

Bundle and Conquer

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Roderick M. Hills, Jr. & David Schleicher, [Building Coalitions Out of Thin Air: Transferable Development Rights and “Constituency Effects” in Land Use Law](#), 12 *J. Legal Analysis* 79 (2020).

The lack of affordable housing in our nation’s most generative cities is an ongoing tragedy. The cause is hardly mysterious: incumbent residents—homeowners, sometimes joined by renters—artificially suppress housing supply by blocking development. The result reflects neither the verdict of free markets nor the outcome of democratic processes, but rather political and regulatory dynamics that are powerfully and systematically skewed against change.

In their new article, Professors Roderick Hills and David Schleicher dust off what might seem like just another wonky policy tool, the transferable development right (TDR), and repurpose it as a coalition-building device that can help unstack the political deck to facilitate development.

The backstory is familiar to those who have been following the land use literature. Incumbent homeowners are a dominant political force, as William Fischel’s work has emphasized.¹ The home looms large in their personal portfolios, and risk aversion drives them to oppose anything that might be perceived as a potential threat to home values—including virtually any and all residential development.

This appears to be true not only in suburbs, the original focus of Fischel’s work, but also in cities, where land use politics typically operate at a fragmented, sub-city scale.² Incumbent renters may also strongly oppose development, fearing gentrification, neighborhood changes, and displacement.³

The collective power of incumbents to block change arises from the “hyperlocal” politics that surround zoning.⁴ Against a backdrop of restrictions, new developments are proposed seriatim and typically require a localized map amendment to the zoning ordinance.

Incumbents who are near a proposed new development are physically proximate to each other and have little difficulty coordinating. Zoning, as Hills and Schleicher explain, does not just reflect but also produces and perpetuates political clout through “constituency effects” that bind together the beneficiaries of the status quo and enable them to entrench it.

The interests on the other side enjoy no comparable constituency effects, Hills and Schleicher argue. The most obvious beneficiaries of development are would-be residents who have no ability to coordinate with each other or influence local political outcomes. There are, however, some better-organized proxies for their interests: employers who lose out on talent and developers who lose out on purchasers.

But employers and developers may not be able to overcome hyperlocal resistance either, because their own interests are often diffuse and fragmented. Projects considered one by one face tremendous headwinds, as local opponents rally against a lone developer who has no way to tie her interests to those of other developers who came before or will come after. Employers too would benefit collectively from more housing development, but they have only a fragmented interest in each particular development.

If there is no natural coalition capable of countering the incumbents, Hills and Schleicher suggest, then we ought to use policy to create one. They thus suggest using TDRs as a bundling mechanism—one that can connect development

tightly enough to popular causes (like environmentalism and historic preservation) to pass political and legal muster.

TDRs are a special-purpose currency that enables the owner of a “sending” property to shift some of its development potential (height, say, or density) to a “receiving” property. The fact that owners on both the “sending” and the “receiving” ends of the TDR have an interest in the transaction occurring makes TDRs a potential coalition-building tool—although it may not be easy to keep those interests aligned.

For example, Hills and Schleicher discuss policy tweaks that would keep those with TDRs to sell from pushing for downzoning in receiving areas in order to increase the value of their entitlements. Other efforts may be necessary to keep those who support restrictions on the sending sites but oppose development on the receiving sites from finding ways to effectively unbundle the two parts of the deal.

Hills and Schleicher cite the High Line in New York as a compelling example of the coalition-building potential of TDRs. The owners under the High Line were restricted from developing into the airspace occupied by the park but were given TDRs that they could sell to those in the surrounding area. The park itself provided a nexus between competing interests, as well as a highly attractive focal point. Notably, the very reason for restricting development—to build an elevated park in airspace over the owners’ properties—also made the adjacent areas much more attractive for development than they otherwise would have been.

One might wonder about the generalizability of this sort of example, given the complex and localized political economy of zoning, the highly contextual way in which land use battles play out on the ground, and the many moving parts in TDR design—which is itself a political product.

Ultimately, what I find most valuable about Hills and Schleicher’s project lies not in any particular approach to TDRs, but rather in its insight that constructing durable bundles of interests offers a way to directly counter the political malfunctions that afflict zoning.

We might think about a variety of ways to carry out this bundling. For example, the recent success of some jurisdictions in loosening the grip of single-family-home zoning likely stemmed in part from the flexibility that the new zoning designations granted single-family homeowners to reconfigure their own properties—perhaps adding an accessory dwelling unit or converting their home to a duplex or three-flat.

Could this trend be further expanded (and its impact heightened) by making the added density permitted under new zoning rules transferable to other properties instead? Or perhaps a modified TDR format might be used to deliver benefits to neighbors who are impacted by nearby development, as other recent work has suggested.⁵

Many other approaches might be imagined as well. Whatever the best policies turn out to be, Hills and Schleicher’s work seems sure to catalyze creative engagement with the ways in which land use law produces constituency effects, and with fresh efforts to reshape regulatory policy in ways that will benefit our cities and their residents—present and future.

1. See, e.g., William A. Fischel, *The Homevoter Hypothesis* (2001).
2. See, e.g., David Schleicher, *City Unplanning*, 122 *Yale L.J.* 1617 (2013).
3. See, e.g., Vicki Been, *City NIMBYs*, 33 *J. Land Use & Env’tl Law* 217, 242-44 (2018).
4. Robert C. Ellickson, *The Zoning Strait-Jacket: The Freezing of American Neighborhoods of Single-Family Homes* 38 (working paper 2020), available at [SSRN](#).
5. For recent ideas along these lines aimed at protecting residents in gentrifying communities, see John Infranca, *Differentiating Exclusionary Tendencies*, Fla. L. Rev. (forthcoming), available at [SSRN](#).

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