the-sky legislation that those same homevoters would likely defeat. Any guidelines for legislation offered here must have some hope of surviving the crucible of zoning politics in which angry home-owning neighbors are highly motivated by their down payments and well-organized by virtue of their physical proximity to each other.

However, pro-housing politicians are elected sometimes, even if by chance. If in power, such officials may be able to design land use procedures that create constituency effects that change the terms of land use politics.<sup>37</sup> Our goal here is to provide pro-housing growth officials some legal tools to help build *stable* pro-development coalitions that are consistent with incumbents' opposition to new growth. These tools solve the “inside, outside” problem. Instead of

36 Whether exactions of this sort should be required to have a closer nexus to potential harms – which would imperil things like affordable housing mandates – is beyond the scope of this project. In practice, TDRs have been used to provide benefits to groups with only a weak connection to new development, with, say, support open space in one part of a region traded for development in another.

37 Other reforms may also help break the political impasse created by America's current land-use law by encouraging interest groups to participate in citywide or statewide deals, rather than neighborhood specific changes. (For a discussion see Hills & Schleicher 2011; Schleicher 2013).



ignoring the public choice problem, they allow those in power to change not only land use policy but also the land use politics that frustrate reform.

Without presuming to tell seasoned local politicians how to do their job, we will offer a few illustrative guidelines for TDR legislation that not only might be enacted over homevoter opposition but also counteract homevoter pressures in implementation after enactment.

First, consider the role of scale. If the point of TDRs is to broaden the scale of neighborhoods to weaken homeowners' advantages, then presumably the receiving zone should be drawn on a large scale.<sup>38</sup> Excessively small numbers of receiving sites not only create a thin market for senders but also a set of landowners who can more easily identify whether they will be likely to suffer a loss when TDRs are sold over a particular parcel.

In suggesting that local legislatures might create such relatively large receiving zones, we are wary about donning our rose-colored "external" perspective on local politics. In a world of politically powerful homevoters, we cannot simply assume that local politicians would unite to upzone whole neighborhoods merely because such an upzoning would be a good idea—such politicians would face the wrath of NIMBY neighbors. TDR legislation breaks this impasse by providing a conditional upzoning, contingent on a sending parcel's owner finding a willing buyer on a receiving parcel. This upzoning should be less politically salient to homevoting neighbors than the proposal of a specific upzoning on an identified parcel. Furthermore, where the recipient and sending zone are close together or coterminous, the benefits created by subsidizing some socially good behavior through the grant of TDRs presumably would have greater effects locally, further limiting and neutralizing opposition from neighbors.

Second, consider the links between sending and receiving parcels' zoning. If the point of TDRs is to mobilize a more unified constituency of pro-development interests, then the TDR legislation ought to align the interests of the owners of parcels in the receiving and sending zones. Sending and receiving landowners are divided by an obvious conflict of interest. The senders have an interest in maximizing the market value of their TDRs by resisting the upzoning and supporting the downzoning of land in the receiving zones. Poorly designed TDR schemes could end up fostering a "Baptist-and-Bootlegger" coalition of NIMBY neighbors (who seek to reduce receiving parcels' height and bulk to protect their own parcels' value) and sending landowners who want to increase

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38 There may be a tradeoff though, as a broader receiving zone would likely require a more complicated environmental review and planning process.

the marginal value of their TDRs.<sup>39</sup> This problem is a particularly dangerous possibility for open-space TDRs in the suburbs and exurbs, where recipient sites have no existing uses that serve as a floor for downzoning.

To counteract these incentives, the TDR legislation ought to align the interests of sending and receiving owners by connecting the ultimate zoning fate of their parcels. That is, a jurisdiction can lock in—by law—the value of TDRs by linking the density they allow to the underlying zoning.

Here's how. TDR legislation could include a provision denominating the TDRs as a ratio of the allowable density on receiving lots and sending lots. If the zoning of either changed, so too would the value of the TDR. Such a “constant ratio” rule would tie together the amount of TDRs to the baseline zoning of receiving areas. Under such a rule, any downzoning of land in the receiving zone would *pro tanto* reduce the percentage of floor area that could be transferred from the sending parcels. Such a “constant ratio” rule applied in the opposite direction could also assure neighbors that the new TDR-related FAR would not be added to new upzonings, as later upzonings in the recipient zone could by legislation be determined to reduce the percentage of floor area that could be transferred through TDRs.<sup>40</sup>

Third, the recipients must be chosen carefully. Understood properly, the recipients of TDRs are getting a resource—a legislatively granted new right to develop—for which the city could get lots of money or other resources (even if limited in their ability to “zone for dollars” by law). Looked at cynically, this is a just payoff to an interest group to lobby for a new project. Furthermore, the recipients of TDRs are unlikely to be impoverished or particularly morally deserving; the idea, after all, is to give TDRs to groups that will be effective in lobbying for the program. The possibility that this payoff will be viewed as unjust is real (and is not unfair). To counteract the accusation that TDRs are an illegitimate payoff to well-connected interests merely because those interests are well-connected, TDRs should be tied to some program with widespread public benefits. Environmental quality, historic preservation, subsidy of theater are all examples of programs that can plausibly be justified as shedding benefits on the public beyond the particular owners of the TDRs themselves. Furthermore, these programs provide a land use justification in the case the program is challenged in court.

39 For a discussion of “Baptist and Bootlegger” coalitions, see [Smith and Yandle \(2014\)](#).

40 A simpler but less good version of the same rule would lock in the existing FAR in the receiving zone at the moment that the TDRs are created, prohibiting any downzoning of receiving parcels unless the entire TDR legislation were repealed. Keeping receiving and sending parcels in close proximity might also provide some assurance to receiving parcels' owners that their land will not be downzoned to increase the marketability of the sending parcels.

These general guidelines cannot be a ready-made political strategy for any high-demand American city. The local politics of each jurisdiction are too different, each calling for their own deals. Instead, these guidelines are merely illustrative of the ways in which a focus on constituency effects changes the design of TDRs. If the core purpose of TDRs is to counteract the constituency effects of homeownership and zoning, then TDR legislation ought to be designed to withstand those effects before, and mitigate those effects after, the legislation is enacted. Zoning itself conjured up the political energy necessary for its survival and expansion by buying off opponents with grandfathering for non-conforming uses. TDR laws could similarly conjure up a counter-constituency while buying off or dividing the opposition with assurances of zoning stability.

That said, it would be useful to consider how successful versions of TDRs actually operated. The next section will discuss three New York City Special District Transfer programs through the lens of constituency effects.

#### **4.4. How TDRs Can Succeed as a Development Strategy: New York City's Special District Transfer Programs**

In the 1970s, New York started using a new TDR tool, the Special District Transfer, to counteract the failures of the landmark transfer. As we will show, these policies worked because they self-consciously considered the constituency effects of TDRs in their design.

How do these transfers work? As a general matter, inside a Special District, some subset of properties within a specified geographic area—for example, landmarked theaters in Times Square or properties underneath the new Highline Park—are given the power to transfer unused floor area to other parcels within the “special district.” The advantage of the special district system is that the district is large enough to include an entire neighborhood of receiving lots rather than just a handful of adjacent properties (Been & Infranca 2013, p. 436).

Aside from this common element of broadening the set of receiving sites, there is huge variation in the policies governing transfers inside Special Districts. In some districts, sale of floor area only requires non-discretionary administrative action (i.e. administrative action according to clear-cut, objective standards), making them effectively as-of-right uses (NYCDCP 2015, p. 14). In others, transfers require approval after discretionary review (meaning review under mushy, policy-laden standards) by the City Planning Commission or a full “ULURP” (Uniform Land Use Review Procedure) process before the purchaser can use the FAR (*id.*, p. 14). Some special districts designate potential sellers based on where they own property, others based on the current use of the

property (like, say, a theater) (*id.*, p. 14). In the Hudson Yards Special District, the government holds the TDRs and then sells them (*id.*, p. 30). Furthermore, many special districts include a “tax” on sales of TDRs, under which the city gets some percentage of the sale price for use for the creation of public goods.<sup>41</sup>

Even this brief description should make clear that the key to special district transfers programs is the broad universe of receiving properties.<sup>42</sup> This is both an intentional and an attractive feature of special district transfers. Special districts are usually used to overcome political objections provoked by large-scale changes in the zoning status quo. The big special district transfers—the Special Theater District, the Highline Transfer Corridor, the Special Hudson Yard District, the recent East Midtown Rezoning—enabled massive new developments that likely would have otherwise been politically impossible. The differences between the regulations governing each Special District can be explained by the efforts of planners to line up coalitions to support what effectively were rezonings of major new areas.

To see how they work, it is worth studying these programs in depth. In previous work, we explored the politics of the Special Theater District that enabled the redevelopment of Times Square (Hills & Schleicher 2015, pp. 125–127). After two famous theaters were demolished and building on a previous program, the City established the Theater Subdistrict in 1982, and then expanded it substantially to make it work in 1998 under Mayor Rudy Giuliani and the visionary leadership of then City Planning Chairman Joe Rose (Dunlap 1997; Kruse 2008; NYCDP 2015, pp. 16–19). The Theater District gave TDRs to the owners of landmarked theaters in return for agreeing to continue to operate, and contribute to a special fund, for those theaters. Those TDRs could be sold across a massive swath of prime real estate in midtown Manhattan. Recipients could use the TDRs to expand their buildings by up to 20 percent effectively as-of-right (transactions only needed to be certified by the city, and were not discretionarily reviewed).

The Theater Subdistrict worked as a political matter because it directly linked the fate of an important and well-regarded interest in the city—Broadway theaters—to a massive rezoning. Supporters saw in the Theater Subdistrict a mechanism for acquiring influential allies for redevelopment, like Actors Equity

41 The authorizations for such levies vary from district to district. For instance, the zoning resolution for the Special Midtown District provides that a contribution of at least 20% of the sales price of transferred floor area must be deposited into a “Public Realm Improvement Fund.” NYCDP (2018, p. 158). Another example is the Theater Subdistrict’s “theater contribution fund,” whereby receiving sites contributed at first \$10 (now \$17.60) per square foot of development rights transferred. NYCDP (2015, p. 17).

42 They are much more flexible than other New York TDR programs like ZLMs and landmark transfers which are limited to a single block or just across a street. See note 5.

and the Broadway Initiative. Perhaps more importantly, because the use of the TDRs was not subject to discretionary review, opponents of any new project needed to argue against the whole program, and thus against a measure intended to save theater on Great White Way. The program proved a success, both in preserving theater on Broadway and encouraging the sale of 470 K square feet of TDRs to be used for new construction.

This move, granting TDRs to politically powerful groups and/or publicly attractive ends, would be repeated and iterated on in later Special Districts.

#### 4.4.1. The High Line and the West Chelsea Rezoning

The creation of the High Line can be viewed as a triumph for the creation of an innovative park in which two plucky neighborhood activists—“nobodies who undertook an impossible mission”—preserved picturesque unused elevated train tracks covered in wild plants that ran between 10th and 11th Avenues from Chelsea to the Meat Packing District (David & Hammond 2017, vii).<sup>43</sup> The High Line is now one of the most visited and beloved public attractions in the city. It set off a huge wave of investment in West Chelsea and has been copied around the world (Smallman 2017).<sup>44</sup>

One can, however, also view the High Line’s creation as a triumph of using constituency effects to overcome NIMBYism. To protect the air above and around the new park and to limit opposition to their efforts, Friends of the High Line worked with the City to develop a system by which property owners near and under the tracks could sell their development rights elsewhere in the neighborhood rather than use them (*id.*, pp. 21, 23–24, 64–66, 89). Once the High Line became popular, city officials used its profile to overcome opposition to new construction nearby. TDRs played a crucial role of linking what was increasingly seen as an important local amenity to a rezoning that could not have otherwise overcome local opposition. That is, rather than seeing the nearby development as the byproduct of saving the High Line, one can regard the High Line as the feat of political engineering through which local officials overcame opposition to needed development.

The High Line park proposal initially faced formidable opposition in the form of owners of property under and near the tracks who wanted to develop

43 Joshua David and Robert Hammond start the preface to their book quoting an unnamed journalist describing them this way. David & Hammond (2011, p. vii). The book is fascinating, but reveals they were not exactly nobodies—a few pages later, they are calling their good friend from college who serves on the City Council (and who later went on to be Speaker) and a few pages after that they are in touch with New York’s glitterati. *Id.*, at 5.

44 See also Been & Infranca (2013, p. 449) (noting \$2B in investment in West Chelsea in years right after the rezoning).

their property by tearing down the old rail line. To overcome opposition from these property owners, the High Line advocates, and eventually the Bloomberg Administration, seized on an idea to use TDRs to compensate their opponents and thereby defuse the opposition (*id.*, p. 22). The Bloomberg rezoning plan for West Chelsea created a Special District Transfer program under which the owners of properties directly under and next to the High Line were given the right to transfer FAR beyond the limits ordinarily imposed by New York's existing TDR systems.<sup>45</sup> In practice, these owners were required to make “transfers at a distance” from the High Line toward other areas (NYCDCP 2015, pp. 23–25).<sup>46</sup> Under the existing zoning, property owners could build above the High Line (one property owner eventually did this, constructing what is now the Standard Hotel) (*id.*, pp. 22–24). But if property owners sold off their development rights, both the space above and directly next to the High Line would remain open.<sup>47</sup> These sending lots were allowed to transfer density to designated recipient lots inside a special district that was an avenue wide and fifteen blocks long.<sup>48</sup> Recipient lots—arrayed on the major avenues and some side streets nearby—could buy FAR at market prices, and could use it increase the density on their lot by as much as 2.65 FAR (although some receiving properties were only allowed to add 1 FAR through TDRs) (*id.*, p. 23). Some properties could add this density to other bonuses, like an affordable housing bonus (often only available once they had maxed out their density with TDRs) (*id.*, pp. 23–24). With TDRs and other bonuses, some properties were allowed to build up to 12 FAR.

The High Line TDR program converted former opponents—those abutting property owners—into fervent allies who could sell their TDRs to developers who sought “as much leeway as possible to develop large, profitable, buildings” (David & Hammond 2011, p. 65). Friends of the High Line were happy to oblige their former opponents with a sophisticated PR campaign to convince the public that a High Line park would be terrific (*id.*, 5–93). The more popular the High Line park, the less opposition confronted by those landowners seeking

45 “The purposes of the TDR mechanism are multiple: First, the TDRs unlock development rights that would otherwise be rendered unusable because of the High Line, thereby compensating owners and preserving overall planned density in the area; Second, and more important from the city’s perspective, the TDRs transfer density away from the High Line to outlying areas to create an open corridor to support and enhance the park.” NYCDCP (2015, p. 23).

46 See also NYCDCP (2005) (describing transfer corridor as including lots under the High Line and parts of adjacent lots).

47 Even vacant lots that had already sold off their FAR were given a bonus 1.0 FAR to sell off if they contributed to the costs of building the High Line. *Id.*, at 24.

48 From 18<sup>th</sup> street to 15<sup>th</sup> Street, it gets narrower at some points, and in this area the city limited transfers and required special review in order to “encourage world class architecture.” *Id.*, at 23.

to develop their newly acquired air rights derived from the High Line plan. By tightly linking downzonings (park creation) with upzonings (transfer of FAR), the High Line TDR program generated specific political allies to lobby for the latter.

This strategy of engineering a political coalition for new construction was a novelty for the Bloomberg Administration. Prior to the High Line, the Bloomberg Administration had provided neighborhood amenities—preservation of existing neighborhoods from taller development—without making any serious effort to link those amenities to new development directly and legally. Between 2003 and 2007, the Bloomberg Administration re-zoned roughly 18 percent of the lots in the City. In 86 percent of the rezoned lots, building capacity was reduced or limited (Armstrong et al. 2010; Fahim 2010). In the remaining lots, the City up-zoned the parcels to permit more housing, often converting manufacturing zones in Brooklyn and Queens into new and massive mixed-use developments. By the end of Bloomberg’s three terms as mayor in 2013, 40 percent of the city had been rezoned (Holeywell 2013). Precisely because they were further from established residential neighborhoods, these conversions of old warehouses and abandoned factories into condos attracted less NIMBY opposition.

In a rough and ready way, the Bloomberg Administration bought political good will from City Council by “contextually” re-zoning established residential neighborhoods filled with anxious brownstone owners fearful of “pop-up” apartment buildings next door (Fahim 2010; Laskow 2014). In a more specific sense, however, there was no such linkage at all. Neighbors who benefitted from contextual re-zonings that shrink-wrapped their neighborhoods had no incentive to lobby for conversion of manufacturing districts into condos, because the fate of one decision did not depend on the fate of the other. As a result, the Bloomberg Administration had no specific allies to fight for the upzonings. This absence of allies may explain why the Bloomberg Administration up-zoned parcels primarily where NIMBY opposition was weak, in areas remote from other more established residential structure. Precisely because the two sorts of zoning decisions were not linked to each other publicly, the political and policy accounting was unclear. As a matter of policy, the avoidance of NIMBY opposition by upzoning remote manufacturing zones also meant that the new condos were not ideally sited, because they were also far from transit infrastructure. It was difficult as well to determine whether the loss of housing capacity from the contextual re-zonings canceled out the new housing capacity added by the upzonings.

Looked at from the perspective of Bloomberg’s broader land use strategy, the Special West Chelsea District was a departure from the loose and informal ties between up- and downzonings. Instead, the West Chelsea district tightly linked



the High Line downzonings to upzonings in nearby West Chelsea, insuring that the beneficiaries of the former could be enlisted to lobby for the latter. Unlike converting a remote bunch of old warehouses in the Outer Boroughs to condos, upzoning West Chelsea would kick the hornets' nest of lots of nearby and established homeowners and renters, provoking the NIMBY-controlled City Council into likely opposition. In order to get this desired new development through the thicket of local politics, the City had to pay a price. Rather than keep development rights for itself to sell for revenue, the Bloomberg Administration therefore gave property owners under and near the High Line the very valuable right to transfer density to properties along the avenues (NYCDCP 2015, pp. 29–30).

By allowing property owners to transfer density, the City bought their support, or at least reduced their opposition, to the High Line. Furthermore, the TDRs linked the added density in recipient sites to the success of High Line. Opponents of new density along the avenues had to argue not only against the density but also against the High Line with which the density transfer was bundled. The bundling together of popular park with unpopular density transfer insured that Friends of the High Line ended up lobbying for the rezoning that included the TDRs. These park supporters could provide political cover for City Hall against accusations that the City was selling out to developers by meeting with anti-development groups to sell both programs—the density transfer and the park (David & Hammond 2011, p. 89). Along with other compromises—things like added affordable housing funding, a requirement that new buildings have unionized doormen, and limits on the heights of buildings near the Chelsea Historic District—the TDR package was enough to get the rezoning of West Chelsea through the City Council.

The TDRs added a lot of new density in the neighborhood, more than 55,000 square feet as of 2017 (and many transactions have been completed since then) (NYCDCP 2015, p. 30). The program was designed to make transfers particularly easy (*id.*, 25). There was no extra layer of review, or even a certification process for buyers—purchasers only needed to notify the city of the transaction. In the five years after the West Chelsea special district was created, more than \$2B flowed into development around the High Line (Been & Infranca 2013, p. 449).

Unlike the downzoning-for-upzoning transfers that characterized the rest of the Bloomberg land use agenda, the Special West Chelsea District also pretty clearly led to a *net* increase in the value and amount of development in the city. The recipient sites were better locations for new density, and the High Line increased the demand and value of properties nearby. Even if the city could have in theory directly regulated the High Line-adjacent properties, while directly allowing new density elsewhere, it almost certainly could not have gotten the

City Council to approve such a rezoning. Linking the fates of the downzoned (and the air above and near the park) to the new density protected it against opposition.

#### 4.4.2. Historic Preservation, Parks, Transit, and the Midtown East Rezoning

On the policy merits, it was difficult to argue in 2012 that East Midtown did not need a new set of zoning rules. East Midtown has long been the pre-eminent office area in New York City and perhaps the country (David 2019). But the actual buildings in the seventy-odd blocks centered around Grand Central Station were old and out of date, often built before World War II with low ceilings and multiple columns that impeded the sort of modern office construction favored by 21st century tenants (NYCDP 2013, p. 4). Those old buildings, however, were non-complying, built more densely than the current zoning resolution allowed. Any developer who tore down the old buildings would lose that extra density when they brought the new buildings into conformity with the new zoning (David 2019). As a result, the old buildings trudged on with depressed rents, losing tenants to newer office buildings coming on line downtown and in Hudson Yards (McGeehan 2017).

The policy merits, however, do not determine zoning policy: politics do. In the last years of his administration in 2012–2013, Mayor Michael Bloomberg proposed an East Midtown Rezoning (EMRZ) that seemed to have forgotten the High Line’s lessons<sup>49</sup> (David 2019). The Bloomberg Administration’s initial proposal almost willfully ignored the political necessity of creating a coalition in favor of a massive upzoning in a densely populated part of the City. Rather than enlist allies by giving them a stake in the success of the upzoning, the Bloomberg Administration’s plan was for the city to sell air rights to developers itself, and thus keep most of the gains from new higher construction around Grand Central Station to invest in transit and parks (Dunlap 2013).<sup>50</sup> The result was that the proposed upzoning was swamped by opposition that could not be countered with equally powerful interests who were invested in the success of the deregulatory proposal. By contrast, when the newly elected mayor, Bill de Blasio, entered the scene in 2014, he allied with an individual Council member

49 Why Bloomberg chose a less delicate approach for East Midtown than his more sophisticated—and successful—effort with the High Line is an open question. One possibility is that the Bloomberg Administration was trying to get the rezoning done before the end of his term in office and did not think it had the time for the careful politics that characterized the West Chelsea rezoning. See David (2019). This story thus suggests one limitation of the TDR approach to building coalitions: the meticulous aligning of incentives is delicate, time-consuming work.

50 The Bloomberg Administration’s plan also, to be fair, incorporated an expansion of landmark transfers, but it was on top of the requirement to pay the city “district improvement bonuses.” See NYCDP (2013), 7.

to create a political coalition in favor of new construction by linking down-zoning with upzoning (NYC 2017). An important part of this coalition-building linkage was the expansion of the historic preservation density transfer program.

The litany of political errors in the 2012 effort were vast and various, but they amounted to underestimating the clout of opponents to new development. Mayor Bloomberg, for instance, ignored aldermanic privilege by announcing the proposed re-zoning in a 2012 speech before ever discussing it with the district's representative, City Councilman Dan Garodnick (David 2019). Predictably, the community boards opposed the proposal. Less predictably, the Archbishop of New York, Cardinal Timothy Dolan, was incensed that City did not take the opportunity of the rezoning to increase the geographic area in which the 1.1 million square feet of air rights associated with St. Patrick's Cathedral might be sold (*id.*). Peter Ward, chief of the Hotel Workers Union feared that the new air rights would lead to new non-Union hotels, while the Municipal Art Society and other civic groups wanted a guarantee of landmark protections, new public spaces, and transit infrastructure commensurate with the scale of the air rights being conferred on developers (Chung 2013; David 2019).

The failure to build a political coalition was directly related to the lack of linkage between the gains and losses from zoning. Because the Bloomberg Administration proposed that the city retain fees paid by developers for air rights, it could not use those funds to build political allegiances. Although Mayor Bloomberg repeatedly emphasized the city would use those funds to build parks and improve transit, he did not make clear who exactly stood to gain (*id.*). No one knew exactly which new buildings would generate specific benefits for which interest groups. In effect, Bloomberg announced a meal of specific nutritious but unloved vegetables while keeping the dessert menu vague and hidden from view. There was no unified constituency of landowners ready to push for the upzoning. Of course, owners of the upzoned lots would enjoy a massive benefit, but owners of air rights over land-marked structures like Grand Central Station or St. Patrick's Cathedral would see the value of those air rights erode with the increased rights of the receiving sites. Likewise, owners of land in competing areas of the City like Related, Larry Silverstein, and Brookfield Office Properties would lose from the increased competitiveness of East Midtown. The City Council predictably killed Bloomberg's proposal in November of 2013 on the eve of Mayor-elect de Blasio's assuming office (Chung 2013).

The de Blasio Administration's success in pushing through an essentially similar upzoning for East Midtown is a lesson in the value of TDRs and similar linkage mechanisms for creating political coalitions. The program allowed buildings on "qualified sites" or large lots along avenues and 42nd Street that

devote no more than 20 percent of their floor space to residential uses, to exceed current zoning treatment using three tools: (i) rebuilding new buildings to the density of current uses, (ii) purchasing TDRs from landmarked buildings in East Midtown, (iii) complete “pre-identified improvements to below grade transit” (NYCDCP 2017). Buildings that used these tools could build at very high densities, as high as 27 FAR.

To understand why this worked when Bloomberg’s plan failed, it is necessary to understand the politics of the linkages. De Blasio courted Cardinal Dolan, eventually promising a massive expansion of the geographic area in which his cathedral’s air rights could be sold. In return, Cardinal Dolan spent \$320,000 on lobbyists to push through de Blasio’s plan, even handing out leaflets promoting the plan at Pope Francis’ visit to Madison Square Garden (Goodman & Neuman 2017). Carl Weisbrod, de Blasio’s head of City Planning, formed a steering committee of stakeholders that carefully connected specific buildings to specific public benefits, eventually tying improvements at specific subway stations to sixteen specific parcels’ being developed at the new and higher densities (David 2019). Likewise, the Council pushed for rules that large parcels (with more than 30,000 square feet) would have to dedicate land and fund specific privately owned public spaces, inducing the Municipal Art Society not only to support the rezoning but to lobby for more floor-area ratio to fund more plazas and parks (MASNYC 2017; NYC 2017).

As the description above indicates, the linkages in the de Blasio Administration’s plan did not all take the form of TDRs. Some interests like park and transit advocates received promises that specific properties would contribute specific sums of money towards particular improvements like subway stops or plazas (NYC 2017). TDRs, however, provided a model even for these sorts of linkages between upzonings and public benefits. Rather than simply ensure a particular level of spending from a dedicated fund for unspecified plazas or subway stops, the steering committee linked specific improvements to specific parcels, in effect giving interest groups that cared about those benefits like the Municipal Art Society a sort of de facto property interest in the development of the parcels (David 2019).

TDRs performed a similar function by providing a de jure property interest to landmarks like St. Patrick’s Cathedral, St. Bartholomew’s Church, and Central Synagogue. By allowing these landmarks to sell over 3 million square feet of unused air rights throughout the 78-block area of the East Midtown Special District, the de Blasio EMRZ conferred a giant financial incentive on their owners—some of the most powerful religious institutions in the City—to lobby for new construction and thereby protect developments from NIMBY backlash. These religious institutions played the same role in the EMRZ that the theaters played in the Times Square project and that the Friends of the High

Line played in the West Chelsea rezoning. This support came at a stiff price for the city: rather than retaining the revenue itself generated from the sale of new air rights as had been central to the Bloomberg plan, the city had to content itself with a 20 percent tax on sales of air rights (Goodman & Neuman 2017; NYC 2017). Even this concession to the city's revenue needs was fought fiercely by Cardinal Dolan, whose lobbying managed to reduce the minimum tax from \$78 to \$61 per square foot (Goodman & Neuman 2017).

The story here shows why using TDRs, rather than mere promises of support for specific causes, can build a coalition for new construction. Unlike a mere promise that money from development will be set aside for a specific improvement, TDRs give the sending lot an actual property right in parcels eligible for new construction. The connection between new construction and benefits to the sending lots created by TDRs, therefore, can be harder for the opponents of the new construction to unbundle. This barrier to unbundling transformed Cardinal Dolan and other leaders of benefited religious buildings from bystanders to passionate allies of new construction that otherwise had nothing to do with them.

The failure of the Bloomberg Administration's approach to East Midtown and the success of the de Blasio Administration is a proof of concept for the argument we advance here. TDRs and linkages can be used to overcome political opposition in contexts where rezonings are otherwise impossible.

## 5. CONCLUSION

In this Article, we have offered a new justification for and a new way to assess TDR programs. Many assessments of TDR programs turn on whether the market "works," that is, whether there are transactions or whether significant land is preserved. But to assess TDRs as a policy, one needs not to look at whether there are trades but rather at how well it achieves each of its three linked goals: preservation, compensation, and development. Just as one assesses the efficacy of the stock market by looking at how well it allocates capital and not on the volume of trades, TDRs must be assessed on how well they achieve their ends, not their means.

We have shown that traditional justifications for TDRs are not successful, as a matter of theory or evidence. Instead of understanding TDR programs as a technocratic fix to the inefficiencies of zoning policy, we argue that they are best understood as a way to build coalitions for new construction and for preservation. They should only be used where it is difficult to achieve these ends through other means; there is no sense employing TDRs in situations where the government could just as easily achieve a rezoning or where there

is no need to create revenues for preservation. But in specific cases, TDRs can link together otherwise unrelated interests in such a way that they can achieve useful results in land use politics. If local politicians are committed to allowing more density in our highest-demand urban areas, TDRs can be beneficial by serving as a tool to get those density increases past the ever-present opponents of growth.

While we have provided a new justification for TDRs, we have also provided a way to look at land use reform more broadly. Most efforts at land use liberalization approach the issue directly, arguing that if land use rules are too strict, whatever political opportunities exist should be used for liberalization directly, passing rezonings that allow more construction. What we argue here is that reformers should use opportunities to create tools that change the structure of land use politics, that create constituencies for more liberal zoning. In the past we have argued that citywide reforms like “zoning budgets” or mandatory replanning rules would give citywide interests like employers and unions a mechanism for becoming involved in land use politics (Hills & Schleicher 2011, 2015; Schleicher 2013). This Article makes that claim more specific by showing how individual projects and programs can reshuffle constituencies. And it generalizes it, showing how theories of constituency effects can be employed to understand land use reform.

Figuring out how to convince our most successful cities and regions to accommodate growth and migrants is one of the great economic and social challenges of our time. This Article hopes to help understand the legal and political elements of that challenge and to provide a framework for thinking about how to develop tools to address it.

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