



California Can Improve Housing and Transit by Preempting Local Ordinances

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In 2017, California State Senator Scott Wiener introduced Senate Bill 827. The bill did not pass, but it would have preempted some local zoning regulations in parts of the state that are well served by public transit. In 2019, Wiener introduced a new version of the bill, Senate Bill 50, that the state legislature will consider in 2020. We have updated a policy brief that we wrote about SB 827 to reflect the new bill (most recently amended in January 2020) along with changes in California's housing markets.

The housing market of coastal California is a good example of a market where growing demand and stagnant supply are leading to high and rising prices. From San Diego to Sonoma County, a strong economy, rich culture, and natural beauty attract Americans and immigrants from all age groups. At the same time, tight restrictions on building new housing at either urban centers or the exurban fringe limit the availability of new housing. When tight supply meets burgeoning demand, prices rise.

In a bid to allow for more new housing and thus slow or even reverse the ongoing growth in prices, State Senator Scott Wiener has introduced a bill in the California State Senate that would preempt some local restrictions on housing construction, particularly near transit stations and frequent bus routes. We argue that the bill, SB 50, is an appropriate use of state power and would likely slow or reverse the growth in house prices. State law already includes a requirement for cities to permit new housing to meet targets for new supply, but the law has no teeth.¹ SB 50 would more effectively limit localities' ability to restrict housing supply.

In this policy brief, we discuss the California housing market, the principled case for preempting municipal ordinances in California's institutional environment, the specifics of SB 50, and the likely effects and limits of passing SB 50 into law.

CALIFORNIA'S HOUSING MARKET

California contains 10 of the 11 most expensive metropolitan areas in the country. The San Jose area has an eye-popping median single-family home value of \$1,219,600. The median single-family home in the San Diego area (the 11th most expensive area nationally) is worth about half that, but that is still about 50 percent more than the median value in the expensive New York City, Washington, DC, or Denver metro areas.²

For renters, the picture is no better. Median apartment rent is greater than \$2,800 per month in the San Jose and San Francisco areas. Eight more California metro areas round out the nation's 12 costliest rental markets, along with New York and Boston. Statewide, monthly apartment rent rose \$52 in 2018, compared to \$47 nationwide.³

Strict and time-consuming land use regulations and ordinances are a major source of California's inflexibility in housing supply. The Wharton Residential Land Use Regulatory Index measures several dimensions of land use regulation based on a 2005 survey of local governments. Consider the standing of California approval processes compared with the rest of the United States in the following categories:⁴

1. Median amount of time between application for rezoning and issuance of a building permit for development of multifamily units:
 - a. California: 9.4 months
 - b. Rest of the United States: 6.3 months
2. Median amount of time between application for subdivision approval and issuance of a building permit (assuming proper zoning is already in place) for the development of multifamily units:
 - a. California: 8.2 months
 - b. Rest of the United States: 5.5 months
3. Share of municipalities in which a new project needs Environmental Review Board approval (even without rezoning):
 - a. California: 11 percent
 - b. Rest of the United States: 3 percent
4. Share of municipalities that require developers to include "affordable" housing:
 - a. California: 39 percent
 - b. Rest of the United States: 17 percent

Within California, regulation varies substantially. In a 2019 Mercatus research paper, Salim Furth and Olivia Gonzalez rank 265 California cities and counties.⁵

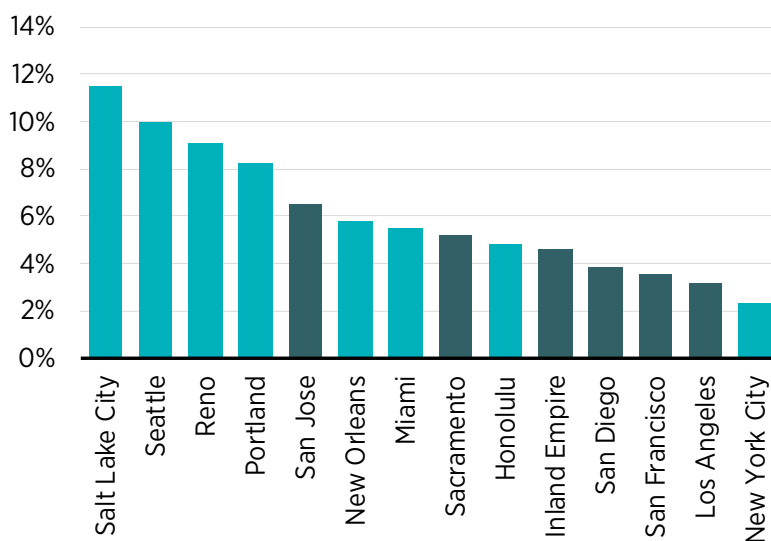
Many studies have shown that housing regulations are an important factor in lower construction rates, with a growing consensus that delays in permitting and construction are particularly insidious.⁶ Although California is far from the only high-regulation state, its inflexibility is particularly detrimental because the state is home to so many high-demand regions. Many people want to live in California because it holds some of the country's most productive labor markets in addition to providing geographic, climatic, and urban amenities.

As a consequence of land use restrictions, housing supply and populations have grown less in California metropolitan areas than in high-demand cities elsewhere. Although the housing supply growth champions of the 2010s are spacious, low-regulation cities such as Austin, Texas (+22 percent), many areas that share California's topographical barriers to growth have nonetheless added more housing in the past seven years than California metros, as figure 1 illustrates.⁷

California's small coastal cities are even more exclusive: the metropolitan areas that make up Monterey, Napa, Santa Cruz, Sonoma, and Ventura counties each added less than 3 percent to their housing stocks during 2012–2019.

California cities offer amenities and economic opportunities that are attracting new residents from across the country and around the world. To accommodate a growing population, the state needs a new regulatory approach, one that allows new growth and offers clearly delineated rules to minimize bureaucratic delays.

Figure 1. Housing Supply Growth Rates, 2012–2019



Source: US Department of Housing and Urban Development, Office of Policy Development and Research, "HUD Aggregated USPS Administrative Data on Address Vacancies," accessed November 16, 2019, <https://www.huduser.gov/portal/datasets/usps.html>.

SB 50'S DENSITY BONUSES

SB 50 would be a big step toward reducing the options available to local government policymakers who wish to reduce new housing construction and population growth. California has a Density Bonus Law that allows developers to build more housing than local zoning allows on land zoned for housing if the developer provides below-market-rate housing as a component of the development. Beginning in 2023, SB 50 would expand the scope of this existing law to set further limits on local density restrictions when certain requirements are met. The bill contains many details and exceptions; we will only touch on its principal provisions.

The limits on local density restrictions would be most significant in counties with at least 600,000 residents and within a quarter mile of a train or ferry stop.⁸ In these areas, housing developments using the SB 50 bonus would be exempt from

1. parking requirements,
2. height limits less than 55 feet, and
3. floor area ratio limits less than 3.25.

SB 50 would create additional lower density bonuses in the following areas:

1. Land within one quarter mile of rail or ferry stations in counties with fewer than 600,000 residents
2. Land between one quarter to one half mile from rail or ferry stations
3. "Jobs rich" neighborhoods, defined as areas that offer positive economic and educational opportunities and reduced commute times
4. Land within one half mile of a bus stop with frequent service⁹

Across the entire state, SB 50 would allow the construction of "fourplexes" (buildings containing four dwelling units) on any vacant land that is zoned for residential use. It would also allow any existing single-family home to be subdivided into as many as four units, provided the overall size of the building does not increase more than 15 percent. One of us wrote earlier about the limits and potential unintended consequences of these provisions.¹⁰

Today, many of California's desirable, transit-accessible neighborhoods are zoned for only low-density residential uses. This bill would make it legal for property owners to sell these homes to developers who would replace them with mid-rise residential buildings that would allow more people to access these locations.

All of the preemptions in SB 50 would reduce current barriers to housing supply that result in high and rising house prices in many California markets.¹¹ Height limits and density restrictions

limit supply directly by preventing developers from taking advantage of high-value land with apartment buildings that allow many households to live in prime locations. Minimum-lot-size and minimum-unit-size requirements are the quintessential “snob zoning” rules that communities have used to outlaw inexpensive housing in their jurisdictions, preventing lower-income households from moving in.¹²

Rules that require open space rather than allowing developers to build to parcels’ lot lines interact with height limits to restrict the potential supply of housing within a jurisdiction. Similarly, while parking requirements may not seem to limit housing supply directly, they mandate that space be dedicated to car storage rather than alternative uses. When developers respond to parking requirements by providing surface lots, less land is available for development. In high-cost locations, they may choose to provide very expensive above-ground or underground garages. In Los Angeles, one estimate finds that parking requirements contribute over \$100,000 to the cost of each new apartment unit.¹³ Under SB 50, some apartments would be built with less parking, resulting in lower-cost options for those who are willing to trade fewer parking spots for cheaper rent.¹⁴

Properties that were designated as historic landmarks before 2010 are exempt from SB 50’s density bonuses, but the bill prevents local governments from using new historic preservation rules to avoid upzoning.

SB 50 would not require new developments to meet any minimum density standards. It sets limits on local regulations and transfers some development decisions from local governments to developers and homeowners.

Antidisplacement Measures

After introducing SB 827, Senator Scott Wiener said that he hoped to add antidemolition requirements to the bill that would be intended to protect existing affordable housing from redevelopment,¹⁵ and SB 50 includes several such measures. Any site that has been home to tenants within the past seven years cannot be redeveloped using SB 50’s density bonuses. Any site where the property owner has used the Ellis Act to evict tenants is exempt from the density bonuses for 15 years. (Under the Ellis Act, local governments may not prevent landlords from evicting all of the tenants in a building if they want to stop renting it entirely to, for example, convert the building to condominiums.)¹⁶

Additionally, any project of 11 or more housing units that uses SB 50’s density bonus must either make a contribution to the locality’s subsidized housing fund or include a percentage of below-market-rate units. Further, housing developments in areas that are defined as “sensitive communities” (areas with high poverty or segregation rates or that meet other socioeconomic requirements) will be granted additional time to determine their own plans to accommodate new housing construction before SB 50’s density bonuses take effect.

CEQA Exemption

The California Environmental Quality Act (CEQA) offers neighbors the chance to tie up any unpopular project in court.¹⁷ Under CEQA's "private right of action," anyone can file a lawsuit to halt a project, public or private, that has allegedly failed to consider some adverse outcome, such as congestion or air quality. Jennifer Hernandez, David Friedman, and Stephanie DeHerrera note that "[any] party can file a CEQA lawsuit, even if it has no environmental purpose. For example, a competitor can file a CEQA lawsuit to delay or derail a competing project."¹⁸ Despite the name, CEQA is used in urban California to stop the very infrastructure, infill, and apartment construction that would make California a more environmentally friendly place.

SB 50 would exempt the fourplexes that it allows across the state from potential CEQA challenges. Since transit-oriented infill development is far more environmentally friendly than the alternatives, it would make sense for projects that receive SB 50 density bonuses to proceed without the threat of CEQA lawsuits as well.

The Manhattan Beach Exemption

Some areas of the state are exempted from SB 50's density bonuses. Logically, areas that are designated as hazardous for development, including fire- and flood-prone regions, are exempt. Less logically, coastal zones are exempt, but only if they are within cities of 50,000 or fewer. Manhattan Beach (population 35,532) and Morro Bay (10,234) are two of the expensive, exclusionary communities covered by this exemption.

Local Flexibility Plans

A city may opt out of SB 50's density bonuses entirely if it adopts a "local flexibility plan" that is at least as effective as SB 50 at expanding housing opportunity and achieving "transportation efficiency." A city could successfully opt out, for example, by offering a plan to rezone a large shopping center near a transit station for high-density residential use. Figure 2 (page 9) shows a location where such a plan would be possible.

The opt-out was added to the bill on January 6, along with the delay of implementation until 2023. In a blog post on the bill's most recent amendments, Senator Wiener provides some detail on plans that would qualify for an opt-out.¹⁹ These plans would have to add at least as much zoned capacity to the municipality as SB 50 would, without increasing expected vehicle miles traveled.²⁰ Additionally, he writes that localities that have reformed their land use regulations in the past 20 years to allow for more housing development could be exempted. However, this detail is not currently reflected in the bill text. Compared to the rest of the bill, the opt-out provision remains vague, and we expect that it will be amended again to provide more detail.

As written earlier, the opt-out provision allows cities with policymakers who support housing construction to create more opportunities for new housing construction relative to SB 50. But it also opens a window for local policymakers who don't want to allow new housing to be built in their jurisdictions to create plans that appear to allow more housing to be built while not doing so in a way that actually makes housing construction feasible.

CALIFORNIA'S ROLE IN PREEMPTING LOCAL LAND USE RULES

SB 50 would implement a moderate state preemption of local land use regulations across the state's localities, with more significant preemption near public transit and in areas designated as "jobs rich." The state would be setting limits on the extent to which municipalities can restrict development, requiring denser development to be allowed in locations where the state invests in transit infrastructure and where new residential development would provide opportunities for people to live near job centers. Preemption of local land use regulations is a legal recourse of state governments because municipalities are "creatures of their states." The State of California has a role to play in restraining local land use regulations for three key reasons: protecting individual property rights, facilitating economic growth, and supporting efficient use of state transportation investments.

Individual Property Rights

Our colleague Michael Farren has argued that, in general, rulemaking should rest at the most local level of government possible, but that higher-level governments should use their authority to ensure that lower levels of government do not violate individual rights.²¹

This principled case for the preemption proposed by SB 50 rests on the state's duty to protect property owners' rights to determine the best use of their land. The bill would increase development options relative to current local rules, in turn increasing access to high-demand areas and allowing more people to take advantage of existing transit investments.

Economic Growth

Aside from protecting individual rights, easing land use regulation in California would improve conditions for economic growth. The density of people, firms, and industries within cities results in agglomeration benefits; living in cities makes people more productive by giving them an opportunity to learn from one another and by creating an environment that supports innovation.

Kyle Herkenhoff, Lee Ohanian, and Edward Prescott use a macroeconomic model to conclude that "deregulating only California to its 1980 level and leaving the land-use regulation level of all other states unchanged, raises [national] output, investment, [productivity], and consumption by about 1.5%, and increases California's population by about 6.0 million workers."²² While SB 50 does

not go as far as this simulation in deregulation, it is nevertheless a policy step toward promoting economic growth.

When local jurisdictions permit new housing construction, they get only a fraction of the resulting benefits—such as economic growth and lower regional housing prices—while absorbing most of the costs. Consequently, local governments constrain new developments at the expense of regional welfare gains.²³ State action provides a coordinating mechanism for citizens to share the costs as well as the benefits of growth.

Efficient Use of State Transportation Investments

The role that California plays in funding transportation provides an additional nexus for state preemption of local land use rules. In 2018, the state allocated nearly \$1 billion to transit projects.²⁴ When local governments don't permit housing development near these transit investments, buses and expensive rail projects benefit a smaller number of riders—and require larger subsidies—than if denser development were allowed near transit corridors.

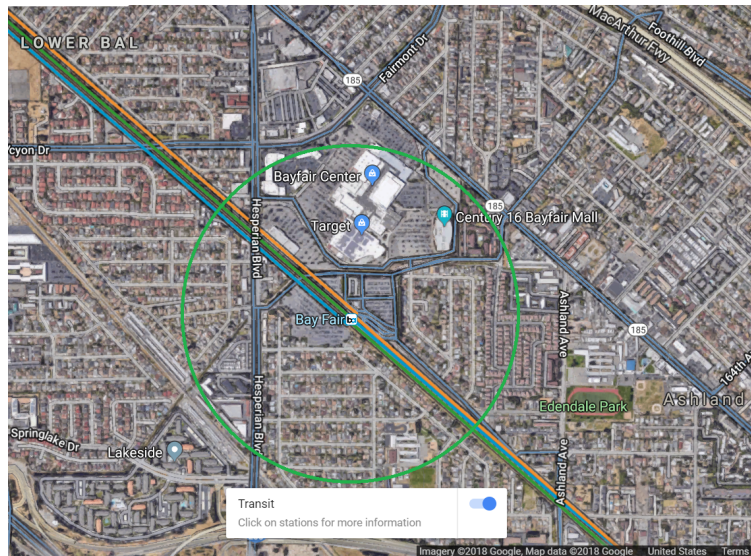
Los Angeles's most recent Exposition Line extension, for example, connects neighborhoods that were, until 2019, zoned largely for single-family or nonresidential development from Santa Monica to Culver City.²⁵ The line covers less than a quarter of its operating expenses with ticket sales, in part because dense housing development has been prohibited, so few people are able to take advantage of it. With liberal zoning near transit, transit fares could cover a larger portion of its expenses, freeing taxpayers from the need to subsidize it so heavily.

Housing growth along the Caltrain corridor from San Jose to San Francisco has been more than twice the Bay Area average since 2010,²⁶ allowing Caltrain to almost double its ridership, lower its per-passenger operating subsidy from \$3.80 to \$1.00, and cut its taxpayer subsidy in half.²⁷ Californians who never use transit nonetheless benefit from efficient private development around transit stations.

Currently, local land use policy is standing in the way of ridership for many California transit systems. Despite the demand for housing and despite infamous road congestion, many California transit stations are surrounded by low-density retail, suburban homes, and parking lots. The potential gains from SB 50 in terms of both housing supply and increasing transit use are largest around low-density suburban stations. Take, for instance, the Bay Fair transit station on the Bay Area metro system (BART) (see figure 2).

In urban Los Angeles, single-family homes dominate the landscape in high-income and low-income neighborhoods alike (see figure 3). The closest buildings to the Exposition Line's Westwood/Rancho Park station on the light-rail line that runs between downtown Los Angeles and Santa Monica are suburban-style homes. Local zoning prevents their owners from taking advantage of the high prices and availability of rapid transit to downtown LA.

Figure 2. Map of Area around Bay Fair BART Station, Ashland, California



Source: Google, "Google Maps," accessed February 16, 2018, <https://goo.gl/maps/WTeWBaaXV9Wbw3wF8>.

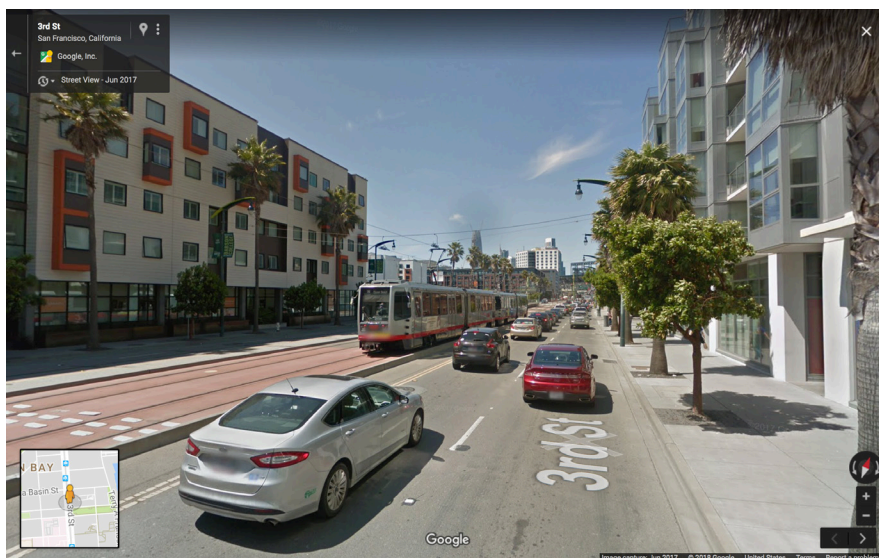
Mid-rise development in the 45- to 55-foot range, which SB 50 would allow in neighborhoods that are both in cities with at least 600,000 residents and within a quarter mile of a major transit stop, would certainly transform areas like these. A Google Street View from newly developed Mission Bay shows a main street with mid-rise housing (see figure 4).

Figure 3. Google Street View of Single-Family Homes, Los Angeles



Source: Google, "Google Maps," accessed February 16, 2018, <https://goo.gl/maps/HWYqZojyvBd4eG4h6>.

Figure 4. Google Street View of Mid-Rise Housing, Mission Bay



Source: Google, "Google Maps," accessed February 16, 2018, <https://goo.gl/maps/VUEnZKwvHcPL2Q9U8>.

IMPROVING SB 50

Preempting local ordinances that limit citizens' property rights and worsen economic outcomes is certainly within the state's purview, but it should be done carefully. States should set limits on local land use restrictions that either apply to all property owners equally or are based on a clear nexus with state programs, such as transportation or education.

Objective Opt-Out Criteria

Cities are given the option to opt out of SB 50 if they achieve the bill's goals another way. Conceptually, that works. But as framed, it invites controversy. The state would be required to judge a city's local flexibility plan against SB 50 at a time when neither has taken effect and both are, therefore, subject to substantial conjecture. This could result in local flexibility plans that are ineffective at allowing more housing to be built near transit, or it could allow little deviation from SB 50's specific requirements. A better approach would be to choose objective criteria (such as the issuance of building permits or the completion of units) and exempt, on a rolling basis, any city that meets the criteria. This approach would be more immediate, more efficacious, and more flexible.

No Arbitrary Exemptions

Giving different rules to counties of different sizes is not, in this case, good governing logic. Some large-population counties have very rural areas; some small-population counties, such as Marin County, are part of major metropolitan areas. Applying a single standard statewide would be

clearer and fairer, and it would decrease the political temptations to use the varying standards to carve out exemptions for favored constituencies.

SB 50's "Manhattan Beach exemption" of coastal zones within cities of 50,000 or fewer residents seems like exactly that sort of political favoritism. Otherwise identical coastal zones in larger cities are not exempted.

Potential for Municipal Workarounds

Relative to SB 827, SB 50 has closed some key loopholes that local governments could have used to avoid upzoning, including those created by CEQA and new historic preservation rules. However, the bill could be further improved to avoid unintended responses from local policymakers who are looking for ways to circumvent the bill's preemption.

SB 50 leaves open the door for local regulators to put costly requirements in their building codes—a platinum toilet mandate, for example. A municipality could mandate that 100 percent of new apartments near transit be leased or sold at below-market rates, effectively ensuring that none are built. By increasing the cost of development, requirements that developers provide below-market-rate housing would decrease the potential for SB 50 to increase housing supply. If localities scramble to update zoning codes, there is a risk of more midproject rule changes that currently bedevil San Francisco construction projects.²⁸

Analysis from the San Francisco Planning Department points out that, as written, SB 827 would have left local review processes in place, as would SB 50.²⁹ Policymakers who wish to severely restrict new development in their jurisdiction could simply allow the queue of proposed projects to accumulate without speeding the rate at which they approve new development.

Antidemolition and Subsidized Housing

SB 50 includes both restrictions on redevelopment for properties where tenants have lived in the past several years and requirements that projects that use its density bonuses include income-restricted housing. However, these restrictions will result in less housing—and corresponding higher prices—than SB 50 could facilitate without these restrictions.

About 45 percent of California households are made up of renters. Exempting almost half the state's existing residential units from the bill will sharply dampen its effects, especially in areas that are particularly attractive to renters.

Some research on inclusionary zoning programs structured similarly to SB 50's affordability requirements indicates that these programs raise prices for those who aren't able to secure the

few units that the programs produce.³⁰ SB 50's density bonuses cannot reduce housing supply or exacerbate housing affordability challenges relative to the status quo, but reducing the bill's anti-demolition and affordability requirements would allow more housing to be built under its density bonuses, likely at a more affordable price than would be feasible under its current language.

Political Discretion

Because land use regulations affect state residents across local borders, states have a role to play in setting limits on the extent to which localities may stand in the way of construction. In some cases, there are clear nexuses between state programs and land use regulations, as in the case of state transportation spending. SB 50's limits on land use regulations that apply across the state and around transit corridors are appropriate places for preemption.

However, SB 50's density bonuses for jobs-rich communities and exceptions for sensitive communities introduce opportunities for decisions about where upzoning will occur to be driven by politics rather than housing or transportation needs. Rather than including subjective definitions for jobs-rich and sensitive communities, SB 50 should include clear metrics for upzoning, such as access to transit, limits that apply statewide, or land prices.

CONCLUSION

States have an important role to play in protecting individual rights from local restrictions. When states preempt local land use regulations, they also facilitate competition between local jurisdictions, promote economic growth, and as in the case of SB 50, reduce transit subsidies.

SB 50 is an attempt by state policymakers to rein in local land use regulations. Because California residents suffer the pains of high and rising housing prices induced by regulatory constraints on supply, state preemption has the potential to create opportunities for increased access to housing in several markets.

Relative to SB 827, SB 50 better anticipates strategies that local governments and neighbors may use to block housing, including CEQA and historic preservation. However, SB 50's own demolition restrictions and affordability requirements mean that some projects that could provide needed new housing won't be feasible. Further, SB 50 introduces the potential for state and local policymakers to use politics to determine where new development will be permitted and where it won't.

ABOUT THE AUTHORS

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