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# EXCLUSIONARY MEGACITIES

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*Human beings should live in places where they are most productive, and megacities, where information, innovation, and opportunities congregate, would be the optimal choice. Yet megacities in both China and the United States are excluding people by limiting the housing supply. Why, despite their many differences, is the same type of exclusion happening in both Chinese and U.S. megacities? Urban law and policy scholars argue that Not-In-My-Back-Yard (“NIMBY”) homeowners are taking over megacities in the U.S. and hindering housing development. They pin their hopes on an efficient growth machine that makes sure “above all, nothing gets in the way of building.” Yet the growth-dominated megacities of China demonstrate that relying on business and political elites to provide affordable housing is a false hope. Our comparative study of the homeowner-dominated megacities of the U.S. and growth-dominated megacities of China demonstrates that the origin of exclusionary megacities is not a choice between growth elites and homeowners, but the exclusionary nature of property rights. Our study reveals that megacities in the two countries share a property-centered approach, which prioritizes the maximization of existing property interests and neglects the interests of*

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*the ultimate consumers of housing, resulting in housing that is unaffordable. Giving housing consumers a voice in land use control and urban governance becomes the last resort to counteract this result. This comparative study shows that the conventional triangular framework of land use—comprising government, developers, and homeowners—is incomplete, and argues for a citizenship-based approach to urban governance.*

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## INTRODUCTION

*“To add 45 feet, no matter what you put in it—you could put Mother Theresa in it—it still is a too-tall building.”*

—Elizabeth Ashby, Co-Chair, Manhattan Community Board<sup>1</sup>

*“[S]trengthen the population control targets through land supply”*

—Outline of Shanghai Master Plan (2015–2040)<sup>2</sup>

Human beings should live in places where they are most productive, and megacities,<sup>3</sup> where information, innovation, and opportunities congregate, would be the optimal choice.<sup>4</sup> Yet megacities in both China and the United States are excluding people by limiting housing supply. In the U.S., New York City “has lost a net 529,000 domestic migrants” from 2010 to 2015, in large part due to its high housing costs.<sup>5</sup> In San Francisco, housing production has long failed to match the city’s economic growth, with only 11,000 units added to its housing stock from 2009 to 2015, a period in which the city added over 123,000 new jobs.<sup>6</sup> In China, city governments in both Beijing and Shanghai have reduced the supply of residential land to control population, resulting in reduced speed of population growth in Beijing and population outflow in Shanghai since 2016.<sup>7</sup>

1. Abigail Savitch-Lew, *How Are NYC’s Community Boards Reacting to de Blasio’s Housing Proposals?*, CITY LIMITS (Nov. 2, 2015), <http://citylimits.org/2015/11/02/how-are-nycs-community-boards-reacting-to-de-blasios-housing-proposals>.

2. “以用地供给强化人口调控目标，以产业结构调整优化人口结构，以适宜的人口密度调节人口分布” [“To strengthen the population control targets through land supply; to optimize the population structure through readjustment of the industrial structure; to regulate the population distribution through appropriate population density.”]. See LEADING GROUP OFFICE OF SHANGHAI MASTER PLAN, 上海市城市总体规划 (2015–2040) 纲要概要 [OUTLINE OF SHANGHAI URBAN MASTER PLAN (2015–2040)] 11 (2015), <http://img.thupdi.com/news/2016/01/1453791519864576.pdf>.

3. “Megacity” is a term widely used and accepted but rarely precisely defined. In this Article, we use the term to refer to first-tier cities in China, represented by Beijing, Shanghai, and Shenzhen, and the biggest cities in the U.S., represented by New York City and San Francisco.

4. See, e.g., EDWARD GLAESER, *TRIUMPH OF THE CITY* (2011).

5. See, e.g., Joel Kotkin, *The Cities Americans Are Thronging to and Fleeing*, FORBES (Oct. 6, 2015, 8:30 AM), <https://www.forbes.com/sites/joelkotkin/2015/10/06/the-cities-americans-are-thronging-to-and-fleeing>.

6. BAY AREA COUNCIL ECON. INST., *SOLVING THE HOUSING AFFORDABILITY CRISIS: HOW POLICIES CHANGE THE NUMBER OF SAN FRANCISCO HOUSEHOLDS BURDENED BY HOUSING COSTS 5* (2016), [http://www.bayareaeconomy.org/files/pdf/BACEI\\_Housing\\_10\\_2016.pdf](http://www.bayareaeconomy.org/files/pdf/BACEI_Housing_10_2016.pdf) [hereinafter HOUSING AFFORDABILITY].

7. See, e.g., 何苗 [He Miao], 外来常住人口首现 15 万净流出：谁离开了上海？ [150,000 Net Outflow of Migrant Permanent Resident Population: Who Leaves Shanghai?], 21 JINGJI (Mar. 2, 2016), [http://epaper.21jingji.com/html/2016-03/02/content\\_33343.htm](http://epaper.21jingji.com/html/2016-03/02/content_33343.htm); 北京楼市，真的遭遇大利空了吗？ [Is the Real Estate Market in Beijing Running out of Interests?], IFENG NEWS (Feb. 28, 2017, 6:17 PM), <http://wemedia.ifeng.com/9158923/wemedia.shtml>; 李迅雷 [Lee Thunder], 人口流向出现逆转，它将

Why, despite their many differences, is the same type of exclusion happening in these two countries? The two countries are fundamentally different in land ownership regimes, land use regulations, and urban governance. Urban law and policy scholars in the U.S. are concerned that Not-In-My-Back-Yard (NIMBY) homeowners are taking over big cities and hindering housing development therein, thereby excluding lower-income and younger populations from the opportunities that those cities offer.<sup>8</sup> Explicit or implicit in their research is hope for an efficient growth machine that makes sure “above all, nothing gets in the way of building.”<sup>9</sup> From an American perspective, growth-oriented elites in cities, including land developers and urban politicians, profit through the increasing intensification of land use.<sup>10</sup> Governments in Chinese megacities monopolize land supply, manipulate land use controls, and centralize decision-making processes to promote growth. Such governments would be an ideal for the above American urban law and policy scholars. If their theory about the urban growth machine was correct, however, there should have been no housing shortage in super growth-focused cities in China. Why do megacities in China also limit housing supply?

Our comparative study of the homeowner-dominated megacities of the U.S.<sup>11</sup> and growth-dominated megacities of China<sup>12</sup> demonstrates that

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对中国经济产生怎样的影响? [How Will the Phenomenon of Reverse Population Flow Affect the Economy in China?], SOHU (Apr. 25, 2017, 6:30 PM), [http://www.sohu.com/a/136422828\\_481642](http://www.sohu.com/a/136422828_481642).

8. See generally Vicki Been et al., *Urban Land-Use Regulation: Are Homevoters Overtaking the Growth Machine?*, 11 J. EMPIRICAL LEGAL STUD. 227 (2014); Roderick M. Hills, Jr. & David Schleicher, *Balancing the “Zoning Budget,”* 62 CASE W. RES. L. REV. 81 (2011) [hereinafter Hills & Schleicher, *Balancing*]; Roderick M. Hills, Jr. & David Schleicher, *Planning an Affordable City*, 101 IOWA L. REV. 91 (2015) [hereinafter Hills & Schleicher, *Planning*]; John Mangin, *The New Exclusionary Zoning*, 25 STAN. L. & POL’Y REV. 91 (2014); David Schleicher, *City Unplanning*, 122 YALE L.J. 1670 (2013); *Urban Land: Space and the City*, ECONOMIST (Apr. 4, 2015), <https://www.economist.com/news/leaders/21647614-poor-land-use-worlds-greatest-cities-carries-huge-cost-space-and-city> (“Lifting all the barriers to urban growth in America could raise the country’s GDP by between 6.5% and 13.5%, or by about \$1 trillion–2 trillion.”); Jason Furman, Chairman, Council of Econ. Advisers, *Barriers to Shared Growth: The Case of Land Use Regulation and Economic Rents*, Remarks at the Urban Institute (Nov. 20, 2015), [https://obamawhitehouse.archives.gov/sites/default/files/page/files/20151120\\_barriers\\_shared\\_growth\\_land\\_use\\_regulation\\_and\\_economic\\_rents.pdf](https://obamawhitehouse.archives.gov/sites/default/files/page/files/20151120_barriers_shared_growth_land_use_regulation_and_economic_rents.pdf).

9. Edward L. Glaeser, *Houston, New York Has a Problem*, CITY J., <https://www.city-journal.org/html/houston-new-york-has-problem-13102.html> (Summer 2008). See Been et al., *supra* note 8; Hills & Schleicher, *Balancing*, *supra* note 8; Schleicher, *supra* note 8. On the other hand, scholars are also concerned about local governments being captured by mobile capital. See generally Richard C. Schragger, *Mobile Capital, Local Economic Regulation, and the Democratic City*, 123 HARV. L. REV. 482 (2009).

10. See generally Harvey Molotch, *The City as a Growth Machine: Toward a Political Economy of Place*, 82 AM. J. SOC. 309 (1976).

11. See, e.g., William A. Fischel, *The Rise of Homevoters: How OPEC and Earth Day Created*

relying on business and political elites to provide affordable housing is a false hope. Homeowners do not generally look favorably on newcomers to a city who demand housing and public services, but do not have sufficiently deep pockets to purchase an apartment. Neither do growth-oriented city governments that control resources and have the capacity to make and implement whatever policies they deem to be pro-growth. This Article argues that the growth-machine-versus-homevoter<sup>13</sup> debate shares the same incomplete framework of urban governance, giving no voice to city residents who own no property or businesses, and it calls for citizen-based urban governance to replace property-based urban governance. The Article also furthers that debate by comparing land use controls and development processes in the U.S. and China. At first glance, the two countries appear fundamentally different in the way they approach such issues.

In the U.S., land use decisions have a democratic basis and involve numerous parties, including neighboring property owners, community advocates, appointed and elected officials, and real estate developers. Although many groups engage in the decision-making process, as housing costs in many American cities have increased in recent years, policymakers have become concerned that the end result is restrictive zoning rules that limit mobility and exacerbate income inequality.<sup>14</sup> Many community advocates have expressed concern that local zoning decision-making processes are complex, inefficient, and lacking in transparency, and, as a result, they prevent needed development.<sup>15</sup> Zoning amendments, a major step in real estate development, have frequently been locked into what David Schleicher and Roderick Hills call “one by one” piecemeal bargaining, dominated by NIMBY property owners.<sup>16</sup>

China presents a very different picture of land use control. There, land

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*Growth-Control Zoning that Derailed the Growth Machine*, in EVIDENCE AND INNOVATION IN HOUSING LAW AND POLICY 13 (Lee Anne Fennell & Benjamin J. Keys eds., 2017); Been et al., *supra* note 8; Schleicher, *supra* note 8.

12. See generally Xiaoyi Sun & Ronggui Huang, *Extension of State-Led Growth Coalition and Grassroots Management: A Case Study of Shanghai*, 52 URB. AFF. REV. 917 (2016); Lei Wang, *Forging Growth by Governing the Market in Reform-Era Urban China*, 41 CITIES 187 (2014); Lin Ye, *State-Led Metropolitan Governance in China: Making Integrated City Regions*, 41 CITIES 200 (2014); Sumei Zhang, *Land-Centered Urban Politics in Transitional China—Can They Be Explained by Growth Machine Theory?*, 41 CITIES 179 (2014).

13. For a discussion of the term “homevoter,” see *infra* text accompanying note 47.

14. Furman, *supra* note 8.

15. Mangin, *supra* note 8.

16. Schleicher, *supra* note 8 at 1706–07.

use regulations are administratively driven.<sup>17</sup> The general public has only nominal rights to participate in the zoning process. Land use power is concentrated at the city administration level under the command of a strong city leader. As a result, city governments can make zoning amendments quickly, with little input from the public.<sup>18</sup> However, the Chinese central government, urban planning officials, professionals, and scholars have exposed significant problems within this “efficient” system and argued that the lack of public participation is endangering the legitimacy of zoning in China and contributing to an inefficient housing market.<sup>19</sup> The Chinese real estate market exhibits a combination of skyrocketing prices in the country’s megacities, which results in the exclusion of middle- and low-income populations (as well as the denial of employment and social opportunities) and housing oversupply in its smaller cities, as symbolized by the numerous “ghost cities” dotting the landscape.<sup>20</sup> In this Article, we focus on housing shortages in Chinese and American megacities.

Although there are major differences between the Chinese and American land use systems, they share the phenomenon of high housing prices becoming a new instrument by which to exclude poorer populations from megacities. China’s megacities, including Beijing, Shanghai, and Shenzhen, have seen demand outpace net new construction since the turn

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17. See *infra* Part III.

18. *Id.*

19. See, e.g., Ye, *supra* note 12 at 189–90. See generally 罗鹏飞 [Luo Pengfei], 关于城市规划公众参与的反思及机制构建 [Reflections on the Public Participation in Urban Planning and Its Mechanism Construction], 6 城市问题 [URB. PROBLEMS] 32 (2012).

20. A defining characteristic of the Chinese housing market is the undersupply of housing in megacities and oversupply of housing in smaller cities. See generally Jing Wu et al., *Evaluating the Risk of Chinese Housing Markets: What We Know and What We Need to Know*, 39 CHINA ECON. REV. 91 (2016). Looking at the bigger picture of nationwide housing demand and supply, both China and the U.S. share a mismatch between housing supply and job opportunities. “[L]ocal governments with the weakest economies have been the most aggressive in promoting new housing supply, perhaps as a means of generating economic growth, while local governments in the richest cities have been slowing down construction.” Edward Glaeser et al., *A Real Estate Boom with Chinese Characteristics*, 31 J. ECON. PERSP. 93, 98 (2017). See also Hanming Fang et al., *Demystifying the Chinese Housing Boom*, 30 NBER MACROECONOMICS ANN. 2015 105, 152–53 (“There is still a lack of systematic understanding of housing supply in Chinese cities. To the extent that housing prices have been rising at a pace comparable to or even higher than the households’ income growth rate during the decade, the housing market equilibrium implies that the growth of housing supply was likely to have stayed either below or comparable to the growth of housing demand . . . .”); Roderick M. Hills, Jr. & Shitong Qiao, *Voice and Exit as Accountability Mechanisms: Can Foot-Voting Be Made Safe for the Chinese Communist Party?*, 48 COLUM. HUM. RTS. L. REV. 158, 168–69 (2017); Mali Chivakul et al., *Understanding Residential Real Estate in China* 18 (Int’l Monetary Fund, Working Paper No. 15/84, 2015) (“For China, Tier I cities are close to the average levels in advanced economies, while smaller cities already see a much higher level, suggesting possible signs of oversupply.”).

of the century.<sup>21</sup> According to joint research by Joe Gyourko, Yongheng Deng, and Jing Wu, from 2001 to 2014, the housing supply was just 87% of projected demand in Beijing, 70% in Shanghai, and 73% in Shenzhen.<sup>22</sup> In the U.S., there are more than two “extremely low income and very low income households” for every one housing unit affordable to them in New York City.<sup>23</sup> The lack of affordable housing in San Francisco has pushed families out of the job market and the city.<sup>24</sup> In both the U.S. and China, procedural obstacles and the biases of (public and private) property owners are obstructing housing development and reinforcing real estate developers’ inherent inclination toward the construction of expensive housing. The result is a limited supply of new construction, which, when combined with continued demand growth from new residents, has led to significant increases in the cost of housing in megacities.<sup>25</sup> Traditional exclusionary zoning approaches have been used to keep certain populations out of attractive communities and to prevent them from accessing decent affordable housing. For example, racial covenants were used in the U.S. until after the Second World War,<sup>26</sup> and the *hukou* residency registration system has a long history in China.<sup>27</sup> As exclusionary policies came under attack in the U.S., more subtle forms of regulatory exclusion took hold in the suburbs, the types of processes that led to the *Mount Laurel* decisions and government intervention.<sup>28</sup> In the twenty-first century, traditional forms of exclusionary zoning continue, and cities are witnessing a growth in

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21. Wu et al., *supra* note 20, at 5–6.

22. See *id.* at 60 (“Market-level analysis of short- and longer-run changes in supply-demand balances finds important variation across markets. In the major East region markets of Beijing, Hangzhou, Shanghai and Shenzhen which have experienced very high rates of real price growth, we estimate that the growth in households demanding housing units has outpaced new construction since the turn of the century. However, there are a dozen large markets, primarily in the interior of the country, in which new housing production has outpaced household growth by at least 30% and another eight in which it did so by at least 10%.”). *Id.* at 2.

23. *Our Current Affordable Housing Crisis*, N.Y.C. HOUSING, <http://www1.nyc.gov/site/housing/problem/problem.page> (last visited July 4, 2017).

24. HOUSING AFFORDABILITY, *supra* note 6, at 4.

25. Furman, *supra* note 8, at 5–6. As discussed in Part IC, the richest cities are often megacities which occupy unique and monopoly positions on the market of places, and, therefore, tend to undersupply housing to grab monopoly rents.

26. See, e.g., RICHARD R.W. BROOKS & CAROL M. ROSE, *SAVING THE NEIGHBORHOOD: RACIALLY RESTRICTIVE COVENANTS, LAW, AND SOCIAL NORMS* (2013).

27. See generally FEI-LING WANG, *ORGANIZING THROUGH DIVISION AND EXCLUSION: CHINA’S HUKOU SYSTEM* (2005).

28. See, e.g., DOUGLAS S. MASSEY ET AL., *CLIMBING MOUNT LAUREL: THE STRUGGLE FOR AFFORDABLE HOUSING AND SOCIAL MOBILITY IN AN AMERICAN SUBURB* 21–23 (2013). See also *S. Burlington Cty. NAACP v. Twp. of Mount Laurel*, 456 A.2d 390 (N.J. 1983); *S. Burlington Cty. NAACP v. Twp. of Mount Laurel*, 336 A.2d 713 (N.J. 1975).

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obstacles to new development through the processes described in this Article.<sup>29</sup> It is particularly surprising to see such obstacles in China, where, despite driving the world's most effective growth machine over the past three decades, housing prices in the country's megacities have skyrocketed.

Why have two such different land use regimes led to a similar form of exclusion? We argue that, despite their different decision-making processes, the development regimes of both countries share an urban governance framework that neglects the voices of the have-nots and is premised on the drive to maximize the value of land for current owners, thereby leading to discrimination against the interests of middle- and low-income populations.<sup>30</sup> We use the Chinese case to demonstrate that, even in super-growth-focused cities, decision-making can lead to exclusion if the politics of urban governance are centered on land value maximization for current owners. The root cause of exclusionary cities is urban governance regimes that prioritize property owners' interests and voices, at the core of which lies the right to exclude. A fundamental lesson is that urban governance is not only about land or capital,<sup>31</sup> but also about labor and housing consumers, the neglect of whose interests leads to inefficiency and exclusion.

The remainder of the Article is structured as follows. Part I lays out the basic differences of property and political markets between Chinese and American megacities and reveals that despite fundamental differences in land institutions and urban governance, landowners dominate both markets; housing consumers' voices are weak or zero in both kinds of megacities. Part II examines the origin and structure of zoning in American megacities, focusing on the growth-machine-versus-homevoter hypothesis, exploring the ways in which zoning processes have become increasingly contested and the impact of conflicts over development in American megacities. Drawing on the example of New York City, it then demonstrates that even in megacities where developers would be expected to have influence, property owners dominate zoning processes, leading to the exclusion of middle- and low-income populations. Part III examines urban governance in Chinese megacities, revealing an alliance between government and developers, as well as the growing influence of property owners. We argue

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29. Mangin, *supra* note 8, at 92.

30. This paper does not address the relationship between city governments and upper-level governments, which can impact housing supply too. See generally David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2255 (2003).

31. Schragger, *supra* note 9, at 485.

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that this alliance has led to skyrocketing prices in Chinese megacities, which exclude middle- and low-income populations. The Chinese case reveals that growth-machine elites' interests are not necessarily in alliance with a greater housing supply. Finally, Part IV concludes by examining the convergence of both American and Chinese megacities towards exclusion and proposes to replace the current property-centered urban governance with a citizenship-based approach to make megacities more affordable and inclusive.

#### I. CONCEPTUALIZING LAND USE IN TWO MEGACITIES: PROPERTY AND POLITICAL MARKETS

In both the United States and China, supply and demand decide the final land use, and land institutions (i.e., land ownership regimes and land use regulations) shape both supply and demand. Therefore, to conceptualize land use in China and the U.S., we need to understand not only their property markets, but also the political markets of urban governance. The most interesting aspect of this comparison is that, despite fundamental differences in land institutions and urban governance, landowners dominate both markets, and consumers' voices are weak in both Chinese and American megacities. More specifically, American megacity politics are dominated by existing property owners, whereas in Chinese megacities, the government, as the sole land owner, prioritizes industrial development and favors high housing prices over satiating demand. As a result, land use processes in both China and the U.S. prioritize property owners' voices and neglect the needs and demands of the have-nots and newcomers to big cities.

##### A. PROPERTY MARKET: STATE MONOPOLY VS. HOMEOWNERS' MONOPOLY

In China, city governments monopolize land supply and are incentivized to undersupply residential land to grab monopoly rents from consumers. In U.S. cities, the real estate industry is much more competitive. Yet, with the institution of zoning, the supply of housing can be restricted by monopolistic practices. Empirical studies have shown that such monopolistic supply restriction is widespread, originally in suburbs and now even in megacities. In other words, since "zoning power within an urban area is sufficiently concentrated" amongst local homeowners and their representatives, the "supply of housing [in such areas has been] below [optimal], and its price above, those which would prevail in competitive

equilibrium with no zoning.”<sup>32</sup> State and homeowner monopolies over the property market are the defining characteristic of land use in China and the U.S., respectively. We can proceed to more detailed description of the two systems with this defining characteristic established.

To compare land use approaches in China and the U.S., it is necessary to clarify the concept of zoning and, more fundamentally, the function of land use regulations. Each society’s understanding of property rights is crucial to its conception of zoning, and China and the U.S. differ greatly in their fundamental understanding of both property rights and zoning. The historic understanding of property rights in the U.S is captured by the phrases “the title of our lands is free, clear, and absolute”<sup>33</sup> and “every proprietor of land is a prince in his own domain.”<sup>34</sup> In other words, private property owners have wide latitude in determining the uses of their property. Although property ownership has always been subject to government regulation in the U.S., the libertarian view captured by the foregoing phrases has shaped the legal rules governing the strength of private property rights and the limited role of the government in determining those rights. The primary justification for zoning in the U.S., as represented by the *Euclid* decision, is the need to prevent negative externalities that may result from individual land use decisions.<sup>35</sup> The goal of the zoning rules developed to regulate land use was to prevent any interference with the rights of neighboring property owners: i.e., the government plays the role of regulator to protect private property interests.<sup>36</sup> However, the problem with a land use system based on private property rights is that “housing owners can employ growth controls to cartelize housing supply.”<sup>37</sup> “If consumer demand for residency in a [place] is not completely elastic,” which is always the case in megacities, homeowners’ interests are allied with limiting housing supply to maintain

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32. Bruce W. Hamilton, *Zoning and the Exercise of Monopoly Power*, 5 J. URB. ECON. 116, 116 (1978). See also William A. Fischel, *Zoning and the Exercise of Monopoly Power: A Reevaluation*, 8 J. URB. ECON. 283 (1980); James A. Thorson, *An Examination of the Monopoly Zoning Hypothesis*, 72 LAND ECON. 43 (1996).

33. STUART BANNER, *AMERICAN PROPERTY: A HISTORY OF HOW, WHY, AND WHAT WE OWN* 5 (2011).

34. *Id.*

35. See *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 394–95 (1926).

36. See, e.g., Richard A. Epstein, *A Conceptual Approach to Zoning: What’s Wrong with Euclid*, 5 N.Y.U. ENVTL. L.J. 277, 286–87 (1996).

37. Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385, 400 (1977).

or even increase the market value of existing housing.<sup>38</sup>

In contrast, local governments in China are the primary land owners and suppliers within their jurisdictions. Zoning is a recent concept, adopted as part of the country's market reforms. Historically, the government has controlled land directly through ownership.<sup>39</sup> Urban planning is a more commonly used term than zoning in China, and it follows the economic planning tradition. It is a powerful weapon for local governments to achieve their city management objectives. In the planned economy period, land use decisions were part of development decisions.<sup>40</sup> The central and local governments formulated five-year economic development plans, implemented through a variety of projects. The governments controlled the plans for such projects, including their locations, how much land to use, and what facilities needed to be built. Hence, land use decisions were not independent, but rather part of, and inferior to, overall project decisions.<sup>41</sup>

The strength of such economic plans was the centralized decision-making process, whereby the government determined the appropriate land use and made decisions concerning individual land parcels by taking into account the overall development picture. The problems with such centralized planning are also obvious, including the potential misallocation of resources and neglect of individual interests. The market reforms launched in the 1980s dismantled the planned economy, resulting in various economic activities being freed from central government control. China promulgated its first urban planning law in December 1989, making urban planning permits a separate requirement in the land use permit system.<sup>42</sup> In the years since, urban planning in China has gradually moved in the direction of American-style land use regulations, with the further retreat of government power from economic activities and the expansion of individual property rights. Today, the government plays a dual role in the development of land: it is both the primary land supplier and the land use

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38. *Id.*

39. Shitong Qiao, *The Politics of Chinese Land: Partial Reform, Vested Interests, and Small Property*, 29 COLUM. J. ASIAN L. 70, 75 (2015).

40. *Id.* at 82

41. *Id.* at 78 ("It was clear from the RRLSC that all land use must be consistent with the State's economic plan."). The Chinese system is in many ways similar to that of cities in early United States. *See generally* HENDRIK HARTOG, PUBLIC PROPERTY AND PRIVATE POWER: THE CORPORATION OF THE CITY OF NEW YORK IN AMERICAN LAW, 1730-1870 (G. Edward White ed., 1983).

42. *See* 中华人民共和国城市规划法 [City Planning Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 26, 1989, effective Apr. 1, 1990, invalidated by the Urban and Rural Planning Law, Oct. 28, 2007), art. 31, *translated in* 1987-1989 P.R.C. LAWS 349 (describing the application process for a construction project in a planned urban area).

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regulator. As the primary land supplier, the government is able to define the scope and content of individual land use rights in land use assignment contracts with individual land users.<sup>43</sup> It can then further regulate individual land uses through its regulatory power, similar to the power of local governments in the U.S.

The U.S. and Chinese systems started from very different, almost polar, positions, with the former focused on private rights and the latter on government privilege, but over time the number of similarities between the two have increased. Land use control in China originated in the planned economy, as noted, with the state exercising control over land as both land owner and economic planner. However, with the ongoing shift toward private property ownership, the government's power to shape development has become more circumscribed. In the U.S., the land use system began with little government intervention, but over time the government's role gradually increased, and today local governments play a meaningful role in directing development. These two different, but converging, frameworks have shaped the development process in both countries. Nevertheless, the government monopoly of the land market is still the defining characteristic of land use control in China. In the U.S., as discussed in more detail in the following section, homeowners also cartelize housing supply through their control of city governments. A monopolized market does not generate optimal housing, regardless of which entities are doing the monopolizing.<sup>44</sup>

#### B. POLITICAL MARKET: GROWTH MACHINE VS. HOMEVOTERS

Urban governance has long been described as a war between growth elites, such as land developers, and homeowners, who are also voters. In 1976, Harvey Molotch coined the term "growth machine" to describe the efforts of the former group:

A city and, more generally, any locality, is conceived as the areal expression of the interests of some land-based elite. Such an elite is seen to profit through the increasing intensification of the land use of the area in which its members hold a common interest. An elite competes with other land-based elites in an effort to have growth-inducing resources invested within its own area as opposed to that of another. Governmental authority, at the local and nonlocal levels, is utilized to assist in

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43. Shitong Qiao, *The Evolution of Chinese Land Law: Stick by Stick?*, in PRIVATE LAW IN CHINA AND TAIWAN: LEGAL AND ECONOMIC ANALYSES 182, 191–95 (Yun-Chien Chang, Wei Shen & Wen-Yeu Wang eds., 2017).

44. See Hamilton, *supra* note 32, at 116.

achieving this growth at the expense of competing localities. Conditions of community life are largely a consequence of the social, economic, and political forces embodied in this growth machine.<sup>45</sup>

In the same article, Molotch speculated that “the political and economic essence of virtually any given locality, in the present American context, is *growth*.”<sup>46</sup> However, also in the 1970s, homeowners began to erode the power of the pro-development growth machine coalition. According to William Fischel:

[U]nprecedented peacetime inflation, touched off by the oil cartel OPEC, combined with longstanding federal tax privileges to transform owner-occupied houses into growth stocks. The inability to insure the newfound value of their homes converted homeowners into “homevoters,” whose local political behavior focused on preventing development that might devalue their homes.<sup>47</sup>

Originally, this occurred in the suburbs, but recently homevoters have also begun to overtake the growth machine in big cities.<sup>48</sup>

A typical land use dispute is therefore a drama featuring three main players: the developer (the main actor in the growth machine), neighbors (i.e., neighboring homeowners, along with, in U.S. megacities, the renters whose neighborhood longevity has created a vested interest), and the local government. The developer “triggers the dispute” by proposing to carry out a controversial activity.<sup>49</sup> The neighbors of the land under dispute constitute “the developer’s first and main line of opposition.”<sup>50</sup> The local government in whose jurisdiction the land is located is then the “principal institution” tasked with “reconciling the competing interests” of the two other parties.<sup>51</sup> This triangular framework dominates discussions of land use disputes in both land use casebooks<sup>52</sup> and law review articles.<sup>53</sup> The way in which the framework unfolds depends on the decision-making mechanisms, which can be simplified into three models.

The first can be called the “omniscient dictator” model. Land use

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45. Molotch, *supra* note 10, at 309.

46. *Id.* at 309–10.

47. Fischel, *supra* note 11, at 1.

48. Been et al., *supra* note 8, at 229; Schleicher, *supra* note 8, at 1682–83.

49. ROBERT ELLICKSON & VICKI BEEN, *LAND USE CONTROLS: CASES AND MATERIALS* 73 (3d ed. 2005).

50. *Id.*

51. *Id.*

52. *See generally id.*

53. *See, e.g.,* Been et al., *supra* note 8, at 228; Schleicher, *supra* note 8, at 1676–77.

decisions are made by a dictator who has the ability to costlessly determine the relative value of different land use arrangements. The second model is a more democratic or majoritarian model, in which proposals are accepted or rejected by some sort of majority vote by a representative decision-making body. At first blush, land use decisions in China fall under the dictator model, with an authoritarian local government deciding what is appropriate and individual property owners lacking any say in the matter, whereas those in the U.S. fall under the democratic model, as the mayors and city councils making decisions are elected, and zoning decisions are often subject to a democratic vote.

However, neither model provides an ultimate answer to the question of who decides which projects go forward. In the Chinese dictator model, we still need to determine what the dictator considers in making decisions, whereas in the American democratic model, we still need to determine what constitutes a majority. This is where the third model, the “influence model,” comes in. The Chinese “dictator” does not have all of the information necessary to make land use decisions, and thus decisions are based on various policy considerations as influenced by a range of interested parties, including real estate developers but also industrial land users and neighboring homeowners, who cannot vote but who can exercise influence in other ways.<sup>54</sup> In the American democratic model, what constitutes a majority is a difficult question to answer, as a small number of property owners often wield disproportionate influence, with the views of other members of the community neglected. City councilors make decisions with imperfect information and under the influence of various interests. Accordingly, the influence model explains land use decisions in both China and the U.S. better than either the omniscient dictator or democratic models.

Throughout U.S. history, homeowners were not against development when they themselves were part of the growth machine and benefited from additional development. According to Fischel, the rise of suburban America and the separation of home from work led to the NIMBY movement, resulting in the displacement of the growth machine.<sup>55</sup> Homeowners concerned about the value of their property, and the

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54. See, e.g., Thomas Johnson, *Environmentalism and NIMBYism in China: Promoting a Rules-Based Approach to Public Participation*, 19 ENVTL. POL. 430, 430–31 (2010); Yi Sun, *Facilitating Generation of Local Knowledge Using a Collaborative Initiator: A NIMBY Case in Guangzhou, China*, 46 HABITAT INT'L. 130, 131–32 (2015).

55. Fischel, *supra* note 11, at 4–8.

homeowners associations that represent them, took control of local governments, exercising a dominant influence in zoning decisions.<sup>56</sup> In China, by contrast, homeowners are not particularly powerful, although their influence is growing in conjunction with their rise in both numbers and power. Chinese cities are also considered super growth machines, and thus pro-development, although that has not prevented them from becoming exclusionary.

Land use decisions are subject to the dynamics of the political market, which, as Douglass North wrote, concern “the underlying rules that are the incentive structure of an economy—property rights, contracting, and credible commitment.”<sup>57</sup> North further highlighted two problems in political markets. The first is that there may be imperfect information and cognition—that is, one must ask how well the representatives of various interests know their interests and whether “the collective outcome [is] rational, in the sense that policies could have been devised that rendered all concerned better off.”<sup>58</sup> Correcting for this, Hills and Schleicher argued that local governments can combat NIMBYism through comprehensive city-wide plans, ensuring that the potential burden of new development is widely shared.<sup>59</sup> Residents do not oppose all new construction, they pointed out. Rather, they worry that they will be forced to accept more than their neighborhood’s “fair share.”<sup>60</sup> To combat homeowners’ strong aversion to development in their neighborhoods, Hills and Schleicher proposed a budget zoning system that renders the overall costs to individual neighborhoods much more visible. To address the same problem, Fennell proposed decoupling the investment volatility associated with off-site influences on housing from the homeowner’s bundle,<sup>61</sup> whereas Fischel proposed “reduc[ing] the tax advantages of homeownership” and “equaliz[ing] the tax treatment of capital gains from housing with that of other assets.”<sup>62</sup> Albeit through different means, all these scholars try to

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56. *Id.* at 4–6.

57. Douglass C. North, *A Transaction Cost Theory of Politics*, 2 J. THEORETICAL POL. 355, 356–57 (1990).

58. *Id.* at 357–58 (quoting Anne O. Krueger, *The Political Economy of Controls: American Sugar* 38 (Nat’l Bureau of Econ. Research, Working Paper No. 2504, 1988)).

59. Hills & Schleicher, *Planning*, *supra* note 8, at 95. *See also* Hills & Schleicher, *Balancing*, *supra* note 8, at 89–90.

60. Hills & Schleicher, *Balancing*, *supra* note 8, at 102 (“[N]o legislator will vote to allow a new development in her district unless she can be sure everyone else will reciprocate by taking their fair share of the housing needed to meet demand.”).

61. Lee Anne Fennell, *Homeownership 2.0*, 102 NW. U. L. REV. 1047, 1062 (2008).

62. Fischel, *supra* note 11, at 13–14.

address homeowners' concerns about property values and their strong aversion to development.

The second problem highlighted by North is credible commitment: constituents vote for representatives who commit to protecting their interests—indeed, Fischel's confidence in homevoters requires the assumption that city councilors are bound by their commitments<sup>63</sup>—but representatives may later be captured by interest groups and fail to honor their commitments.<sup>64</sup> The growth machine hypothesis falls into this category: city councilors and urban planning officials violate their commitments to homevoters and decide in favor of growth elites instead. Under this theory, growth elites distort the political market, leading to inefficiency.

Contracting costs or transaction costs are another problem. Hills and Schleicher argue that “decentralized” and “lot-by-lot” zoning decisions impede development by raising developers' costs of lobbying for still more development.<sup>65</sup> The solution, they averred, is to elevate zoning decisions to a city-wide system.<sup>66</sup> A comprehensive and binding plan would both ensure credible commitment—through a package deal guaranteeing community representatives on city councils that their constituents will not bear disproportionate burdens—and also greatly reduce transaction costs.<sup>67</sup> This idea of metropolitan urban planning derives from the long-standing U.S. debate over planning versus zoning, dating back to as early as the 1950s.<sup>68</sup> American cities have never taken comprehensive plans seriously, despite academics advocating for such plans.<sup>69</sup> But Chinese cities have well-designed comprehensive plans. The making of such plans proves to be more challenging than academics imagine, and their effect is more limited than academics expect.<sup>70</sup> Would comprehensive plans work in New York City or San Francisco? We do not know for sure. Do comprehensive plans

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63. See Fischel, *supra* note 11, at 4.

64. North, *supra* note 57, at 357–60, 363–64.

65. Hills & Schleicher, *Planning an Affordable City*, *supra* note 8, at 95.

66. See *id.* at 94–95 (arguing for “centralized” plans).

67. See *id.* at 92.

68. See Charles M. Haar, *The Master Plan: An Impermanent Constitution*, 20 LAW & CONTEMP. PROBS. 353, 365–66 (1955). See generally Daniel R. Mandelker, *The Comprehensive Planning Requirement in Urban Renewal*, 116 U. PA. L. REV. 25 (1967); Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 CALIF. L. REV. 837 (1983). For a fantastic literature review of this debate, see generally Hills & Schleicher, *Planning*, *supra* note 8.

69. See Hills & Schleicher, *Planning*, *supra* note 8, at 102–04.

70. See generally Wing-Shing Tang, *Chinese Urban Planning at Fifty: An Assessment of the Planning Theory Literature*, 14 J. PLAN. LITERATURE 347 (2000).

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work in Beijing or Shanghai? By the standard of providing affordable housing, the answer is no!—they are instrumental in reducing, rather than increasing, affordable housing. Either way, though, whether to use comprehensive plans or piecemeal deal-making is a secondary question for those who participate in the decision-making process.

That leaves us with the preliminary question to any bargaining: the initial allocation of property rights. Defining who is entitled to what is a precondition of any market exchange, and political transactions are no exception. Property rights on the political market mean entitlement to political bargaining. In both the American and Chinese cases, the power of property owners outweighs the influence of others in the decision-making process.<sup>71</sup> Even with the above proposals in place, housing is likely to continue to be the most important investment that most people make, and homeowners' interests will remain aligned with less development and against competition for public resources from outsiders. If the political market for urban governance does not check homeowners' growth-control tendencies, any reform measures will likely be of only limited effect. Fischel actually concedes that his proposals may only "slow down the growth of growth controls, not reverse them."<sup>72</sup> As far as non-property owners who have no direct access to political bargaining, their interests would not be reflected and protected by a property-dominated political market. This is a fundamental problem.

To summarize, the failure of the political markets of urban governance in China and the U.S. cannot be attributed solely to the property owners' information and cognition insufficiency, the high transaction costs in decentralized decision-making, or the challenge to community representatives to make credible commitments to each other. Entitlement to political bargaining is the first question we need to solve before reaching a more detailed institutional design.

### C. THE VOICELESSNESS OF HOUSING CONSUMERS IN MEGACITIES

There is a fundamental limitation in the aforementioned development triangle in both jurisdictions: it only partially incorporates the interests of the ultimate consumers of the activity in question, i.e., the potential buyers and renters of the housing to be developed. More specifically, Robert Ellickson identified the housing consumers who suffer from exclusionary

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71. See, e.g., North, *supra* note 57, at 357.

72. Fischel, *supra* note 11, at 13.

land use controls, including: “(1) current tenants who like [a city] too much to want to move out . . . ; and (2) all households that move into [a city] in the future;” as well as (3) “tenants who subsequently leave the municipality because their rents go up; and [(4)] potential immigrants to [a city] who have decided not to buy or rent there simply because of the price increase caused by the antigrowth policies.”<sup>73</sup>

In megacities in both China and the U.S., land use decisions are made without full consideration of the ultimate housing consumers, and, in practice, those consumers are rarely sufficiently organized to exert any influence on land use decisions<sup>74</sup> and are given few opportunities to voice their concerns. Theoretically, housing suppliers should care about the ultimate consumers, and therefore speak for them in the process of making land use decisions. However, profit-maximizing developers prefer building more expensive and therefore more profitable housing and are far from perfect proxies for the interests of housing consumers. They are rarely interested in lobbying for middle- and low-income populations, from which they cannot draw sufficient profits to justify their expenses (particularly in areas with high construction and regulatory costs),<sup>75</sup> which is why governments in both jurisdictions often require developers to build affordable housing, a phenomenon that in certain situations is defined as constitutionally controversial exaction.<sup>76</sup> So-called “inclusionary housing programs” are designed to counterbalance the exclusionary effects of developer-driven markets. Although who ultimately bears the costs of exaction is highly debatable, the underlying consensus on the exclusionary nature of real estate development is solid.<sup>77</sup>

Democratic local governments in the U.S. are supposed to represent the interests of middle- and low-income populations; municipal corporations are different from business corporations in the sense that they allow “one person one vote” rather than “one acre one vote.”<sup>78</sup> Nevertheless, the country’s long tradition of municipal corporations strongly favors homevoters. The individuals who are truly able to influence

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73. Ellickson, *supra* note 37, at 402.

74. *Cf. id.* at 402, 436–38; Andrew H. Whittemore, *Zoning Los Angeles: A Brief History of Four Regimes*, 27 *PLAN. PERSP.* 393, 393–94 (2012).

75. *See, e.g.*, Richard A. Epstein, *Exit Rights Under Federalism*, 55 *LAW & CONTEMP. PROBS.* 147, 155–58 (1992).

76. *See* ELLICKSON & BEEN, *supra* note 49, at 671–74.

77. *Id.*

78. *See generally* JON C. TEAFORD, *THE MUNICIPAL REVOLUTION IN AMERICA: ORIGINS OF MODERN URBAN GOVERNMENT 1650–1825* (1975).

the zoning process are normally property owners, who vote at higher rates than others and express their preferences more robustly.<sup>79</sup> Authoritarian local governments in China monopolize primary land markets in their cities and rely on land sales revenue as a major source of their revenue.<sup>80</sup> They are motivated to keep land prices and therefore housing prices high.<sup>81</sup>

In short, property ownership prevails in both the Chinese and American zoning processes. In this Article, we examine the functions and mechanisms of land use regulations and role of public participation in both jurisdictions to demonstrate the dominating influence of property ownership in urban governance.

If there is no change to the fundamental character of urban land governance shared by these two countries' megacities, such cities will continue to be exclusionary. Exclusion is not necessarily inefficient or unfair per se. Property owners do have a legitimate claim to preserving their particular living styles and values through land use controls.<sup>82</sup> But such controls should be evaluated in a larger social context, beyond property owners' interests and values. When an exclusionary community is fungible, i.e., when there are plenty of location options from which consumers can choose, exclusionary policies are tolerable.<sup>83</sup> However, megacities are not fungible. They are the economic and cultural centers of the whole nation and occupy unique, monopolizing positions in the market of places. In such a situation, housing consumers cannot simply exercise their right to exit in order to discipline megacity governments. When they do leave, they may suffer a loss of better career opportunities—the population flow from coastal cities to Texas is an example<sup>84</sup>— and when they do not leave, they either pay higher rents or suffer from much poorer living environments. “Ant tribes” in Beijing—people living in crowded,

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79. WILLIAM A. FISCHER, THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES 8, 16, 75–76 (2001).

80. See Qiao, *supra* note 39, at 85–88, 96–98.

81. See *supra* Section I.A.

82. Ellickson, *supra* note 37, at 401 (“Residents may genuinely prefer that their municipality remain the way it is rather than grow rapidly.”).

83. *Id.* at 430.

84. See, e.g., Glaeser, *supra* note 9 (“To East Coast urbanites, Houston’s appeal must be mysterious: the city isn’t all that economically productive—earnings per employee in Manhattan are almost double those in Houston.”); Kotkin, *supra* note 5 (“The nation’s three largest metropolitan areas fall to the bottom of our list: Los Angeles (46th), Chicago (52nd) and, in last place New York. Since 2010, the New York metro area has lost a net 529,000 domestic migrants, adding to the 1.9 million who departed from 2000 to 2009.”). Cf. *id.* (“[S]everal Texas cities . . . have logged strong job growth . . .”).

underground spaces<sup>85</sup>—are examples of this.

Moreover, some proposals assume that real estate developers are appropriate proxies for the needs of future consumers.<sup>86</sup> However, real estate development in megacities is expensive—in capital, risk, and time—which pushes developers to focus on projects that promise the highest return: namely, those that produce more expensive housing. In and of itself, unleashing the market—albeit important—will not fully resolve this problem. In theory, filtering, a process whereby “higher income households move on,” with the “homes or apartments they formerly occupied . . . [being] sold or rented to people with more modest incomes,” generates a large amount of housing stock affordable to middle- and low-income populations.<sup>87</sup> In a 2014 article, though, Stuart Rosenthal rigorously tested the filtering effect and found considerable variation in different parts of the U.S.<sup>88</sup> He noted in particular that severe restrictions on new housing construction have significantly slowed down the filtering process in coastal regions.<sup>89</sup>

Since the market of places cannot effectively discipline megacity governments, everybody, including property owners and consumers, is to some extent trapped in such unique locations, and improving urban governance is the only solution. In the highly monopolized political and property markets, the ultimate consumers who are residents or potential residents of megacities are voiceless. Those who care most about affordable housing have no representatives, and thus their interests are sacrificed, resulting in an inadequate housing supply in both American and Chinese megacities. Inefficient land use regulations persist because they

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85. See, e.g., Sue Feng, *China's Graduates: An Ant's Life*, WALL ST. J.: CHINA REAL TIME REP. (Nov. 5, 2009, 4:42 AM), <https://blogs.wsj.com/chinarealtime/2009/11/05/chinas-graduates-an-ants-life>; Kevin Tang, *China's "Ant Tribe" Lives in the World's Most Cramped Apartments*, BUZZFEED (Nov. 27, 2013, 7:12 AM), <https://www.buzzfeed.com/kevintang/chinas-ant-tribe-lives-in-the-worlds-most-cramped-apartments>.

86. See, e.g., Vicki Been, “Exit” as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine, 91 COLUM. L. REV. 473, 511–16 (1991); Christopher Serkin, *Local Property Law: Adjusting the Scale of Property Protection*, 107 COLUM. L. REV. 883, 888–89 (2007).

87. Daniel Hertz, *What Filtering Can and Can't Do*, CITY OBSERVATORY: CITY COMMENT. (Oct. 11, 2015), <http://cityobservatory.org/what-filtering-can-and-cant-do>. See also Stuart S. Rosenthal, *Are Private Markets and Filtering a Viable Source of Low-Income Housing? Estimates from a “Repeat Income” Model*, 104 AM. ECON. REV. 687, 687 (2014) (“[P]rivate markets are thought to provide low-income housing primarily through a dynamic process in which homes built for higher income families slowly deteriorate and filter down to lower income households.”).

88. Rosenthal, *supra* note 87, at 704.

89. See *id.* at 688–89.

serve the interests of growth elites (in China) and/or homevoters (in the U.S.). In both cases, those without property pay the price of exclusion.

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In summary, despite their fundamentally different origins, the land use regimes in both Chinese and American cities can be understood as examples of the influence model, wherein different parties with conflicting interests exert influence over land use decisions. First appearances suggest that the U.S. and Chinese regimes remain fundamentally different, with property owners dominant in the former, and growth elites in the latter. However, once we link urban governance with property rights, the two jurisdictions begin to appear more similar than different: urban governance in both jurisdictions is based on the pursuit of value maximization by property rights owners. In the Chinese context, a slight caveat is needed: the government is the primary land owner, and thus plays a major role, while rising middle-class homeowners play a minor role. The young, middle-, and low-income populations that own no property are severely underrepresented in, if not totally absent from, the political market of urban governance in both jurisdictions. In the following sections, we present detailed analyses of both regimes.

## II. LAND USE IN AMERICAN MEGACITIES: CONCEPT, MECHANISM, AND PUBLIC PARTICIPATION

American property law evinces a strong disposition toward property owners. Protection of private property from government incursion has been an important legal principle since the framing of the Constitution. Although the history of American law can be interpreted as one of increasing government influence over private property, the rights of property owners to control the uses of their property remain strong.<sup>90</sup> The U.S. zoning system must be understood in the context of this framework. However, reliance on the “sanctity of private property” is not helpful when the activities of one property owner impact the enjoyment of another property owner. The zoning system emerged to mediate this tension. Over the course a century of zoning law, the system has come to encompass much more than just a framework to mediate disputes between individual property owners.<sup>91</sup> Zoning shapes the communities in which Americans live, work,

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90. See FISCHER, *supra* note 79, at 215 (“After zoning was established, however, the suburbs did not have to bow to the inevitability of convergence with their neighbors. They could control their own destiny.”); Fischer, *supra* note 11, at 4–6; Been et al, *supra* note 8, at 231.

91. See, e.g., JOSEPH P. SCHWIETERMAN & DANA M. CASPALL, *THE POLITICS OF PLACE: A*

and play. It shapes social interactions and strongly influences the opportunities to which individuals have access. As a result, zoning decisions are among the most contested legal disputes in the country.<sup>92</sup> As this Part will argue, in recent years, policymakers have expressed increasing concern over the dominant role that the zoning system plays in America's economic and social life. No place exemplifies these tensions better than the country's largest city, New York.

This Part is organized as follows: Section A briefly describes the historic roots of U.S. zoning law, focusing on the role of zoning rules to supplement and add further protection for private property owners in the context of industrialization. Section B discusses the changes in the sociopolitical context in which development happens in the U.S., arguing that the growth machine has, in general, given way to anti-development sentiment in urbanized areas. Finally, Section C focuses on New York City as a place that is struggling to balance public involvement in zoning decisions with the need to increase the amount of affordable housing in the city. New York's example reveals the very high obstacles facing efforts to make American cities (at least those experiencing growth) more inclusive.

#### A. ZONING AGAINST NUISANCE

Before the twentieth century, land use disputes were resolved as private actions among property owners.<sup>93</sup> This system worked fairly well until industrialization and urbanization dramatically increased the types and intensities of land use and disrupted traditional legal relations. Facing escalating tensions over the appropriate uses of property, American zoning law built on nineteenth-century nuisance law, which granted property owners protections against the acts of neighbors that affected the enjoyment of their property.<sup>94</sup> Property owners at common law often claimed damages from noxious activities in their vicinity, and nuisance claims were, until the early twentieth century, the predominant means by

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HISTORY OF ZONING IN CHICAGO (Jane Heron ed., 2006); William A. Fischel, *An Economic History of Zoning and a Cure for Its Exclusionary Effects*, 41 URB. STUD. 317 (2004) (explaining how zoning transformed from a means to mediate disputes to a means of exclusion).

92. See, e.g., *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *S. Burlington Cty. NAACP v. Twp. of Mount Laurel*, 456 A.2d 390 (N.J. 1983); *S. Burlington Cty. NAACP v. Twp. of Mount Laurel*, 336 A.2d 713 (N.J. 1975).

93. Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 721–22 (1973).

94. ELLICKSON & BEEN, *supra* note 49, at 74–76 (discussing the evolution of zoning laws).

which property owners protected their rights.<sup>95</sup>

As American urbanization increased, many cities built upon these common law rules with legislative provisions protecting property owners against damage from their neighbors' acts.<sup>96</sup> Industrialization created many new noxious uses, however, and great increases in the population density of American cities resulted in many more nuisance disputes. Governments struggled to balance their desire to promote development with their responsibility to protect property, and they experimented with different approaches.<sup>97</sup> Often the rules granted property owners the right to prohibit a nuisance use unless the property owner obtained from adjacent neighbors a majority (or supermajority) of votes approving the activity. Among the first of these laws was Chicago's, which prohibited several noxious uses, such as livery stables, unless approved by a majority of the neighbors.<sup>98</sup> Chicago's law, as well as many others, was attacked as both too restrictive and an inappropriate delegation of government power, but courts generally ruled that these approaches were proper.<sup>99</sup>

Zoning law did not replace private law protections but rather emerged out of them. Zoning was a more "efficient" way to make community-based decisions about appropriate urban land uses. The basic principle of zoning was that urban "zones" separated industrial, commercial, and residential uses, while also differentiating amongst the types of residential use.<sup>100</sup> This separation of uses protected the public interest and property rights, providing security to property owners that their interests would not be damaged by the acts of one another. At the same time, the provision for different types of uses ensured that cities could continue to grow and prosper. Under modern zoning, industrial uses also received protection from the nuisance claims of adjacent property owners. Confident in the security of their operations, owners of industrial concerns could continue to expand their efforts.<sup>101</sup>

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95. Ellickson, *supra* note 93, at 721–22.

96. *See id.*

97. *See, e.g.,* Robert G. Bone, *Normative Theory and Legal Doctrine in American Nuisance Law: 1850 to 1920*, 59 S. CAL. L. REV. 1101, 1105–08 (1986); Joel Franklin Brenner, *Nuisance Law and the Industrial Revolution*, 3 J. LEGAL STUD. 403, 408–11 (1974).

98. *See* SCHWIETERMAN & CASPALL, *supra* note 91, at 13 ("Frontage-consent ordinances . . . were based on nuisance doctrines and required that the majority of residential owners on a block provide consent before certain land uses would be permitted.").

99. *See id.*

100. *See* ELLICKSON & BEEN, *supra* note 49, at 73–98 (discussing the evolution of zoning through the *Euclid* decision).

101. *See, e.g.,* Brenner, *supra* note 97, at 408.

Under this new zoning regime, the decision of where to place different uses was often made by professionals who had studied the most efficient ways to allocate land uses and who developed “comprehensive plan[s]” for urban areas that protected the public and promoted economic growth.<sup>102</sup> These comprehensive plans were made with the input of the public, particularly property owners. Both the Standard State Zoning Enabling Act (“SSZEA”) and the Standard City Planning Enabling Act (“SCPEA”)—the land-use frameworks developed by the U.S. Department of Commerce in the 1920s and promoted around the country—required public input in the development of comprehensive plans.<sup>103</sup> This requirement was in accordance with Progressive Era principles of citizen engagement, which envisioned an enlightened citizenry, led by professionals, who would provide meaningful input to guide the public interest.<sup>104</sup>

While comprehensive plans were made with public input, the public’s role in the daily operations of the zoning process was less clear. Under the act, most localities created Zoning Boards of Adjustment (“ZBA”) to administer the system.<sup>105</sup> The role of the ZBA was to hear exceptional cases, where a property owner wanted to use property in a manner not in accordance with the zoning code.<sup>106</sup> ZBAs were envisioned as professional organizations that would objectively determine whether developments met the legal requirements specified under the zoning code for a variance from the general rules.<sup>107</sup> Early zoning advocates believed that planning principles could be developed that would promote the public interest, and that once these principles were applied to a city it could follow its natural development.<sup>108</sup> As a result, public participation in the variance process was not strictly necessary, although the SSZEA does provide that “all meetings of the board shall be open to the public,” any person “aggrieved” by the acts of a ZBA may appeal its decisions, and any aggrieved person,

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102. Allison Dunham, *A Legal and Economic Basis for City Planning (Making Room for Robert Moses, William Zeckendorf, and a City Planner in the Same Community)*, 58 COLUM. L. REV. 650, 652–53 (1958).

103. See *id.* at 654, 656–58. See also A STANDARD CITY PLANNING ENABLING ACT §§ 8, 15 (DEPT. OF COMMERCE 1928); A STANDARD STATE ZONING ENABLING ACT §§ 4, 7 (DEPT. OF COMMERCE 1926).

104. See Dunham, *supra* note 102, at 654, 656–57.

105. Phillip P. Green Jr., *The Power of the Zoning Board of Adjustment to Grant Variances from the Zoning Ordinance*, 29 N.C. L. REV. 245, 245 (1951).

106. *Id.* at 245–46. See also Jesse Dukeminier, Jr. & Clyde L. Stapleton, *The Zoning Board of Adjustment: A Case Study in Misrule*, 50 KY. L.J. 273, 273 (1962).

107. See Green, *supra* note 105, at 245–48.

108. See, e.g., Paul Davidoff, *Advocacy and Pluralism in Planning*, 31 J. AM. INST. PLANNERS 331, 335 (1965).

taxpayer, or city official may sue over “illegal” ZBA actions.<sup>109</sup>

The original zoning acts were vague about the role of the public in the zoning adjustment process itself, though, as advocates believed there would be few variances because plans would accurately capture neighborhood demands and the goals of the market.<sup>110</sup> In addition, any needed variances would be granted by professionals well-versed in planning and zoning.<sup>111</sup> Of course, this objective vision of the planning process came quickly under assault, with ZBAs the locus of heated battles amongst stakeholders over the appropriate uses of property.<sup>112</sup> As a result, over the last fifty years the zoning system has struggled to balance demands for transparent and legitimate decision-making with the desire for efficient operations to promote development.

#### B. HOMEVOTERS: NOT IN MY BACKYARD

The zoning system in the United States is approximately one hundred years old. That history can be fairly neatly divided into two equal periods. These names of these two eras—first the “Growth Machine,” followed by “NIMBY” (“Not In My Back Yard”)—succinctly encapsulate the continuing challenge of balancing competing interests in the land use system.

From the 1920s until the 1970s, the Growth Machine framework predominated in American cities and their suburbs.<sup>113</sup> Throughout the country, housing and economic development were seen as almost unqualified positives. Local governments organized around the generally agreed-upon desire for growth. In the post-World War II era, suburban development in the United States skyrocketed, as did the percentage of the American population living in those areas.<sup>114</sup> Fearing the loss of population, business, and, therefore, tax revenues, city governments across the country undertook large-scale efforts to reorganize and make

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109. A STANDARD STATE ZONING ENABLING ACT §§ 7, 11 (DEPT. OF COMMERCE 1926).

110. See, e.g., Ronald M. Shapiro, *The Zoning Variance Power—Constructive in Theory, Destructive in Practice*, 29 MD. L. REV. 3, 18–22 (1969).

111. See *id.*

112. See David W. Owens, *The Zoning Variance: Reappraisal and Recommendations for Reform of a Much-Maligned Tool*, 29 COLUM. J. ENVTL. L. 279, 295–98 (2004); Carol M. Rose, *New Models for Local Land Use Decisions*, 79 NW. U. L. REV. 1155, 1155–57 (1984).

113. See Molotch, *supra* note 10, at 321.

114. See KENNETH T. JACKSON, *CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES* 232–34 (1987).

themselves attractive to development.<sup>115</sup> During the “urban renewal era,” which reached its height in the 1950s and 1960s, cities cleared large swaths of land, uprooting their residents and partnering with private developers to build modern residential and commercial facilities.<sup>116</sup> They also rebuilt the urban infrastructure, creating the modern urban highway system (which uprooted even more people than housing and commercial developments).<sup>117</sup>

Most of this activity occurred with little public involvement. Government officials, real estate developers, urban planners, and other elites made these decisions and presented them to the public as faits accomplis. This public acquiescence started to change in the 1960s, with increasing public protests over highway and other clearance proposals, and accelerated greatly in the 1970s when, as William Fischel argues, suburban-citizen revolts over growth added to the objections to urban renewal.<sup>118</sup> The result of this public outrage was that zoning dynamics were radically altered, and for the past fifty years land use regulation has been among the most hotly contested of public topics.<sup>119</sup>

Each year, thousands of neighbors, and others, appear before zoning boards to voice support or, more commonly, opposition to zoning changes or special exceptions/variances regarding specific development projects.<sup>120</sup> Generally, this is a post-1970 phenomenon. Before the advent of modern neighborhood organizations, most zoning board meetings were sleepy affairs.<sup>121</sup> However, the backlash against urban renewal and highway programs (along with other types of neighborhood activism) resulted in a significant increase in neighborhood organizations, and much of the focus of these groups was on preventing or at least shaping development.<sup>122</sup> Neighbors frequently fight against projects that would increase density, affect parking availability, or change neighborhood aesthetics and culture. Their goal is to prevent or at least slow neighborhood development, and, overall, these efforts are successful.<sup>123</sup> For example, in San Francisco,

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115. See, e.g., Wendell E. Pritchett, *The “Public Menace” of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL’Y REV. 1, 21 (2003).

116. *Id.*

117. See ROBERT A. CARO, *THE POWER BROKER: ROBERT MOSES AND THE FALL OF NEW YORK* 19 (1974).

118. See Fischel, *supra* note 11, at 19–21, 26–27.

119. See *id.* at 13, 21–25.

120. See *id.* at 18–19.

121. See *id.* at 17, 26. Cf. Mangin, *supra* note 8, at 101.

122. See Fischel, *supra* note 11, at 13; Mangin, *supra* note 8, at 108–10.

123. See, e.g., Mangin, *supra* note 8, at 99–100 (describing the ease with which San Francisco can “zone[] up”).

despite the significant demand for housing, neighborhood insistence upon regulations to limit density severely restricts new development. In 2011, the city, which has among the highest housing costs in the country, “added just 269 housing units.”<sup>124</sup>

Because of their crucial role in shaping new development, zoning boards also became the prime venue in which to fight neighborhood racial and social change, both in the cities and the suburbs. As *Village of Arlington Heights v. Metropolitan Housing Development Corp.* showed, by the 1960s, zoning regulations were an effective means of racial exclusion,<sup>125</sup> and the past forty years, the citizens of New Jersey have debated the 1975 *Mt. Laurel* decision, which required suburban governments to adjust their land use regulations to provide for the construction of affordable housing.<sup>126</sup> No issue in the state has been more contentious over this period,<sup>127</sup> and there and in many other states, local governments are organized around the desire to exclude certain populations and uses.<sup>128</sup>

Because opponents of development play such a significant role in the zoning process, several states have attempted to regulate their participation. Some, such as Minnesota, are skeptical about neighborhood influence and consider neighbor opposition a factor in determining the (ir)rationality of zoning board decisions.<sup>129</sup> But, in general, local governments have wide latitude to control the shape, scope, and population of their communities through land use regulation. Many legal practitioners, developers, and academics have come to criticize the “neighborhood veto” for its role in impeding development and exacerbating related economic and racial segregation. As Michael Lewyn argues, “This ‘neighborhood veto’ sometimes artificially reduces housing supply and urban density, thus making housing more expensive and making American cities more

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124. *Id.* at 99.

125. Harold A. Ellis, *Neighborhood Opposition and the Permissible Purposes of Zoning*, 7 J. LAND USE & ENVTL. L. 275, 285–86 (1992). *See also* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 255, 263 (1977) (holding that plaintiffs had failed to prove that the zoning laws had a racially discriminatory purpose, though this may have been their effect).

126. *See generally* S. Burlington Cty. NAACP v. Twp. of Mount Laurel, 336 A.2d 713 (N.J. 1975).

127. *See* Roderick M. Hills Jr., *Saving Mount Laurel*, 40 FORDHAM URB. L.J. 1611, 1612–14 (2013).

128. *See* MASSEY ET AL., *supra* note 28, at 18–19.

129. *See* Ellis, *supra* note 125, at 284, 297–98. *See also generally* Edward G. Goetz & Barbara Lukermann, *The Minnesota Land Use Planning Act and the Promotion of Low- and Moderate-Income Housing in Suburbia*, 22 LAW & INEQ. 31 (2004).

dependent on automobiles.”<sup>130</sup> However, opposition to new development is the dominant position in much of the country.

C. PUBLIC PARTICIPATION (AND REFORMS): THE EXAMPLE OF NEW YORK CITY

To many observers, New York City is the quintessential example of a “growth machine” city. Real estate development has always played a central role in the city’s economic life. The real estate sector is one of the largest in the urban economy, and real estate was, and is, the foundation of many of the city’s largest fortunes.<sup>131</sup> Real estate developers in New York City have had a major influence on the shape of the city as well as its politics and culture. Few cities did more during the urban renewal era to reshape themselves to be even more responsive to modern commercial and residential development. New York’s master builder Robert Moses—“The Power Broker”—remains for many the face of urban redevelopment.<sup>132</sup> However, New York is and always has been a city of neighborhoods, and those neighborhoods have frequently pushed back against development. Today, as in many times previous, the growth machine and the neighborhoods are at odds.<sup>133</sup> As with many aspects of this city, the struggle has implications for land use conflicts elsewhere.

Given that it was the first city to pass a zoning law, it is not surprising that New York also has the most developed structure for community participation in land use. In 1951, Manhattan Borough President Robert Wagner created a series of neighborhood advisory boards to help him make decisions on land use and development, and these “Community Planning Boards” were incorporated into the city planning structure with the passage of the revised city charter of 1963.<sup>134</sup> Updated in 1968 and again in 1975, the city created fifty-nine community planning boards, each of which has authority to develop comprehensive plans for their district or parts of it.<sup>135</sup> Appointed by the Borough President, each board can have up to fifty members. The boards also have authority to “cooperate and consult with

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130. Michael Lewyn, *Against the Neighborhood Veto*, 44 REAL EST. L.J. 82, 82 (2015).

131. See, e.g., RICHARD PLUNZ, A HISTORY OF HOUSING IN NEW YORK CITY xli–xliii (2016).

132. See Caro, *supra* note 117.

133. See Been et al., *supra* note 8, at 228–29.

134. See RAYMOND CHARLES RAUSCHER & SALIM MOMTAZ, BROOKLYN’S BUSHWICK—URBAN RENEWAL IN NEW YORK, USA 63–64 (2014); Richard Bass & Cuz Potter, *A Tale of Three Northern Manhattan Communities: Case Studies of Political Empowerment in the Planning and Development Process*, 31 FORDHAM URB. L.J. 285, 287 (2004).

135. See Bass & Potter, *supra* note 134, at 288–89.

local administrators of city departments and agencies,” and “to cooperate with other boards on matters of common concern.”<sup>136</sup> Under the Uniform Land Use Review Procedure (“ULURP”), also created in 1975, community boards have sixty days to review and make a recommendation on any development project that is required to have approval of the borough president. Community board recommendations are only “advisory” and do not have any legal weight either in the planning process or upon the decision of the borough president.<sup>137</sup>

Over the years, community planning boards have been criticized both for being too influential in preventing development and for being ineffective representatives of the community against powerful development interests.<sup>138</sup> Critics have also raised questions about the qualifications of community board members and the representativeness of boards.<sup>139</sup> While, in theory, community boards can develop comprehensive plans, the budgets provided for these organizations do not support such efforts, and many boards have had to raise outside funding to support their activities. Not surprisingly, studies have found that community planning boards in wealthy neighborhoods have higher capacity and more influence than those in poorer neighborhoods.<sup>140</sup>

But the influence of community boards has definitely increased over time, as was particularly evident during the neighborhood rezonings initiated by the administration of Mayor Michael Bloomberg. From the beginning of Bloomberg’s term in 2002, the administration, arguing that the city’s zoning resolution—dating to 1961—was outdated, undertook more than 100 neighborhood rezonings, with the goal of modernizing the regulations in these districts to make them more responsive to community needs and development trends.<sup>141</sup> In most of these rezonings, the community planning board played a central role, and, in general, that role was to protect the neighborhood against higher-density development. In a comprehensive study of this initiative, Vicki Been and her colleagues concluded that while the totality of the rezonings resulted in a city-wide

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136. *Id.* at 289.

137. Tom Angotti, *Race, Place and Waste: Community Planning in New York City*, 1999 NEW VILLAGE J. 5, 5.

138. *See id.* at 5–6; Robert F. Pecorella, *Community Governance: A Decade of Experience*, 37 PROC. ACAD. POL. SCI. 97, 102–03 (1989).

139. *See, e.g.*, Howell S. Baum, *Community Organizations Recruiting Community Participation: Predicaments in Planning*, 18 J. PLANNING EDUC. & RES. 187, 188 (1999).

140. *See* Angotti, *supra* note 137, at 5–6; Pecorella, *supra* note 138, at 100–01 & tbl.3.

141. Been et al., *supra* note 8, at 241.

1.7% residential capacity increase, more parcels were “down-zoned,” to place greater restrictions on potential future development, than the number of parcels that were “up-zoned.”<sup>142</sup> Furthermore, many of the parcels that were down-zoned were in areas close to mass transit or other amenities that, under “smart growth” principles, made them appropriate for higher-density development.<sup>143</sup> The result in many neighborhoods was that properties that could have been used to meet increased housing demand in the city were, at least temporarily, removed from the potential development inventory.

Like many other U.S. cities, New York currently faces a significant housing affordability problem. A significant percentage of the population pays more than half of their income for housing.<sup>144</sup> While the city is experiencing a development boom, almost all of the new housing is for the highest income residents. In Manhattan the average sale price for a one bedroom apartment exceeds \$1 million.<sup>145</sup> Unmet housing demand has resulted in a dramatic increase in housing prices in many parts of the city, and developers looking to meet that need have increased construction in previously-ignored neighborhoods.<sup>146</sup> A recent analysis of housing in the city determined that 34.3% of city neighborhoods were experiencing gentrification.<sup>147</sup>

Long major political issues, housing costs and neighborhood changes were central to New York’s 2013 mayoral election. During his campaign, Mayor Bill de Blasio gave great attention to the city’s housing shortage City, specifically the lack of affordable housing to support the city’s poor and working-class residents.<sup>148</sup> A year after his election, de Blasio

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142. *Id.* at 252.

143. *Id.* at 252–253 (“[D]ownzoned lots were more likely to be located near . . . rail stations than the typical lot located outside a rezoning project study area.”).

144. See Rachel Sugar, *More than Half of New Yorkers Are Rent Burdened: Study*, CURBED (Dec. 15, 2016, 11:04 AM), <https://ny.curbed.com/2016/12/15/13967302/new-yorkers-cost-burden-rental-market-apartment-list>.

145. Amy X. Wang, *The Average Manhattan Apartment Now Costs \$1 Million*, QUARTZ, (Oct. 1, 2015), <https://qz.com/515524/the-average-manhattan-apartment-now-costs-1-million>.

146. NYU FURMAN CTR., STATE OF NEW YORK CITY’S HOUSING AND NEIGHBORHOODS IN 2015 43 & fig.4 (2016), [http://www.nyc.gov/html/mancb3/downloads/resources/NYUFurmanCenter\\_SOCin2015\\_9JUNE2016.pdf](http://www.nyc.gov/html/mancb3/downloads/resources/NYUFurmanCenter_SOCin2015_9JUNE2016.pdf).

147. *Id.* at 5. The study defined gentrified neighborhoods as “sub-borough areas (SBAs) . . . that were low-income in 1990 and experienced rent growth above the median SBA rent growth between 1990 and 2010–2014.” *Id.* at 4.

148. See, e.g., Henry Goldman, *De Blasio Re-Election Bid Stresses Affordability, Not Inequality*, BLOOMBERG (Mar. 31, 2017, 2:00 AM), <https://www.bloomberg.com/news/articles/2017-03-31/de-blasio-re-election-bid-stresses-affordability-not-inequality>.

introduced a major housing plan, proposing initiatives to develop and/or preserve 200,000 units of affordable housing.<sup>149</sup> The program, controversial from its introduction, included a wide variety of approaches to the challenge of affordable housing, including: (1) funding programs for renovation and construction of new housing; (2) “inclusionary zoning” requirements for developers, giving them “density bonuses” for including affordable housing in projects; and (3) zoning law changes to eliminate barriers to development and allow for higher-density development in some areas.<sup>150</sup> Among the areas of regulation the administration proposed to re-examine were “parking requirements, zoning envelope constraints, and restrictions on the transferability of development rights.”<sup>151</sup>

Mayor de Blasio’s housing plan was immediately criticized by affordable housing advocates, who complained that it did not produce enough housing for low-income citizens and that the inclusionary zoning requirements did not demand enough from real estate developers.<sup>152</sup> The plan was also criticized by community planning boards across the city, many of whom were concerned by the impact that higher-density development would have on their communities.<sup>153</sup> “We want a mixed-income population . . . . We want parking for the seniors and for any new buildings coming in,” stated a community board chair in the Bronx, echoing concerns expressed by many regarding the impact of new development.<sup>154</sup> Further, the Queens borough president stated that community boards in many neighborhoods were worried that allowing more development would result in the conversion of existing affordable housing and dislocate current residents.<sup>155</sup> According to one paper:

Community meetings have turned long and contentious, sometimes with dozens of residents lining up to testify against the proposal. The opposition ranges from concerns that more development will bring gentrification and higher real estate costs that would displace some

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149. BILL DE BLASIO & ALICIA GLEN, HOUSING NEW YORK: A FIVE-BOROUGH, TEN-YEAR PLAN 5 (2014), [http://www.nyc.gov/html/housing/assets/downloads/pdf/housing\\_plan.pdf](http://www.nyc.gov/html/housing/assets/downloads/pdf/housing_plan.pdf). See also Jennifer Fermino, *Mayor de Blasio Unveils \$41B Proposal to Develop 200,000 Units of Affordable Housing*, N.Y. DAILY NEWS (May 5, 2014, 1:36 PM), <http://www.nydailynews.com/news/politics/mayor-unveils-41b-affordable-housing-plan-article-1.1780018>.

150. DE BLASIO & GLEN, *supra* note 149, at 9, 32, 71.

151. *Id.* at 10.

152. See, e.g., Vivian Yee & Mireya Navarro, *Some See Risk in de Blasio’s Bid to Add Housing*, N.Y. TIMES (Feb. 3, 2015), <https://nyti.ms/2FD0fKC>.

153. *Id.*

154. Michael Gartland & Yoav Gonen, *Sky-High Opposition: De Blasio Faces Revolt Over Building Plan*, N.Y. POST, Nov. 17, 2015, at 10.

155. *Id.*

longtime residents to complaints that more density will overwhelm the transit and school systems.<sup>156</sup>

More than three-quarters of the city's community boards, and all five of the borough boards (consisting of the chairs of the community boards and political leaders) opposed de Blasio's original plan.<sup>157</sup> Much of the opposition focused on fears of higher-density development, loss of parking, and neighborhood change. As a member of Community District 8 in Queens stated, "[w]e are very concerned, as are people all over, that we do not become a high-density neighborhood, full of people and crowds."<sup>158</sup> "To add 45 feet, no matter what you put in it—you could put Mother Theresa in it—it still is a too-tall building," said the co-chair of Community Board 8 in Manhattan.<sup>159</sup>

In low-income neighborhoods, particularly those of color, community leaders expressed concern that the mayor's plan was a mechanism to open their communities to gentrification and racial change. State Assemblyman Charles Barron argued:

They're going to tell you that unless there's a diversity of incomes, we're not going to be able to build our economy. What this means, translated? You need white folks down here. If you want to have an economy, you need white folk here. If you want to get transit stuff, you need white folk to come in. If you want to get a new school, you need white folk to come in . . . They want to make this place look better, to gentrify it.<sup>160</sup>

In the end, despite the no votes of a majority of community planning boards, the New York City Council approved an amended proposal in 2016. The revised proposal met some of the criticisms of the original, significantly increasing developers' inclusionary zoning requirements and altering the income levels for new-housing eligibility. The de Blasio administration organized a vocal and influential coalition of labor organizations and advocacy groups to argue that the proposal would

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156. Josh Dawsey, *New York City Zoning Plan is Under Fire*, WALL ST. J. (Dec. 4, 2015, 8:20 PM), <https://www.wsj.com/articles/new-york-city-zoning-plan-is-under-fire-1449277801>.

157. Michael M. Grynbaum & Mireya Navarro, *Mayor de Blasio Seeks to Rebuild Momentum for Affordable Housing Plan*, N.Y. TIMES (Dec. 10, 2015), <https://nyti.ms/2uwXdXH>; Ed Garcia Conde, *NYC Council Has a Big Opportunity to Do the Right Thing*, WELCOME 2 BRONX (Feb. 10, 2016), <https://www.welcome2thebronx.com/2016/02/10/nyc-council-has-a-big-opportunity-to-do-the-right-thing>.

158. Savitch-Lew, *supra* note 1.

159. *Id.*

160. *Id.*

significantly increase the amount of affordable housing in the city.<sup>161</sup>

But the fight against increased density and other zoning reforms is far from over. In order to spur housing development, the administration must now undertake the task of “re-zoning” individual neighborhoods for new development. Community planning boards will have more opportunities to oppose these plans. Although the first rezoning, in the East New York section of Brooklyn, was approved, the administration will continue to face significant challenges managing public participation in the process of zoning approval.<sup>162</sup>

Opposition to increased density has also stalled housing plans in Seattle and San Francisco, two cities with among the highest housing costs in the country. In Seattle, Mayor Ed Murray had to disavow his administration’s draft housing plan, which proposed allowing multi-family dwellings in many of the city’s single-family zones.<sup>163</sup> In San Francisco, a plan by Mayor Ed Lee, permitting developers to build two stories higher than zoning allowed in return for making 30 percent of the units affordable for middle-income families, also faced significant opposition from neighborhood advocates.<sup>164</sup>

America’s largest cities play an outsized role in the U.S. economy, with “[t]he combined annual gross product of the country’s 10 largest metropolitan areas [being] greater than the combined GDP of 36 states.”<sup>165</sup> Between 2012 and 2015, more than 90 percent of the new jobs created in the country were located in its largest urban areas.<sup>166</sup> As a result of this economic power, migration to these areas will continue, and thus they will also continue to be challenged by housing shortages. At the same time, growth pressures will continue to play a major role in urban politics, as current residents push back against new development. Developing

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161. J. David Goodman & Mireya Navarro, *New York City Council Backs Affordable Housing Plan*, N.Y. TIMES (Mar. 14, 2016), <https://nyti.ms/2mVgx7W>.

162. See Erin Durkin, *City Council Passes Mayor de Blasio’s Zoning Plan to Transform Brooklyn’s East New York*, N.Y. DAILY NEWS (Apr. 20, 2016, 10:20 PM), <http://www.nydailynews.com/new-york/brooklyn/city-council-passes-plan-transform-brooklyn-zone-article-1.2609215>.

163. Daniel DeMay, *Murray: No Changes to Single-Family Zones*, SEATTLE POST-INTELLIGENCER: SEATTLE POL. (July 29, 2015, 3:08 PM), <https://blog.seattlepi.com/seattlepolitics/2015/07/29/mayor-wont-pursue-changes-to-single-family-zones>.

164. J.K. Dineen, *Uphill Battle for Housing Bonus Plan*, S.F. CHRON. (Feb. 25, 2016), <https://www.pressreader.com/usa/san-francisco-chronicle-late-edition/20160225/282226599798937>.

165. Reid Wilson, *Cities Drive the U.S. Economy: Here’s Proof, in One Map*, WASH. POST: GOVBEAT (Mar. 6, 2014), <https://wapo.st/1hQ3JZs>.

166. *Id.*

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mechanisms to support additional housing, particularly for low- and middle-income residents, is crucial to the success of America's largest cities, and it is a problem that must be confronted by restructuring the spheres of influence in the land regulatory system.

### III. LAND USE IN CHINESE CITIES: CONCEPT, MECHANISM, AND PUBLIC PARTICIPATION

As in the U.S., urban planning in China has contributed to the exclusion of middle- and low-income populations from first-tier cities—Beijing, Shanghai, and Shenzhen in particular. The urban planning policy is pro-growth and business-friendly, but not necessarily pro-consumer. As the primary landowner, city governments are the major players in the Chinese real estate market. Although middle- and low-income populations provide the labor upon which cities rely, local government preferences are for profit-making and revenue-generating businesses, and their reluctance to provide public goods (e.g., education, health care, and transportation) to serve those populations has shaped government priorities and resulted in housing shortages.

Government-led, property-owner-focused planning has excluded the poor and the young from the first-tier cities in which the most promising career opportunities are concentrated. Primarily, and most directly, poor and young people cannot afford to live in big cities. City governments also squeeze them out by limiting their access to schools, health care, and other services. Secondarily, skyrocketing housing prices have fostered private property consciousness in China, with private property owners—somewhat ironically—joining the governments' efforts to exclude newcomers, partly because of perceived competition for services. Furthermore, like their counterparts in American megacities, property owners are increasingly sensitive to property value changes. The NIMBY phenomenon has come to China!

The remainder of this Part is structured as follows. Section A sketches out the concept and structure of urban planning in China and discusses how it has become a powerful weapon in the hands of growth machine elites. Section B discusses the establishment of urban planning commissions, with members from outside the government, as an effort to democratize the decision-making process, as well as the limitations of this initiative. Finally, Section C discusses the rise of public participation in Chinese urban planning and describes how democratization has made Chinese megacities more exclusionary. The three factors have combined to promote

exclusion in Chinese megacities.

#### A. PLANNING FOR GROWTH (FOR SOME)

Leading political scientists and economists refer to China's governmental structure as "market-preserving federalism."<sup>167</sup> Under the country's economic reforms, city and county governments have been given greater autonomy and incentives to manage their own economies, with competition encouraged among them. City and county governments rely on two financial resources: enterprise income tax and land sale revenue.<sup>168</sup> The enterprise revenue framework makes industrial development the top priority of Chinese cities. The land sale framework, which links the operation of local governments to their ability to sell land at high prices, pushes government decisions toward high-value projects, resulting in exclusion.

The urban planning structure in China is complicated, but it can generally be divided into two layers: a comprehensive or "master plan," and a detailed plan.<sup>169</sup> "The master plan outlines the general land uses of the city, while the detailed plan is prepared for the area that faces immediate construction or is specified in the master plan," and is similar to zoning in American cities.<sup>170</sup> The comprehensive plans of megacities such as Beijing, Shanghai, and Shenzhen are prepared by city governments and approved by the State Council (i.e., the Chinese central government).<sup>171</sup> Under party leadership, decisions are made by city leaders—usually the city party secretary and mayor—in consultation with other government officials, urban planning experts, and related business interests.<sup>172</sup> Detailed plans govern individual land use decisions and are prepared by the urban planning administration and approved by the city government.<sup>173</sup>

Comprehensive city plans are more akin to economic plans,

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167. Hills & Qiao, *supra* note 20, at 177.

168. *See id.* at 191 & n.95.

169. FULONG WU, PLANNING FOR GROWTH: URBAN AND REGIONAL PLANNING IN CHINA 59 (2015).

170. *Id.*

171. 中华人民共和国城乡规划法 [Urban and Rural Planning Law of the People's Republic of China] (promulgated by the Nat'l People's Cong., Oct. 28, 2007, effective Jan. 1, 2008), art. 14.

172. *See, e.g.*, Kui Xiong, Political Analysis of Power Structures in Urban Planning Process: Based on Shanghai Urban Planning Institutions and Practices in the 1990s, at 81–84 (2005) (unpublished Ph.D. dissertation, Tongji University) (on file with author).

173. 中华人民共和国城乡规划法 [Urban and Rural Planning Law of the People's Republic of China], art. 19.

incorporating strategic positioning, industrial development, population control, infrastructure construction, and other priorities over a twenty-year horizon.<sup>174</sup> In China, such plans are always growth-oriented. For example, the Shanghai City Master Plan (1999–2020) includes sixteen sections covering the scope of city development, goals, directions, industrial development, transportation, and residential development plans.<sup>175</sup> The goal of city development, according to the plan, is to make Shanghai an international center for finance and trade, and urban planning is directed toward achieving that goal.<sup>176</sup> The comprehensive plans of Beijing and Shenzhen share a similar structure and a clear focus on economic and city growth.<sup>177</sup>

Together, these comprehensive and detailed plans determine who can live in Chinese megacities, and they focus on attracting highly educated professionals such as engineers, lawyers, investors, and investment bankers.<sup>178</sup> Those with fewer skills enjoy limited provision in the plans because local governments set population control goals that are often too low. For example, in its comprehensive plan for 2004–2020, the Beijing municipal government planned for a total population of 18 million by 2020.<sup>179</sup> However, the city’s total population exceeded 19 million by 2010.<sup>180</sup> Similarly, in its comprehensive plan for 1999–2020, the Shanghai municipal government forecast a population of 18.5 million by 2020, whereas the city’s total population in 2013 was already more than 24 million.<sup>181</sup> Such population targets shape land use decisions by pretending

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174. See WU, *supra* note 169, at 59.

175. 上海市城市总体规划（1999年 - 2020年）[Shanghai City Master Plan (1999–2020)] (Dec. 4, 2003), <http://www.shanghai.gov.cn/nw2/nw2314/nw2319/nw10800/nw11407/nw12941/u26aw1100.html>.

176. *Id.*

177. See 北京市城市总体规划（2016年 - 2035年）[Beijing City Master Plan (2016–2035)], <http://zhengwu.beijing.gov.cn/gh/dt/t1494703.htm> (Sept. 29, 2017); 深圳总体规划获批 10年后人口低于 1100万 [Shenzhen Comprehensive Plans Approved According to Which Its Total Population Should be Under 11 Million in 10 Years], SHENZHEN NEWS NETWORK (Aug. 24, 2010, 7:46 AM), [http://www.sznews.com/finance/content/2010-08/24/content\\_4860257.htm](http://www.sznews.com/finance/content/2010-08/24/content_4860257.htm).

178. See 北京市人民政府办公厅关于印发《北京市积分落户管理办法（试行）》的通知 [Administrative Measures for the Settlement of Beijing Hukou Points] (2016), <http://zhengce.beijing.gov.cn/library/192/33/50/438650/79206/index.html>; 年上海积分落户政策 [The Policies of Hukou Points in Shanghai, 2017], HUKOU SHANGHAI, <https://web.archive.org/web/20170826093541/http://www.hukoushanghai.com/lhsh/907.html> (last visited Sept. 26, 2017).

179. 北京市城市总体规划缘何“短命”？ [Why Is Beijing’s Master Plan “Short-Lived”?], PEOPLE (June 6, 2011, 8:43 PM), <http://politics.people.com.cn/GB/30178/14830221.html>.

180. *Id.*

181. Yi Huiyun, 京沪启动新一轮城市规划编修：计划赶不上变化 [New-Round Amendment of Urban Planning Gets Started in Beijing and Shanghai: Plan May Not Be Able to Keep up with

that housing demand is smaller than it actually is.

Shenzhen is probably the most extreme case, with a planned population that lags far behind its actual population growth. In the city's first comprehensive plan, the estimated population for 2000 was 840,000, a figure that was already far exceeded by 1994, when the population reached 1.5 million. In the second comprehensive plan, issued in 1996, the projected population for 2010 was 4.3 million, whereas Shenzhen's population in 2000 stood at 7 million.<sup>182</sup> The city is currently home to more than 15 million people, although its current plan estimates a population of just 11 million by 2020.<sup>183</sup> The population targets in these plans determine the planning of public transportation, public utilities, schools, hospitals, the police force, and many other public goods crucial to city functioning. Public services in Beijing, Shanghai, and Shenzhen have been planned in a way that is never going to meet the demands of their rapidly expanding populations, as evidenced by their public transportation systems, which are severely crowded relative to those of New York.<sup>184</sup>

Detailed plans are used as a way to regulate land development and control the location and density of real estate projects, but they are not necessarily opposed to development. The success of individual projects depends on whether they serve planned city development goals or the preferences of city leaders. Newspaper reports on corrupt local government leaders often reveal the way in which they have used urban planning to facilitate their idiosyncratic ideas about urban development and/or favor one or a few developers to help them realize those ideas.<sup>185</sup> Research on

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*Changes*], SINA FIN. (Apr. 3, 2014, 1:58 AM), <http://finance.sina.com.cn/china/20140403/015818695993.shtml>.

182. See 深圳市城市总体规划 (1996–2010) [*Shenzhen Master Plan (1996–2010)*], SHENZHEN NEWS (June 8, 2013, 11:21 AM), [http://www.sznews.com/news/content/2013-06/08/content\\_8159168\\_3.htm](http://www.sznews.com/news/content/2013-06/08/content_8159168_3.htm).

183. 深圳总体规划获批 10 年后人口低于 1100 万 [*Shenzhen City Master Plan Receives Approval, and the Population Is Projected to Be Less than 11 Million in 10 Years*], SHENZHEN NEWS (Aug. 24, 2010, 7:46 AM), [http://www.sznews.com/finance/content/2010-08/24/content\\_4860257.htm](http://www.sznews.com/finance/content/2010-08/24/content_4860257.htm).

184. See Tania Branigan, *Riding Beijing's Subway End to End: 88km of Queues and Crushes on a 20p Ticket*, GUARDIAN (Sept. 10, 2014, 7:51 AM), <https://www.theguardian.com/cities/2014/sep/10/-sp-beijing-subway-china-metro-queues-ticket-investment> ("Each day 9.75 million passengers ride the lines across Beijing: nearly three times as many as take the London Tube and twice as many as use the New York system."). See also, e.g., Daozu Bao, *Shanghai Metro Hires People to Shove Commuters into Trains*, CHINA DAILY (Feb. 4, 2010, 8:40 AM) [http://www.chinadaily.com.cn/china/2010-02/04/content\\_9425324.htm](http://www.chinadaily.com.cn/china/2010-02/04/content_9425324.htm); Kevin McGeary, *Shenzhen Subway Line to Add Shuttle Trains During Rush Hours*, NANFANG (Jan. 18, 2013, 7:00 AM), <https://thenanfang.com/shenzhen-subway-line-to-add-trains-during-rush-hours>.

185. See, e.g., 从宿迁到昆明：商人刘卫高的“地”国 [*From Suqian to Kunming: The "Land"*

Beijing concluded that when a zoning amendment was directly ordered by a government leader, it had greater than 90 percent likelihood of approval. Compared with factors such as development density, location, and the nature of a project, government leaders' instructions were the most significant factor in determining the result of zoning amendments, according to the same study.<sup>186</sup>

#### B. URBAN PLANNING COMMISSIONS AS PART OF THE GROWTH MACHINE

To combat the arbitrariness of government-led development decisions, many Chinese cities have established urban planning commissions. Shenzhen was the first city to experiment with such a commission in 1998; this subsequently became a model for other. The Shenzhen Urban Planning Commission enjoys the power to review comprehensive plans and to approve detailed control plans (i.e., zoning maps). It has twenty-nine members, fourteen of them government officials, with the mayor serving as chair. The other government members are directors of relevant bureaus and urban district presidents. The fifteen non-government members are professors, real estate professionals and managers, urban planners, public utility company managers, and other community members. Decisions must be approved by two-thirds of attending members and no fewer than half the total number of commission members.<sup>187</sup>

Such strict procedures are designed to confer legitimacy upon urban planning in Shenzhen. In theory, the rules are supposed to prevent the government or political leaders from dominating the planning process. In reality, however, the non-government commission members primarily raise easily resolved technical issues. Few people in the city would seriously challenge a project that city leaders had decided to push through. The non-governmental members of the commission are selected to represent the general public interest, rather than special or particular interests.<sup>188</sup> The

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*Empire of Businessman Weigao Liu*], SINA NEWS (Mar. 19, 2015, 9:32 AM), <http://news.sina.com.cn/zl/zatan/2015-03-19/09323406.shtml>; Shen Fan Cui Xiankang, 受贿超 2400 万 云南原副书记仇和获刑 14 年半 [*The Former Deputy Secretary In Yunnan, Qiu Ji, Accepted Bribes for Over RMB 24 Million and Was Sentenced to a Prison Term of 6 Months and 14 Years*], CAIXIN (Dec. 12, 2016, 5:28 PM), <http://china.caixin.com/2016-12-15/101027333.html> (last visited Mar. 12, 2017).

186. Linmao Xia, *Analysis on the Technical and Political Factors of the Regulatory Detailed Planning Alteration in Beijing 78* (2005) (unpublished Ph.D. dissertation, Tsinghua University) (on file with author);

187. Yuefeng Chen, *Legal Control Over City Planning Power: A Realistic Perspective* 112 (2010) (unpublished Ph.D. dissertation, Shanghai Jiaotong University) (on file with author).

188. 深圳市城市规划委员会章程 [Charter of Shenzhen Urban Planning Commission]

Shenzhen Urban Planning Commission is thus not designed as a forum for bargaining by various stakeholders, although in reality members from the real estate industry frequently promote their sector's agenda in the name of public interest.<sup>189</sup>

Even such limited public participation proved intolerable to the Shenzhen city government, with officials viewing it as too time-consuming and inefficient. From their perspective, city development could not wait for extensive reviews and discussions within the commission.<sup>190</sup> As a result, the city government revised its urban planning regulations in 2001 and redrafted the Shenzhen Urban Planning Commission Charter.<sup>191</sup> The reform provided for smaller special commissions—most notably the Commission on Zoning Maps, which is charged with approving detailed plans and any variations to them. This commission comprises nineteen members, nine of whom are also government employees of the Shenzhen Urban Planning, Land, and Resources Commission, a super-government bureau combining the powers of land administration and urban planning. Among the other ten members are urban planners and engineers from the Shenzhen Urban Planning Institute and other public institutions, environmental and agricultural officials, a professor from Shenzhen University, and a real estate appraiser. Given that nine of its members are from the Urban Planning, Land, and Resources Commission and some of its non-governmental members are closely associated with them, the Commission on Zoning Maps is clearly dominated by the government, and has become an efficient agency for implementing city leaders' business plans.<sup>192</sup> In addition, faced with an increasing number of cases, the Shenzhen government has delegated part of its power to approve zoning amendments to the urban district planning bureaus to achieve greater efficiency.<sup>193</sup>

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(promulgated by the Shenzhen Urb. Plan. Comm'n, Aug. 1, 2002, effective Aug. 1, 2002), arts. 18, 27, [http://www.szpl.gov.cn/szupb/zcfg\\_6712/czgc/201105/t20110506\\_457328.html](http://www.szpl.gov.cn/szupb/zcfg_6712/czgc/201105/t20110506_457328.html); Yuefeng Chen, *supra* note 187, at 106.

189. Yuefeng Chen, *supra* note 187, at 107.

190. Interview with a former Shenzhen urban planning official (Jan. 10, 2017) (transcript on file with author).

191. 深圳市城市规划委员会章程 [Charter of Shenzhen Urban Planning Commission], art. 12; 吴丹 (Dan Wu), 深圳市存量土地背景下控规管理机制研究-以控规局部调整为例 (A Study of Regulatory Control Plans in Urban Redevelopment in Shenzhen: Partial Adjustments as an Example) 11–13 (unpublished manuscript) (on file with author).

192. Interview with Dan Wu (October 6, 2015).

193. See, e.g., 罗湖城市更新快得想不到 原因就是改革放权 [Unbelievable Pace of Urban Renewal in Luohu: The Reason is Reform and Devolution of Power], SHENZHEN NEWS (Feb. 15, 2017, 9:08 AM), [http://dc.sznews.com/content/2017-02/15/content\\_15278331\\_2.htm](http://dc.sznews.com/content/2017-02/15/content_15278331_2.htm).

What we see in the Shenzhen case is a tradeoff between legitimacy and efficiency. Even a limited broadening of public participation reduced decision-making efficiency, and thus found itself in tension with city development. As the primary suppliers of land for housing, city governments in China also try to maximize their profits from the land market. Because most local government functions are funded through land sales, the land price that governments can secure is crucial to their sustainability. City governments thus create a “hungry supply” (i.e., an insufficient supply that is never able to catch up with demand) to push up land and housing prices in order to harvest monopoly rents from the market. The resulting skyrocketing housing prices have made the lives of cities’ middle- and low-income populations very difficult and, in many cases, pushed them out while also excluding potential incomers.

To further reduce housing supply and drive up housing prices, city governments strictly control residential development density. According to urban planning rules, the highest floor-area ratio (“FAR”) for residential plots in Beijing is 2.8.<sup>194</sup> The corresponding figures for Shanghai, Guangzhou, and Shenzhen are 2.5,<sup>195</sup> 3.0,<sup>196</sup> and 6.0, respectively.<sup>197</sup> In comparison, the residential FAR in New York City can be 10 or even higher.<sup>198</sup> The first reason for city governments to limit residential development density is that they are concerned that high-rise residential buildings will attract too many residents, thereby exceeding the capacity of public facilities. The second reason is that they wish to control the total amount of available housing on the market in order to maintain high housing prices and, in turn, the high land prices which are crucial to government land-sales revenue. Let us think about a simple illustration. Suppose that a city mayor decides that the total amount of housing units should be limited to 1,000 during his term—the mayor can then choose to

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194. 关于加强北京市城市建设节约用地标准管理的若干规定 [Stipulations on Strengthening Urban Construction Land Use Control Standards] (promulgated by the Beijing Mun. People’s Gov’t, effective March 24, 2008), <http://www.lawinfochina.com/display.aspx?lib=law&id=6808>.

195. 上海市城市规划管理技术规定 [Shanghai Urban Planning Administration Technical Regulations] (promulgated by the Shanghai Mun. People’s Gov’t, Oct. 18, 2003, effective Jan. 1, 2004), <http://www.shanghai.gov.cn/nw2/nw2314/nw2319/nw2407/nw12939/u26aw972.html>.

196. 广州市城乡规划技术规定 [Guangzhou City Urban and Rural Planning Technical Regulations] (promulgated by the Guangzhou Mun. People’s Gov’t, Oct. 19, 2015, effective Jan. 1, 2016), <http://www.gz.gov.cn/gzgov/s8263/201512/731366b75b7c4c11af46b24c8550412c.shtml>.

197. 深圳市城市规划标准与准则 [Shenzhen Urban Planning Standards and Rules] (promulgated by the Shenzhen Mun. People’s Gov’t, effective Jan. 1, 2014) <http://www.zzguifan.com/webarbs/book/52416/955629.shtml>.

198. *Residence Districts: Overview*, N.Y.C. DEP’T CITY PLAN., <https://www1.nyc.gov/site/planning/zoning/districts-tools/residence-districts-r1-r10.page> (last visited Mar. 20, 2018).

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sell 200 plots of land with a FAR of 5, or 500 plots of land with a FAR of 2. The 200 plots of land may sell at a higher price per plot than the 500 plots of land. But considering two additional factors, the total land sales revenue from the former is actually less than the latter: first, low-density housing is of higher price per unit; second, low-density housing puts much less burden on public infrastructure. Moreover, city governments always choose to sell more land rather than increase FAR, given their power to take land from farmers, with compensation equal to the agricultural value, and sell it to developers at a much higher price, reflecting the development value.<sup>199</sup>

Real estate developers do lobby city governments for more density after they buy land from them. Like their counterparts in many other countries, real estate developers also invest in relationships with government officials, sometimes building up corrupt ties. However, even considering ex post adjustments and imperfect compliance, land use regulations in China still impose a highly restrictive constraint on urban land development. A recent empirical study investigated land developers' compliance with FAR, using a unique set of 854 pairs of land parcels and corresponding residential development projects across thirty major Chinese cities. In 181 of these 854 cases, the land developers exceeded the regulatory upper limits set when the land parcels were acquired. "The developers adjusted the FAR upward in 21.2% of all the cases, covering approximately 25.2% of the total land area developed. . . . Including all 854 cases, the total floor area was increased by 4.3% beyond the total regulatory limit due to upward adjustments of FAR."<sup>200</sup> The study also estimated that "there exists a significant gap between the FAR that maximizes the market land value and the regulatory FAR. . . ; "[c]orruption may facilitate an upward adjustment and reduce the gap, but only modestly."<sup>201</sup> Overall, this first empirical study "suggests that FAR regulations have imposed a highly restrictive constraint on China's urban land development even in the absence of strict compliance."<sup>202</sup>

Detailed plans also determine the ratios of industrial, commercial, and residential land. On average, industrial land occupies more than 20 percent of total buildable land in Chinese cities, a much greater percentage than in

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199. See Qiao, *supra* note 39, at 103.

200. Hongbin Cai et al., *To Build Above the Limit? Implementation of Land Use Regulations in Urban China*, 98 J. URB. ECON. 223, 223–24 (2017).

201. *Id.* at 224.

202. *Id.*

other countries.<sup>203</sup> From 2009 to 2014, twelve major Chinese cities—including Beijing, Shanghai, Guangzhou, and Shenzhen—zoned more than 40 percent of their annual land supply for industrial use.<sup>204</sup> Chinese cities have thus seen too much land zoned for industrial development and too little for residential development. Moreover, the development density of industrial land is often very low. According to the Chinese Ministry of Land and Resources, the FAR of industrial land in Chinese cities is about 0.8, on average, whereas the figure ranges from 1.0–2.0 in developed countries.<sup>205</sup> Partial reasons include the unexamined assumptions that industrial companies require large factories and that it is infeasible to move large machines to tall buildings, although in many cases neither is true: many industrial companies do not require large machinery, and it is not always difficult to install such machinery in high-rises, as evidenced by Hong Kong and other places in which land is used more efficiently.<sup>206</sup> However, industrial investors have no incentive to make more efficient or intensive use of land that is assigned to them by the government cheaply, or even at no cost. A comparison of industrial land prices and the prices of other types of land reveals industrial land to be, on average, about one-sixth the price of residential land in 105 major Chinese cities.<sup>207</sup>

In conclusion, the growth machine of Chinese cities is sufficiently powerful to control the decision-making processes of land use, and cities use that power to maximize land sale revenues and promote economic growth based on industrial development. The result has been a limited housing supply and controlled residential development density, which in turn contribute to skyrocketing housing prices and the exclusion of lower-end housing consumers from megacities.

### C. PUBLIC PARTICIPATION: THE SLOW RISE OF A MOVEMENT

China's reforms have maintained the political structure of the party state while liberating the economic sector, allowing individuals to own housing and hold land use rights within a system of strict government control. In the wake of economic development and urbanization, though,

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203. See GUOJIN QI ET AL., 关于银行不良资产包涉及抵押工业地产的收购处置调研报告 [RESEARCH REPORT ON THE ACQUISITION AND DISPOSITION OF NON-PERFORMING BANKING ASSETS INCLUDING MORTGAGED INDUSTRIAL REAL ESTATE] (2015), <http://www.coame.com.cn/dfzch/jtyf/ywtt/201508/P020150812561751803967.pdf>.

204. See *id.*

205. See *id.*

206. See *id.*

207. *Id.*

city management became more complicated, and the interests of various parties within a city are increasingly interconnected. Urban planning decisions increasingly affect the lives of property owners; combined with growing awareness of and sensitivity to property values, this has led to greater public participation in urban planning decisions. The Chinese central government's role in this system is complex. Although supportive of local government autonomy, the central government sees public participation as a way of constraining abuses of power by local officials. As early as 2000, the then-Minister of Construction, Yu Zhengsheng, emphasized the importance of public participation to urban planning.<sup>208</sup> In 2006, the Ministry of Construction promulgated urban planning ordinances that made public participation a principle of urban planning. The ministry also stipulated that urban planning drafts and detailed plan amendments must be open to public opinion and publicize the results of public surveys before the approval process could be completed.<sup>209</sup>

At the local level, city governments view public participation as a way of promoting public *acceptance* of urban planning decisions, partly in response to bottom-up pressure. For example, the 2003 revision to the Shanghai's urban planning regulations highlighted the importance of public participation and made listening to public opinion an urban planning requirement.<sup>210</sup> More specifically, it required the city's planning agency to publish detailed plans and organize meetings and hearings before submitting those plans for approval. The rules also stipulate that the city government should report to the city-level People's Congress or its standing committee annually to strengthen the monitoring of urban planning.<sup>211</sup> In the same year, Beijing's urban planning committee also made an effort to institutionalize public participation practices by promulgating the Beijing City Interim Rules on Urban Planning Publicity.<sup>212</sup> From November to December 2004, the committee also

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208. Huajian Zhong, 俞正声部长告诫大城市一把手: 城市规划公开才能遏制腐败 [Minister Yu Zhengsheng Warned Leaders of Big Cities: Only Public Urban Planning Can Contain Corruption], *Urban Planning Communication*, No. 23, at 3 (2000).

209. See ZHENYU CHEN, 城市规划中的公众参与程序研究 [A RESEARCH ON THE PROCESS RELATED TO PUBLIC PARTICIPATION IN URBAN PLANNING] 42–43 (2009).

210. See 上海市城市规划条例(2003 修正), [Shanghai Municipal Regulations of Urban Planning (amended 2003)] (promulgated by the Shanghai Mun. People's Cong. Standing Comm., Nov. 13, 2003), art. 26, <http://www.shqyg.com/rendera/cwhgb/node185/userobject1ai609.html>.

211. See *id.*, arts. 17–19.

212. See 北京市城市规划公示管理暂行办法 [Beijing City Interim Rules on Urban Planning Publicity] (promulgated by the Beijing City Gov't Comm. of Urb. Plan., Nov. 7, 2003, abolished Jan. 1, 2009).

publicized its draft of the revised Beijing City Comprehensive Plan to solicit public opinion.<sup>213</sup> In 2006, Shenzhen followed suit, again emphasizing the importance of public participation by soliciting public opinion on its comprehensive plan for 2020. It even changed the strategic positioning of several urban districts in response to public opinion.<sup>214</sup>

These local initiatives culminated in the incorporation of public participation in the country's 2007 Urban and Rural Planning Law ("URPL"), which for the first time established a national legal framework for such participation in urban planning.<sup>215</sup> Article 26 of the URPL states that drafting agencies should make drafts of comprehensive plans available to the public for at least thirty days and organize meetings, discussions, hearings, or other forums to solicit both experts and public opinion.<sup>216</sup> The agencies should then consider such opinions carefully and attach a relevant report in their submissions for approval. Recent changes to the URPL have given neighbors more influence over development decisions than they enjoyed in the past. The current rules require agencies proposing a zoning amendment to solicit the opinions of "parties of interest" ("PoIs") in the area. They also conclude that detailed control plans—which impose specific restrictions on land development—directly affect the interests of those parties, and therefore their opinions are required before modification.<sup>217</sup> Another section of the URPL establishes the same requirement for variations to detailed building plans, and require that PoIs be compensated where zoning variances result in property value losses.<sup>218</sup> These stipulations in the URPL signal significant progress in public participation in Chinese urban planning. However, the limitations are also quite apparent. Comprehensive plans are often too broad and vague for meaningful public participation, whereas detailed control plans and zoning variations are limited to PoIs with a clear entitlement and specific interest

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213. See Peng Xinqiong, 北京城市总体规划（2004–2020年）昨起公示 [*Beijing City Comprehensive Plan 2004–2020 Publicized Yesterday*], NEWS 163 (Nov. 7, 2004, 2:09 AM), <http://news.163.com/41107/2/1415OQSA0001124T.html>.

214. See Bing Zou et al., 从咨询公众到共同决策—深圳市城市总体规划全过程公众参与的实践与启示 [*From Public Consultation to Joint Decision-Making: Practice and Implications of Public Participation in the Process of the Shenzhen Comprehensive Urban Plan*], 35 CITY PLAN. REV. 91, 91–96 (2011).

215. See 中华人民共和国城乡规划法 [Urban and Rural Planning Law of the People's Republic of China] (promulgated by the Nat'l People's Cong., Oct. 28, 2007, effective Jan. 1, 2008).

216. *Id.* art. 26.

217. *Id.* art. 48.

218. *Id.* art. 50.

in judicial or administrative procedures.<sup>219</sup>

### 1. Impotent Public Participation in Comprehensive Plan Formulation

As discussed above, comprehensive plans focus on the strategic positioning, grand goals, and plans of a city. They are drafted by professional urban planners, and are often too complex for individual participation. They represent the intention and will of city leaders, to be implemented by urban planners and legitimated to some extent by a veneer of public participation. It is argued here that public participation faces three main problems in drafting comprehensive plans.

First, the timing of public participation comes quite late in the process. According to the URPL, public opinion should be solicited before the draft plan is submitted for approval. In other words, the plan has been drafted before any public input, and the public has limited options for making substantial changes to it. The drafting agency does not usually expect any overhaul of its draft plan. Urban planners use their own models, mechanisms, and terms in drafting comprehensive plans, and do not expect laypersons to understand the process, let alone engage in any meaningful participation. Individual complaints are often rejected with reference to the “science” of comprehensive plans and the interconnectedness of a city’s various goals within those plans.

Second, comprehensive plans are generally too broad and too vague to foster substantial public participation. The URPL reflects a lack of clarity regarding the purpose of participation as well as who should participate. The URPL offers no clear definition of who constitutes the public in law—which means that anyone can participate in theory, but only certain members of the public have the capacity and motivation to engage in the process in practice. This lack a clearly defined explicit entitlement to public participation also results in a lack of structure for that participation. The primary avenue of participation—as in the U.S.—is public hearings. However, there are no clear rules for public hearings in China. Given the lack of guidance on who should participate, public hearings often turn into a public show put on by local government officials and the urban planning experts they invite. Hence, public participation is largely symbolic, especially given that members of the public are often less interested in

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219. See, e.g., 定安县人民政府与定安金地建设开发有限公司规划行政管理上诉案 [People’s Gov. of Ding’an Cty. v. Ding’an Jindi Constr. & Dev. Co.] (Hainan High People’s Ct. 2016), <http://openlaw.cn/pdf/judgement/b25f8d1c215d453d94c32965ad6f94bf>.

comprehensive plans than they are in specific neighborhood projects.<sup>220</sup>

Finally, the URPL is unclear about the consequences of neglecting the public participation requirement. It simply requires a drafting agency to submit a report responding to public opinion without specifying any consequences sufficient to force meaningful participation. For all of these reasons, the so-called public participation movement has not led to better urban planning. Nor has it changed the administrative-driven nature of urban planning or counterbalanced the influence of growth machine elites.

## 2. Zoning Maps and Adjustments: Housing Owners as Parties of Interest

In contrast to the lack of clarity surrounding “the public,” PoIs have specific rights, including the right to request information on construction projects that might affect their interests and the right to initiate administrative (and even private) litigation if their property rights are violated.<sup>221</sup> Both administrative and judicial agencies in China equate PoIs with housing owners. If you own an apartment in a neighboring area, you are by definition a PoI; if you do not, you cannot be a PoI.<sup>222</sup> Considering that PoIs were already the most active participants in the drafting of comprehensive plans, the more specific rights and procedures they have been granted at the detailed-plan level afford them even greater power relative to non-property owners. However, PoIs in China are still not satisfied by the administrative and judicial protection of their property interests, and often engage in public protests when these interests are challenged. As a result, the limited progress achieved in public participation has been dominated by this rising class of property owners, who are sensitive to anything likely to diminish the value of their property, whether it be the rezoning of public land or open space as residential land or just the simple addition of more housing to their neighborhood. Accordingly, housing development in China’s megacities has become even more difficult to achieve than before, and urban planning decisions are

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220. See generally Guangxin Liu & Yanwen Liu, 论城市规划过程中的公众参与 [On Public Participation in Urban Planning], 8 THEORETICAL RES. URB. CONSTRUCTION 1 (2013); Yanfen Ye, 论城市规划过程中的公众参与问题 [On the Problem of Public Participation in the Process of Urban Planning], 13 ECON. VISION 390 (2013). This is also consistent with Carol Rose’s critique of master plans. See Rose, *supra* note 68, at 875.

221. 中华人民共和国城乡规划法 [Urban and Rural Planning Law of the People’s Republic of China] (promulgated by the Nat’l People’s Cong., Oct. 28, 2007, effective Jan. 1, 2008), arts. 9, 48, 60.

222. See, e.g., 唐小红诉苏州市规划局规划许可纠纷案 [Xiaohong Tang v. Planning Bureau of Suzhou City] (Canglang District People’s Ct. 2007); Chenwei Ji, 论行政诉讼中城市规划利害关系人的判定 [On the Judgment of Urban Planning Stakeholders in Administrative Litigation], 32 LEGAL F. 70 (2017).

increasingly facing challenges.<sup>223</sup>

For example, within the past decade the central government has developed a major plan for the construction of affordable housing and ordered city governments to build a certain amount of such housing in their jurisdictions. To avoid concentrating the poor in particular neighborhoods and districts, the Ministry of Construction has further promoted a mixture of affordable housing with regular commercial residential housing. However, these efforts have been met with a number of challenges from existing property owners. For instance, a 2008 affordable housing proposal in the Xu Jiahui district of Shanghai was originally planned for a central area, to promote the integration of people from different social and economic backgrounds and to avoid the segregation of rich and poor. The proposal passed with little difficulty (probably due in part to limited public participation), but once the project got underway, more than 6,000 households in the neighboring residential district rose up in protest.<sup>224</sup> These property owners first argued that the project would occupy land that had originally been planned for a healthcare facility, senior center, and kindergarten. In response, the government explained that those public facilities would be included in the affordable housing project and open to all of those living nearby. The property owners then claimed that the project might influence the natural light and air quality in the neighborhood. What was their real concern? As one resident explained in the aftermath, “We were concerned that low prices and [a] low-income population would pull down housing prices [in] the three [surrounding] neighborhoods.”<sup>225</sup> The pressure that property owners exerted through institutional channels, such as the local People’s Political Consultative Conference, resulted in the Shanghai city government relocating the project to a more remote area.<sup>226</sup>

This case illustrates the national debate over the concept of mixed living for the rich and poor (*pinfu hunju*). The Ministry of Housing and Urban-Rural Development promotes such mixed living, requiring real estate developers to incorporate a certain percentage of affordable housing

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223. See, e.g., Yang Jian, 改规划乱规划无规划 政绩驱使致城市规划乱象频出 [*Problematic Urban Planning Motivated by Political Achievement*], PEOPLE (Dec. 13, 2013, 8:23 AM), <http://finance.people.com.cn/n/2013/1213/c1004-23830135.html>.

224. Jia Lunong, 上海市中心建经适房遭附近业主联合抵制 [*The Construction of Economically Affordable Housing in the Downtown Shanghai Faces Boycott from Nearby Property Owners*], SINA NEWS (Aug. 17, 2010, 1:00 AM), <http://news.sina.com.cn/c/sd/2010-08-17/010020910222.shtml>.

225. *Id.*

226. *Id.*

into their projects to avoid concentrations of the poor in particular regions. However, both real estate developers and high-income residents have expressed opposition to this policy. As one such resident from Lanzhou in Gansu province explained, "I paid a large amount of money for housing exactly for its environment and surroundings; it's good for us and for our children's education."<sup>227</sup> Property owners' concerns over property values, which are inseparable from existing neighborhood characteristics, have contributed to the rise of the NIMBY movement in China. It has become increasingly common for middle-class property owners to challenge urban planning decisions, sometimes through public protests. NIMBY movements across the country have forced local governments to take existing property owners' interests more seriously, though the political and social impact of such movements on Chinese urban governance is yet to be fully examined.<sup>228</sup> To date, the movement has attracted public attention primarily with respect to environmental issues, as in the case of opposition to the construction of nearby chemical factories or garbage-disposal sites.<sup>229</sup>

Community opposition thus far has been separate from public participation. Unlike their American counterparts, local communities in China have little institutional power in the urban planning process. Under Chinese law, public participation is incapable of accommodating and dealing with community opposition, which is why such opposition is mainly presented politically, in the form of public protest. However, such protests have proved a powerful weapon in slowing down government-planned development projects, owing to the government's concern with social stability.<sup>230</sup> Overall, the NIMBY movement in China has not made cities more inclusive, but rather has strengthened the government's already existing inclination to exclude newcomers who would impose a burden on public services or create a nuisance for neighboring property owners.

The voices of newcomers and citizens without property are completely

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227. See Xiao Wenxin & Li Kainan, 媒体调查称兰州高低收入者均不满贫富混居政策 [*Those with High or Low Incomes Are All Dissatisfied with the Policies of Mixed Rich and Poor Residences*], SINA NEWS (Oct. 8, 2010, 12:17 AM), <http://news.sina.com.cn/c/sd/2010-08-10/001720860323.shtml>.

228. See, e.g., Johnson, *supra* note 54, at 431; Sun, *supra* note 54, at 133, 136.

229. See, e.g., 近年新建大项目受到周边居民反对事件一览 (包括PX事件) [*Those Incidents That Received Opposition from Nearby Residents in Recent Years (Including the PX Incident)*], IFENG (Sept. 20, 2014, 2:24 AM), [http://finance.ifeng.com/a/20140920/13131025\\_0.shtml](http://finance.ifeng.com/a/20140920/13131025_0.shtml); Chen Yang, 东莞樟木头上百村民散步抗议建垃圾焚烧厂 [*Hundreds of Villagers Protested the Construction of a Waste Incineration Plant in Zhangmutou, Dongguan*], SOUTH CN (Mar. 29, 2010, 9:11 AM), [http://news.southcn.com/g/2010-03/29/content\\_10554085.htm](http://news.southcn.com/g/2010-03/29/content_10554085.htm).

230. Johnson, *supra* note 54, at 436; Sun, *supra* note 54, at 136.

absent from the urban planning process. For example, bargaining in urban renewal, which has become an increasingly important means of city development, occurs primarily between growth machine elites—government officials, real estate developers, and property owners—with the interests of the majority of residents in blighted neighborhoods—namely, renters—receiving little, if any, consideration. In Shenzhen, eight million residents of intra-city villages (villages within the city) are migrants, and most of their landlords do not live in those villages.<sup>231</sup> When intra-city villages are targeted for redevelopment, their migrant worker residents (generally taxi drivers, factory workers, cleaning staff, security guards, and the like) are forced to move to another village.<sup>232</sup> If the Shenzhen government succeeds in redeveloping all such villages, migrant workers will have nowhere to live.

To summarize, urban governance in China is dominated by growth elites, including government officials who pursue industrial-driven economic growth, financial investors, and real estate developers. The decision-making mechanism is administratively driven and allows little democratic deliberation or public input. The resulting growth machine has little sympathy for the young and the poor. Combined with the conventional *hukou* regime, land use regulations have become an increasingly important weapon for Chinese cities to exclude the unwanted. The rise of homeownership in China was supposed to balance the power of local governments, but only to the limited extent of protecting existing property owners' interests. For the non-property owners in Chinese cities, Chinese NIMBYism operates similarly to its U.S. counterpart, serving to limit the housing supply and shore up housing prices by slowing down or pushing out development.

#### IV. HOUSING, THE NEW EXCLUSION, AND THE WAY OUT

Our research reveals that two very different systems—with very different legal frameworks, governmental structures, and goals—can each produce exclusionary housing policies that limit the construction of affordable housing where it is needed. The role of property owners in preventing development has widespread implications for society that go far

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231. Shitong Qiao, *Planting Houses in Shenzhen: A Real Estate Market Without Legal Titles*, 29 CANADIAN J.L. & SOC'Y 253, 258–66 (2014).

232. See Eli Mackinnon, *The Twilight of Shenzhen's Great Urban Village*, FOREIGN POL'Y (Sept. 16, 2016), <http://foreignpolicy.com/2016/09/16/china-demolition-economy-the-twilight-of-shenzhens-great-urban-village-baishizhou>.

beyond the issues of exclusion and inconvenience for developers. In recent years, a growing number of economists have begun to focus on the rapidly escalating cost of housing in many American cities—particularly coastal cities, where housing prices have risen dramatically—forcing many people to relocate. Jason Furman, Chairman of the Council of Economic Advisors under President Obama, has written:

[S]ome land use regulations can be beneficial to communities and the overall economy. There can be compelling environmental reasons in some localities to limit high-density or multi-use development. . . . But in other cases, zoning regulations and other local barriers to housing development allow a small number of individuals to capture the economic benefits of living in a community, thus limiting diversity and mobility. The artificial upward pressure that zoning places on house prices—primarily by functioning as a supply constraint—also may undermine the market forces that would otherwise determine how much housing to build, where to build, and what type to build, leading to a mismatch between the types of housing that households want, what they can afford, and what is available to buy or rent.<sup>233</sup>

Furman’s analysis relies on the work of Edward Glaeser, Joseph Gyorke, and Raven Saks, who concluded that zoning regulations in New York City increase the cost of housing there by 50 percent.<sup>234</sup> And high housing costs, as Peter Ganong and Daniel Shoag have argued, are largely responsible for hindering the migration of Americans from lower-wage to higher-wage regions.<sup>235</sup>

In both the U.S. and China, the impact of overly restrictive development approaches has contributed to gentrification, as consumers seek housing in previously undesirable neighborhoods, with developers following close behind. As John Mangin has argued, zoning restrictions that prevent development in high-income areas push home-seekers to expand their targets to adjacent neighborhoods.<sup>236</sup> The result is a rise in

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233. Furman, *supra* note 8, at 2. See also Peter Ganong & Daniel Shoag, *Why Has Regional Income Convergence Declined?* 1–4 (Hutchins Ctr., Working Paper No. 21, 2016).

234. Edward L. Glaeser et al., *Why Is Manhattan So Expensive? Regulation and the Rise in Housing Prices*, 48 J.L. & ECON. 331, 359–60 (2005).

235. Ganong & Shoag, *supra* note 233, at 2. Of course, land use regulation is not the only factor contributing to megacity housing shortages. For example, “[a]ccording to a recent study by Issi Romem, chief economist at BuildZoom, part of the explanation lies in the geographic characteristics of cities and metros—mountains, lakes, coastlines, etc.—that make it all but impossible to expand and add more housing.” Richard Florida, *Blame Geography for High Housing Prices?*, CITYLAB (Apr. 18, 2016), <http://www.citylab.com/housing/2016/04/blame-geography-for-high-housing-prices/478680>.

236. See Mangin, *supra* note 8, at 106.

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housing costs there, which attracts developers—and a backlash from long-term residents concerned about being priced out of the area. However, efforts to stop development do little to prevent increases in housing costs, which are the result of demand rather than construction.<sup>237</sup>

In the remainder of this Article, we first discuss some of the commonalities and differences between the U.S. and China with regard to land use regulation in fast-growing cities. We then discuss several proposals made by other academics for dealing with exclusion in the context of urban development, and argue for replacing property-based urban governance with citizenship-based urban governance.

A. U.S. AND CHINESE LAND USE REGULATION: CONVERGENCE TOWARD EXCLUSION?

As this Article reveals, the political systems in both the U.S. and China have imposed limits on high-density development. To an American visiting China, the claim that the country's cities are "anti-density" may seem odd. After all, Chinese cities have many more high-rise apartments than American cities. And unlike in the U.S., it is true that the predominant living style in Chinese urban culture is apartment-dwelling, often in large buildings. However, as we have demonstrated herein, Chinese local governments often thwart the even-higher-density developments for which there is considerable demand. The fact that land sales account for a significant portion of local government budgets pushes those governments to transform additional rural land into developable residential areas instead of focusing their efforts on increasing the development of already-built-up areas, leading to the rapid sprawl seen in many cities. In the U.S., opposition to density is the fundamental position of most homeowners, as we have seen in the New York City cases. Historically, such opposition—a cause of deconcentration, or sprawl—has been less important than suburban opposition to development. However, should urban homeowner opposition continue apace, we can expect increased demand for new developments in exurban areas.

High on the list of reasons for opposing density in both the U.S. and China is concern for the additional infrastructure costs that density imposes. Concerns over overcrowding in schools, parks, and other public facilities, as well as over the potentially high costs of improving and expanding infrastructure, generate public opposition and government

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237. *See id.*

obstruction to new development in both countries. In addition, explicit and implicit fears over income mixing have also shaped opposition to higher-density housing. In the U.S., “snob zoning” is an old phenomenon. In fact, land use regulation in the West—from Euclid onwards—has been based in large part on the principle of separation of income levels. In China, this is a rather new phenomenon, but, as we have seen, exclusionary communities are becoming prevalent in the country’s largest cities.

Housing markets in China and the U.S., albeit different in many ways, are exhibiting signs of convergence. This Article has focused on the housing debate in both countries’ fast-growing cities, but such “weak market” cities as Ordos and Qin Zhou in China<sup>238</sup> and Detroit and St. Louis in the U.S. feature a glut of affordable housing. In the U.S., that glut is the result of demographic changes in these and similar cities. People have moved in search of better economic opportunities, leaving their housing behind. In China, such oversupply is the result of poorly planned construction projects that were not based on market demand.

Despite dramatically different fundamental frameworks, the U.S. and China are also converging toward the same exclusionary results. In China, control of land use decisions remains concentrated in local government hands. Although real estate developers have some influence, government leaders make the decisions about what gets built and where. In the U.S., government regulators, private property owners, and developers vie for power in both short-term disputes over individual projects and long-term debates over the appropriate level of construction. Although governments in the U.S. have the power to reject proposals, and therefore shape development, they do not generally plan and/or initiate housing developments. However, even with concentrated power in China and dispersed power in the U.S., the end result in the megacities of both is a decision to limit growth.

Additionally, in the U.S., public participation is a fundamental aspect of the development process. New York City is a typical example. Its property owners and their representative organizations wield significant power in shaping both the general zoning map and decision-making about individual development projects. In China, public participation is limited, and has historically been directed toward input on general plans. However,

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238. 中国或现 50 个“鬼城” 三亚威海排前十 [*China’s 50 “Ghost Cities;” Sanya and Weihai Rank in the Top 10*], CAIXIN (Oct. 14, 2014, 9:58 AM), <http://m.datanews.caixin.com/m/2014-10-14/100738050.html>.

the situation is changing, with public opposition to development seemingly on the rise.

Finally, the types of markets and goals of government decision-makers certainly differ in the two countries. In China, industrial development often takes priority over residential development. In the U.S., opposition to residential development is strong among residents and government officials because of concerns over the costs of increased density. Industrial development is less of a priority in American cities, which are generally older, with existing (and underutilized) industrial areas already in place. However, in both countries the fundamental structure of the property system is based almost exclusively on the interests of current property owners. In China, much of the land remains owned by the government. The transfer of land to private parties has brought about new development, but not enough to meet demand. In the U.S., private land ownership is the norm, but private property owners' incentives to limit competition for resources and to maintain property values point toward exclusion. Our research leads us to conclude that more equitable land use regulatory regimes require the conscious inclusion of non-property owners in the planning and development process. Neither a public nor a private system that places power solely in the hands of property owners will ever produce the necessary amount of housing.

#### B. TOWARD A NEW, INCLUSIONARY REGULATORY SYSTEM

The value of cities, according to agglomeration economics, is that they are able to share information, talent, public transportation, education, healthcare systems, and other public goods. Sharing and more inclusive cities are more efficient than exclusionary cities, as they ensure that developments benefit from the greater availability of human capital, governments benefit from more taxes, and citizens (both old and new) benefit from more information, communication, services, and opportunities. That is how cities have grown over time and why we consider them the greatest invention of civilization.<sup>239</sup> Recognizing the importance of cities to human development, people also share a vision of "cities for all," to be achieved, as the U.N. General Assembly resolved, "by leveraging the agglomeration benefits of well-planned urbanization, high productivity, competitiveness and innovation, by promoting full and productive employment and decent work for all, [and] by ensuring the

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239. GLAESER, *supra* note 4, at 6.

creation of decent jobs and equal access for all to economic and productive resources and opportunities.”<sup>240</sup> Fundamental to the core of inclusive cities, of course, is “a variety of adequate housing options.”<sup>241</sup>

However, as exemplified by the comparative study reported herein, vested interests in both American and Chinese megacities have accelerated their exclusionary tendencies. To address the failure of the political markets regarding land use regulations in megacities, we can either abolish zoning altogether<sup>242</sup> or empower non-property owners in the decision-making process of zoning. Abolishment of zoning would theoretically enable landowners to “develop their property in the manner they desire[.]”<sup>243</sup> But the question is whether landowners desire the same amount of housing as do potential consumers—in particular the middle- and lower-end consumers. As discussed previously, this is not necessarily the case. Moreover, the expansion of government in Chinese and American metropolitan areas has rendered this solution very difficult, if not entirely infeasible. The other approach—empowering those whose interests are not protected by the current system—is thus more practical. Land use regulations have become more necessary than they were a century ago because of interconnectedness and the agglomeration of economic and social activities in cities. However, that does not preclude the possibility of redefining the boundaries of the political market of urban governance. A more balanced approach may be to facilitate equal access and participation in the political market by creating neighborhood plans that set general parameters for development while leaving individual development decisions to individual property owners, supplemented by private remedies. The essential component of this approach is to clearly define the boundaries of the political market and the entitlements of its participants.

Urban governance regimes are shaped by city politics, increasingly dominated by private owners in the U.S. and by public ones in China. There are few meaningful mechanisms to welcome newcomers, traditionally the primary source of cities’ greatness. These problems cannot be resolved solely by technical revisions of democratic procedures; they can be resolved only by changing the composition of political representation. Newcomers to cities must be afforded more power to shape

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240. G.A. RES 71/256, ¶14(b) (Dec. 23, 2016).

241. *Id.* at ¶ 33.

242. Ellickson, *supra* note 93, at 705–11; Ilya Somin, *The Emerging Cross-Ideological Consensus on Zoning*, WASH. POST (Dec. 5, 2005), <https://wapo.st/1Ny1U4C>; Glaeser, *supra* note 9.

243. Glaeser et al., *supra* note 234, at 367.

land use regulations. Changing the number and composition of participants could well reshape the urban governance landscape. Empowering absent stakeholders is of more fundamental importance than effecting technical amendments to land use procedures and regulations. Zoning budgets and city-level discussions can improve the situation by limiting the influence of local community opposition, but they will not shift the city dynamics from pro status quo to pro housing development.

In his celebrated article, *Suburban Growth Controls*, Ellickson addresses how to protect housing consumers against monopoly pricing.<sup>244</sup> His proposal is to grant housing consumers legal rights: more specifically, an entitlement to initiate antitrust class actions, using the threat of damages to deter housing owners from exercising monopoly control over zoning.<sup>245</sup> In the spirit of incorporating housing consumers into the bargaining process, we propose to restructure the political market for urban governance to bring housing consumers into the political market, and to entitle them to participate in zoning decisions. Doing so would mean changing the current tripartite urban planning framework to a four-party framework.

In future work, we plan to develop a way to incorporate non-property owners into the political system.<sup>246</sup> However, we suggest several first steps. In essence, urban governance regimes must give non-property owners and their representatives, as well as NGOs that build and advocate for affordable housing, a substantive voice and power in the process of deciding overall land uses and urban development densities. For example, governments in both China and the U.S. could consider establishing community involvement commissions at the city level to formally represent low-income populations, homeless residents, and renters in the urban planning process.<sup>247</sup>

Empirical studies have revealed that exit cannot replace voice in shaping policy change.<sup>248</sup> Meltzer and Schuetz's analysis of policy changes in 100 Bay Area cities and towns between 1998 and 2003 reveals that

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244. See Ellickson, *supra* note 37, at 437.

245. *Id.*

246. See Wendell E. Pritchett, *The Curious Tale of Public Participation in American Land Use Decisions* (Mar. 14, 2017) (unpublished manuscript) (on file with author).

247. For a real-world practice, see Erica C. Barnett, *How Seattle Is Dismantling a NIMBY Power Structure*, NEXT CITY (Apr. 3, 2017), <https://nextcity.org/features/view/seattle-nimbys-neighborhood-planning-decisions>.

248. See James S. Liebman, *Voice, Not Choice*, 101 YALE L.J. 259, 259–78 (1991).

“political factors, such as partisan affiliation and the strength of affordable housing nonprofits, are more robust predictors [than economic and spatial factors] of whether or not a local government adopts inclusionary zoning.”<sup>249</sup> In other policy areas, such as environmental protection, we also see the importance of political participation. Portney and Berry’s survey of city councilors and administrators in fifty large American cities shows that “contact with different group sectors and degree of inclusiveness of those sectors in policymaking is linked to policymakers’ support for environmental protection and for sustainability.”<sup>250</sup> Successful urban policy changes are shaped much more by advocacy and participation than by choosing to leave. Therefore, the next step is to figure out a plan for giving housing consumers equal access to decision-making in land use control and urban governance.

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249. Rachel Meltzer & Jenny Schuetz, *What Drives the Diffusion of Inclusionary Zoning?*, 29 J. POL’Y ANALYSIS & MGMT. 578, 578 (2010).

250. Kent E. Portney & Jeffrey M. Berry, *Urban Advocacy Groups, City Governance, and the Pursuit of Sustainability in American Cities* 1, 28 (Aug. 21, 2009) (manuscript delivered to the Am. Political Sci. Ass’n), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1459082](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1459082).