Journal of Law, Property, and Society

Volume 6 **Article 2**

September 2021

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Recommended citation: Michael Casey Gleba, *Toward Alienable Zoning*, 6 J. L. PROP. & SOC'Y 51 (2021), www.bit.ly/JLPS-Gleba

Journal of Law, Property, and Society

ISSN 2373-5856

A publication of the Association for Law, Property and Society

Toward Alienable Zoning

Michael Casey Gleba*

Homeowners and other property owners have two distinct interests tied to their land. The first is in the legal title to their properties; the second is in the neighborhood conditions created by others' use of their properties. While the former is protected by property law and freely alienable, the latter is protected by inalienable zoning rules that can only be altered by municipal authorities. As such, while owners can sell all or part of their properties to others, they cannot waive, either with or without compensation, any of the use and dimensional regulations that purport to protect their properties from negative externalities emanating from neighboring properties. When zoning regulations are modified to allow new or denser land uses, affected neighbors receive no direct compensation, even if they expect to suffer diminished property values and enjoyment of their homes. This inevitably sets the stage for acrimonious NIMBY ("Not in My Backyard") battles that can delay or stop projects and the public and private benefits they can create. Yet, while neighboring property owners who are not supportive of such changes might otherwise accept them in exchange for cash payments, reciprocal waivers, or some other mutually agreed upon compensation, this option is not available under existing zoning practices.

Bringing together legal, economic, and planning perspectives, this Article explores issues and opportunities related to mechanisms I have entitled

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"Locally Alienable Zoning Regulations," or "LAZRs," that would allow the sale or waiver of certain zoning protections by neighboring property owners. Allowing such alienation of zoning protections could enable metropolitan areas to realize some politically difficult land-use policy goals, such as adapting to changing demographic needs, environmental conditions, and market demands.

I. Introduction: The Inevitability of NIMBYism

Almost a century after the United States Supreme Court upheld zoning's constitutionality, the practice is pervasive at the municipal level, its legitimacy is largely taken for granted,[1] and "it may be hard to imagine a planning world in which zoning, as it developed in the United States over the last hundred years, is absent …. Zoning has long carried an aura of normalcy and inevitability in the US planning imagination."[2] Indeed, municipal-level zoning is seen as virtually inviolable and equated

[1] JONATHAN LEVINE, ZONED OUT: REGULATION, MARKETS, AND CHOICES IN TRANSPORTATION AND METROPOLITAN LAND USE 11 (2006).
[2] Sonia A. Hirt, *Mixed Use by Default: How the Europeans (Don't) Zone,* 27 J. PLAN. LIT. 375, 375 (2012).

with "an impressive list of desiderata: democracy, freedom from Big Brother, and the American Dream of a big home on five acres."[3]

While zoning and its promises of protection to homeowners and other property owners have proven durable, specific zoning regulations are not carved in stone.[4] Local authorities are often amenable to the blandishments of developers (and sometimes homeowners) who want to deviate from what is allowed under current zoning. As noted by Robert Bruegmann, zoning codes often give way where they conflict with market demand.[5] Accordingly, "[z]oning rights are routinely, if informally, transacted"[6] with zoning authorities granting zoning relief and other development rights in exchange for monetary exactions, infrastructure improvements, and other mitigation payments that flow to the public treasury to offset the resulting development's purported public costs.

In what Sandy Ikeda has characterized as privatization of municipal zoning with "developers openly buying back property rights that government had previously taken from the free market,"[7] zoning authorities allow project proponents to obtain zoning relief and other development rights (e.g., rezonings, special permits, variances, waivers, and/or other discretionary approvals) in exchange for monetary exactions, infrastructure improvements, and other so-called mitigation payments that flow to the public treasury to offset

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[3] LEVINE, *supra* note 1, at 16.

[4] LEE ANNE FENNELL, THE UNBOUNDED HOME: PROPERTY VALUES BEYOND PROPERTY LINES 69 (2009).

[5] ROBERT BRUEGMANN, SPRAWL: A COMPACT HISTORY 106 (2005).

[6] Peter Gordon & Harry W. Richardson, *The Sprawl Debate: Let Markets Plan*, 31 PUBLIUS 131, 136 (2001) (discussing ROBERT NELSON, ZONING AND PROPERTY RIGHTS: AN ANALYSIS OF THE AMERICAN SYSTEM OF LAND-USE REGULATION (1977)).

[7] Sandy Ikeda, *Private Neighborhoods and the Transformation of Local Government*, MARKET URBANISM (Nov. 29, 2016), http://marketurbanism.com/2016/11/29/private-neighborhoods-and-the-transformation-of-local-government/ (reviewing ROBERT NELSON, PRIVATE NEIGHBORHOODS AND THE TRANSFORMATION OF LOCAL GOVERNMENT (2005)).

the resulting development's purported public costs. While such transactions are to be expected,[8] they tend to be costly and produce doubtful efficiency gains.[9]

Since current zoning practice largely excludes private negotiations,[10] such negotiations are conducted by project proponents and local public officials. Those most directly affected by land-use changes, namely neighboring property owners, have no direct role in the process, save participation in the review process as members of the public,[11] and they receive no direct compensation for any real or expected diminishment in property values and neighborhood conditions that may result.[12] As incumbent residents often fear diminished property values and reductions in the consumer surplus in the use value of their houses, properties, and the surrounding neighborhood,[13] such land-use changes often set the stage for acrimonious "Not in My Backyard," or NIMBY, battles waged by abutting property owners and other neighbors.

Opposition to zoning changes is not be surprising since "[a]mong the key problems associated with NIMBYism are the wedges driven between societal costs and private costs, and between private costs

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[8] Gordon & Richardson, *supra* note 6.

[9] A. Dan Tarlock, *Toward a Revised Theory of Zoning*, LAND USE CONTROLS ANN. 141, 147 (1972).

[10] Zhu Qian, *Without Zoning: Urban Development and Land Use Controls in Houston*, 27 CITIES 31, 32 (2010).

[11] This is somewhat curious as often the criteria for the granting of special permits or other zoning relief is often that the proposed structure or use will not be detrimental to the neighborhood, and yet such findings can be made by the zoning authority in the face of opposing statements by the residents of the neighborhood.

[12] That said, while undoubtably in some instances a project proponent will informally negotiate with neighbors for them to acquiesce and publicly support, or at least not oppose, projects during the public review process and/or subsequent litigation, such agreements are "under the table" and generally not enforceable contracts, and therefore of limited use and value to either side.

[13] Bradley Karkkainen, *Zoning: A Reply to the Critics*, 10 J. LAND USE & ENV'T L. 45, 65 (1994).

and private benefits."[14] Although incumbent homeowners have no vested right in existing zoning, they have, consistent with the collective property rights theory of zoning, seemingly been endowed with a sense of entitlement in the status quo in land use in their neighborhoods.[15] Further, since zoning limits incumbents from using their properties in response to market demand and preferences, it transforms them from "potential developers into … purely NIMBY neighbors, exclusively interested in maintaining the fixity of supply of housing and in protecting their interest in common-pool assets in a neighborhood like spots in school catchment areas and seats in good local restaurants."[16]

Ultimately, a "community that is thoroughly opposed to a particular project has several brigades to defend its fortress."[17] Small, geographically concentrated NIMBY groups can readily organize into an effective lobbying force[18] to delay or kill projects, frustrating project proponents' and land-use policymakers' attempts to locate socially and economically beneficial projects such as schools, multifamily housing and commercial uses, as well as the public benefits they can create, including expanded housing options, employment opportunities and improved community facilities.

NIMBYism has led to many suggestions to reform zoning, often by having states curb the ability of municipalities (and their current

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[14] Ryan Avent, *The Case for Strengthening Urban Property Rights*, ATL. CITIES, (Sept. 22, 2012), https://www.bloomberg.com/news/articles/2011-09-22/the-case-for-strengthening-urban-property-rights.

[15] WILLIAM FISCHEL, THE ECONOMICS OF ZONING LAWS: A PROPERTY RIGHTS APPROACH TO AMERICAN LAND USE CONTROLS 36 (1985) [hereinafter FISCHEL, ECONOMICS OF ZONING LAWS]; William Fischel, *Why are There NIMBYs?*, 77 LAND ECON. 144, 147 (2001) [hereinafter Fischel, *Why are There NIMBYs?*]; Karkkainen, *supra* note 13, at 68.

[16] David Schleicher, *City Unplanning*, 122 YALE L.J. 1670, 1715 (2013).

[17] *See* FISCHEL, ECONOMICS OF ZONING LAWS, *supra* note 15, at 36.

[18] Kenneth Stahl, *Neighborhood Empowerment and the Future of the City*, 161 U. PA. L. REV. 939, 981 (2013).

residents) to exclude new, and different kinds, of housing. The impulse to shape local zoning practice from above is now also finding energy at the federal level, with some discussing the possibility of using the power of the federal purse to incentivize or coerce municipalities to modify their zoning bylaws and ordinances to allow for more diverse housing.[19]

Those derided as NIMBYs are often people concerned about the well-being of their families, homes, and communities. Homeowners can reasonably see themselves as having bought and paid for their neighborhoods' current conditions—and the zoning that purports to protect them—through the prices paid for their homes, the property taxes they pay every quarter, and the limitations that zoning places on the use of their own properties.

Therefore, a productive and realistic response to NIMBYism could be, rather than shifting power upward from the municipal level, to instead shift some downward to the neighbors of proposed development and empower neighbors to waive or sell some of the zoning protections they currently enjoy to builders, and to do so in exchange for bargained-for compensation, such as cash payments, site improvements, reciprocal waivers, and/or other negotiated benefits. Toward that end, this Article explores the possibilities and implications related to the proposed establishment of what I have entitled "Locally Alienable Zoning Regulation" mechanisms (LAZRs).

The Article build on the zoning literature, especially that rooted in property rights theory, and extend the idea of zoning as a property right held by municipalities to it also having, in certain instances, the nature of individual property rights that should be alienable by abutting property owners. LAZRs would include zoning rules that lack

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[19] Andrew Ackerman & Nicole Friedman, *Program Seeks to Ease Zoning Rules*, WALL ST. J. (April 8, 2021), https://www.wsj.com/articles/biden-seeks-to-ease-housing-shortage-with-looser-zoning-rules-11617796817.

connections to the public welfare, such as those that primarily protect property values by limiting the housing supply, serve purely aesthetic purposes, and, obviously, have exclusionary effects.

Perhaps ironically, lessening the municipal monopoly on zoning by giving neighbors more control over nearby land use, could reduce NIMBYism. It could do so by increasing fairness for affected neighbors and creating real incentives for them to accept denser development. It could also enhance neighborhood stability by encouraging existing residents to remain in evolving areas and creating opportunities for strategic cooperation where one property's improvement could benefit neighboring properties. Ultimately, by providing real inducements for neighbors, LAZR mechanisms could enable metropolitan areas to realize politically difficult land-use policy goals such as adapting to changing demographic needs, environmental conditions, and market demand.

Part I of the Article reviews the historic, legal, and theoretical foundations of American zoning practice. It discusses zoning's implications for social and racial segregation (as warned of in a 1924 lower court decision in the *Euclid* case) as well as zoning's nature as an inalienable property right held and exercised collectively by municipalities' current residents.

Part II discusses the perceived role zoning has for homeowners in the protection of their property values as well as existing neighborhood conditions. It argues that in many cases NIMBYism, rather than being simply dismissed as a product of selfishness, fear of change, hatred, or some combination thereof, can be more usefully understood as neighbors' rational response to anticipated uncompensated losses.

Conventional economic thinking and common sense suggest neighbors might accept, or at least not oppose, new development nearby if they were compensated for their expected losses. Part III

explores neighbor compensation as tool to address NIMBYism. Previous proposals to allow neighbors or neighborhoods to negotiate for compensation in exchange for zoning relief are discussed as are thorny questions about the appropriateness and legality of empowering individuals to waive protections imposed as an exercise of the police power. Implications of zoning's location within states' police powers are also discussed, as is the United States Supreme Court's muddled jurisprudence regarding enhanced roles for neighbors in zoning decisions.

Part IV discusses the forms LAZR mechanisms could take. LAZR mechanisms would be complements to, not substitutes for, existing zoning regimes. It explores what LAZR mechanisms could look like in practice, including (1) identifying which types of zoning regulations and which neighbors could properly be subject to LAZRs by distinguishing between regulations that primarily protect public and private interests, and (2) using the concept of standing to identify which neighbors could be empowered to alienate those regulations that protect private interests.

The Article identifies and addresses possible objections and concludes with observations regarding the implications such a power-decentralizing modification to land-use control might have for the future growth and development of metropolitan areas.

II. What Is Zoning Anyway?

A. American Zoning and the Euclid Decision

What gets built where and, inevitably, who lives where, is largely determined by zoning. As the political allocation of land-use rights,

zoning may indeed be, as Justice Thurgood Marshall wrote in 1974, "the most essential function performed by local government."[20]

As the primary mechanism for land-use management in the United States, zoning serves several related but different purposes. As an exercise of the states' police powers to protect the public health, safety, welfare, and morals, zoning regulations are intended to prevent landowners from using their properties in ways that create negative externalities that harm neighbors or the general welfare. Justified as protecting the "general welfare," zoning "has been used to stabilize property values, promote homogeneity of development, control competition, preserve landmarks and natural settings, refine a community's moral and aesthetic values, control population density, and maintain a community's tax base."[21]

All this is generally done by regulating the location of residential, commercial and industrial uses, the lot area to be built upon, the size and height of buildings, etc.[22] The "interventions of local zoning are legion" and can also include other regulations pertaining to "floor-area ratio, number of unrelated persons who may live together, and restrictions on buildings' architectural details."[23] Stated more pointedly, "[m]unicipalities in the United States zone their territory in a detailed and prescriptive fashion, as anyone who has attempted to start a business or add an apartment in a single-family zone will readily attest."[24]

As zoning implicitly "withdraws part of the right to use property as a private owner sees fit and gives this control to the political

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[20] Village of Belle Terre v. Boraas, 416 U.S. 1, 13 (Marshall, J., dissenting)
[21] Douglas Kmiec, *Deregulating Land Use: An Alternative Free Enterprise Development System*, 130 U. PA. L. REV. 28, 93 (1981).
[22] Euclid v. Ambler, 272 U.S. 365, 379 (1926).
[23] *See* LEVINE *supra* note 1, at 11.
[24] *Id*.

authorities of the municipality,"[25] early zoning ordinances were frequently challenged in court as violations of private property rights. While sometimes struck down, they were "usually approved with paeans to the American home."[26] A key question was often whether such withdrawals were property taking that required compensation under the Fifth Amendment for any resulting diminishment in value, or, rather, whether such actions should be seen in the spirit of President Theodore Roosevelt's expansive Progressive Era view that "[e]veryman holds his property subject to the general right of the community to regulate its use to whatever degree the public welfare may require it."[27] Advocates and promoters also constructed arguments framing zoning as a mere extension of principles that undergird long-standing nuisance law.

The United States Supreme Court established zoning's legal legitimacy in its 1926 *Village of Euclid v. Ambler Realty Co.* decision [28] The Village of Euclid adopted a town-wide zoning ordinance that divided Ambler Realty's property among three use districts as well as several height and area districts. As a result, Amber Realty's intended use of the site for an auto body plant was not allowed. Ambler Realty sued the municipality, arguing that by reducing the market value of the property by approximately 75%.[29] By doing so, Ambler Realty argued, such zoning deprived it of its liberty and property rights without due process, denied it equal protection under law

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[25] William Fischel, *A Property Rights Approach to Municipal Zoning*, 54 LAND ECON. 64, 66 (1978).
[26] Norman Williams, Jr., *The Evolution of Zoning*, 15 AM. J. ECON. & SOC'Y 253, 257 (1956).
[27] RUTHERFORD H. PLATT, LAND USE AND SOCIETY: GEOGRAPHY, LAW, AND PUBLIC POLICY 291 (Rev. ed. 2004).
[28] Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).
[29] RICHARD EPSTEIN, SUPREME NEGLECT: HOW TO REVIVE CONSTITUTIONAL PROTECTION FOR PRIVATE PROPERTY 117 (2008).

and, as such, represented an unconstitutional, uncompensated taking under the guise of the police power.[30]

The village's successful defense of its zoning ordinance was hardly a foregone conclusion. State and federal courts had already invalidated some other zoning ordinances, and just a few years earlier Justice Oliver Wendell Holmes had written that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[31] Also, when previously overturning explicitly racial zoning in *Buchanan v. Warley*, the Supreme Court followed a rather conservative, or classically liberal, jurisprudence in that it gave great deference to individual property rights (in that case, the right of the property owners to sell to a chosen buyer) and rejected government intrusion into what was seen as a primarily commercial affair.[32] In his lower court decision in favor of Ambler Realty, federal Judge David Courtney Westenhaver was consistent with this tradition, finding that the ordinance's limits on Ambler Realty's use of its land represented a taking of its value. [33]

Additionally, the Euclid ordinance's exclusion of multifamily dwellings from single-family dwelling districts was viewed as a significant potential legal vulnerability. Zoning's early proponents had great concerns regarding the constitutionality of exclusively single-family residence districts, and it was feared to be by some as the Achilles' heel of the entire zoning project. Accordingly, New York City's 1916 zoning ordinance included a single residential district designation that allowed apartment houses and other multiple dwellings as well as single- and two- family houses.[34] This approach

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[30] *Euclid*, 272 U.S. at 367.
[31] Pennsylvania Coal v. Mahon, 260 U.S. 393, 415 (1922).
[32] Buchanan v. Warley, 245 U.S. 60 (1917).
[33] Ambler Realty Co. v. Village of Euclid, Ohio, 297 F. 307 (D.C. Ohio 1924).
[34] EMILY TALEN, CITY RULES: HOW REGULATIONS AFFECT URBAN FORM 95 (2012).

reflected the thinking of one of the ordinance's authors, Edward M. Bassett, that it was legally "hazardous" to separate the different housing types, believing that courts would find the practice unconstitutional.[35] Alfred Bettman, the attorney and zoning proponent who wrote a crucial amicus curia in the *Euclid* case, stated that such separation was the aspect of zoning ordinances for which "the most anxiety has been felt."[36]

Zoning's promoters need not have been so concerned. The Supreme Court overruled Judge Westenhaver and upheld Euclid's ordinance in a 6-3 decision. In writing for the majority, Justice George Sutherland (somewhat unexpectedly given his previous resistance to many forms of economic regulation) found zoning to be a constitutionally valid exercise of a state's police power as delegated to a municipality. The decision gave local zoning regulations a presumption of validity, holding that before one could be ruled unconstitutional, "it must be found … that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."[37]

B. Zoning, Stratification, and Segregation

As noted by economist Robert Nelson, "[o]nce zoning powers became available to local governments, it was probably inevitable that municipalities would use them to advance the full scope of their interests."[38] Although originally an urban phenomenon geared toward protecting commercial property interests, once upheld by the Supreme Court, zoning quickly spread to the residential suburban

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[35] *Id.*
[36] *Id.*
[37] *Euclid*, 272 U.S. at 388.
[38] Robert Nelson, *A Private Property Right Theory of Zoning*, 11 URB. LAW. 713, 715 (1979) [hereinafter Nelson, *A Private Property Right Theory of Zoning*].

context. The great deference the Supreme Court accorded municipalities has allowed the often politically dominant home-owning majorities to use zoning to go well beyond simply separating noxious or nuisance-producing commercial or industrial uses from residences as a response to externalities but to also increase their homes' property values.[39]

With such zoning institutions in place, homeowners could have some comfort that their investments would not likely be subject to rapid, catastrophic declines in value. Although briefly delayed by the Depression and the Second World War, the United States soon embarked on its well-documented suburbanization project, flush with the proceeds of post-War prosperity. The suburban single-family house—long the object of desire for many social reformers, spread across and between metropolitan areas, made physically accessible to the millions by the automobile and extensive road systems—would turn much of the supposedly unassimilated, city-dwelling masses into property-owning Americans.

The effect of the unprecedented compulsory separation of uses and accompanying constraint of development in forms and at levels other than what the market would demand mandated by conventional zoning practice is evident in the fact that as of 2015, 73.91 million of the United States' 118.2 million homes were single-family detached houses.[40] While this perhaps reflects the revealed preference of many suburbanites to live in low-density, single-family housing, it is further reflective of the fact that, apparently, and, "more

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[39] WILLIAM T. BOGART, DON'T CALL IT SPRAWL: METROPOLITAN STRUCTURE IN THE TWENTY-FIRST CENTURY 136 (2006).

[40] U.S. Energy Information Administration, *Residential Energy Consumption Survey (RECS)* Table HC2.1 (Structural and Geographic Characteristics of U.S. Homes by Housing Unit Type), (released February 2017, revised May 2018) https://www.eia.gov/consumption/residential/data/2015/hc/php/hc2.1.php.

importantly in terms of the formulation of public policy, they want their neighbors to do so as well."[41]

Relatedly, the vesting of the power to zone in municipal governments inherently placed into their hands the power to zone against not only objectionable physical things but also certain types of people, especially racial minorities and the economically disadvantaged.[42] Municipalities recognized early on that zoning's use and dimensional regulations could be used to prevent the entry of certain economic and social classes to maintain "enclaves of affluence or of social homogeneity."[43] When so used to codify economic and social stratification, zoning takes the form of a pernicious variant—exclusionary zoning—which usually involves compelling developers to cater to the upper-middle class[44] by excluding multifamily housing and limiting residential development to single-family homes on large lots. It can also include the imposition of other excessive, but facially neutral dimensional requirements such as generous setbacks, relatively low maximum floor area ratios, modest height limits, etc. By increasing the amount of space and development potential that must be left idle, such regulations can serve to artificially inflate housing prices.[45] The exclusion of multifamily dwellings can be considered the product of

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[41] Michael S. Carliner, *Comment on Karen A. Danielsen, Robert E. Lang, and William Fulton's "Retracting Suburbia: Smart Growth and the Future of Housing*," 10 HOUS. POL'Y DEBATE 549, 552 (1999).

[42] Williams, *supra* note 26, at 255.

[43] Marc Seitles, *The Perpetuation of Residential Racial Segregation in America: Historical Discrimination, Modern Forms of Exclusion, and Inclusionary Remedies*, 14 J. LAND USE & ENV'T L. 89, 95 (1998) (citing NAACP v. Twp. of Mount Laurel, 336 A.2d 713, 736 (N.J. 1975) (*Mount Laurel I*) (Pashman, J., concurring*), cert. denied and appeal dismissed*, 423 U.S. 808 (1975)).

[44] Edwin Mills, *Want Affordable Housing? Take Reins Off Developers,* CRAIN'S CHICAGO BUS., September 30, 2002, at 11.

[45] Edward Glaeser & Joseph Gyourko, *Zoning's Steep Price,* 25 REGULATION 24 (2002).

suburbanites' historical association of higher density affordable housing with neighborhood racial succession and a long resistance to multifamily dwellings out of concern of both what they might do to property values and who may live in such housing.[46] This was recognized early on in a Judge Westenhaver's district court decision in *Euclid*. He warned of the use of zoning's tools for discriminatory purposes,

> The plain truth is that the true object of the ordinance in question is to place all the property in an undeveloped area of 16 square miles in a strait-jacket. The purpose to be accomplished is really to regulate the mode of living of persons who may hereafter inhabit it. In the last analysis, the result to be accomplished is to classify the population and segregate them according to their income or situation in life.[47]

It would seem that the very DNA of zoning allows its use consistent with zoning's early supporters' view of socio-spatial segregation as not only as a natural phenomenon, but also as a benefit to order and efficiency,[48] a belief that shaped its creation and continues to influence its practice today. Indeed, zoning spread as quickly and as widely as it did because it allowed municipalities to not only control building sizes, settings, and uses, but also to exclude various socio-economic groups from the suburbs. While some levels of income segregation and stratification might be possible without it, "[i]n the absence of zoning, more desirable neighborhoods would lack protection from and would be occupied by less affluent individuals living

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[46] Karen A. Danielsen, Robert E. Lang, & William Fulton, *Retracting Suburbia: Smart Growth and the Future of Housing*, 10 HOUS. POL'Y DEBATE 513, 516 (1999).
[47] Ambler Realty Co. v. Village of Euclid, Ohio, 297 F. 307, 316 (D.C. Ohio 1924).
[48] Raphael Fischler, *Health, Safety, and the General Welfare: Markets, Politics, and Social Science in Early Land-use Regulation and Community Design*, 24 J. URB. HIST. 675-719 (1998).

in higher density facilities"[49] as "developers would have a strong incentive to build lower-cost housing in affluent districts to take advantage of the higher quality services and lower tax rates."[50]

Given existing racial income inequality, this effect of zoning also has direct implications for racial segregation. Although the Supreme Court struck down explicitly racial zoning with its 1917 *Buchanan v. Warley* decision,[51] zoning's effect of reducing contact between different races and classes was not an unintended consequence. The practice would deepen with ever-more restrictive zoning regulations being adopted by many municipalities in the wake of both the United States Supreme Court's decision in *Shelley v. Kraemer* (1948)[52] striking down racially restrictive covenants, and the enactment of federal and state fair housing legislation in the 1970s.[53] The resulting situation is consistent with the Tiebout-Hamilton model of local public goods in which people "vote with their feet" and locate into municipalities that offer a desirable combination of costs, amenities, services, and taxation.[54] This dynamic creates a vicious cycle where exclusionary zoning erects barriers by raising housing prices, which then attracts buyers who are willing and able to pay the premium of living in such a town. In turn, the higher cost also increases these buyers' feelings of risk and vulnerability, causing them to want to raise their neighborhoods' metaphorical drawbridges even higher by supporting even more exclusionary zoning regulations.

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[49] *See* Nelson, *A Private Property Right Theory of Zoning supra* note 38, at 719.
[50] William Fischel, *Does the American Way of Zoning Cause the Suburbs of Metropolitan Areas to be Too Spread Out?* in GOVERNANCE AND OPPORTUNITY IN METROPOLITAN AMERICA 151, 156 (Alan Altschuler et al. eds. 1999).
[51] Buchanan v. Warley, 245 U.S. 60 (1917).
[52] Shelley v. Kraemer, 334 U.S. 1 (1948).
[53] WILLIAM FISCHEL, ZONING RULES!: THE ECONOMICS OF LAND USE REGULATION 201 (2015) [hereinafter FISCHEL, ZONING RULES!].
[54] Charles M. Tiebout, *A Pure Theory of Local Expenditures,* 64 J. POL. ECON. 416, 418 (1956).

By 2006, Anthony Downs could state that "[m]ost suburban land use markets are dominated by local zoning and other regulations that are aimed at excluding low-income households that distort what would occur in a truly free market."[55] The use of zoning to segregate different types of residential uses cannot, as a practical matter, be distinguished from its use to segregate different kinds of people. There is little way around the fact that even facially neutral use restrictions and dimensional requirements (especially when taken to extremes, e.g., five-acre minimum lot size) function exceedingly well as potent, effective, and legally durable proxies for forbidden class and race restrictions, especially since courts have consistently deferred to local authorities regarding land-use decisions.

C. The "Nuisance" and "Planning" Theories of Zoning

When finding zoning constitutional, the Court seemingly did so by embracing the nuisance theory of zoning, seeing the practice as an extension of nuisance law while also establishing a rather expansive definition of nuisance. This embrace is manifest in the Court's comment that a "nuisance may be merely a right thing in the wrong place, like a pig in the parlor instead of the barnyard"[56] and in its citation of a Louisiana state supreme court decision that stated that when apartments are placed near single family homes: "the residential character of the neighborhood and its desirability as a place of detached residences are utterly destroyed. Under these circumstances, apartment houses, which in a different environment would be not only entirely unobjectionable but highly desirable, come very near to being nuisances."[57]

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[55] *Quoted in* LEVINE, *supra* note 1, at 9.
[56] *Euclid*, 272 U.S.at 388.
[57] *Id.* at 394.

While the nuisance theory might provide a theoretical basis for zoning in developed areas where existing uses require protection from supposedly incompatible uses, it didn't do so for undeveloped areas as guidelines for zoning in such areas were difficult to adopt given the lack of current uses.[58] Reflecting zoning's origins in early the twentieth century when "progressive reformers sought to use scientific methods to find solutions to a wide spectrum of social problems,"[59] the theoretical justifications for zoning also included the "planning theory of zoning." This theory saw zoning as a tool for experts to implement urban planning policies, as identified in comprehensive municipal plans, regarding the proper allocation and use of land, with planners arguing that city planning was "objective and 99 per cent technical."[60]

D. The Property Rights Theory of Zoning

Despite the fact that they are hard to organize given their large numbers,[61] *Euclid* gave the incumbent single-family homeowners who often dominate local politics the ability to use zoning to their advantage. They do so by acting collectively through municipal zoning authorities who tend to reflect homeowners' preferences and, almost invariably, adopt regulations that protect their interests.

Economist William Fischel has explored the role of politically dominant homeowners and their zoning preferences with his

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[58] *See* Nelson, *A Private Property Right Theory of Zoning, supra* note 38, at 715.
[59] *Id.* at 716.
[60] *See* Tarlock, *supra* note 9, at 144. Ironically, in the first post-*Euclid* presidential election in 1928, zoning proselytizer Herbert Hoover defeated and Governor Al Smith of New York, who, with his Roman Catholicism and Lower East Side ethnicity, mannerisms, and politics, could be portrayed as the embodiment of the immigrant groups that Progressives sought to contain and transform through "scientific" methods like zoning.
[61] Stewart E. Sterk, *Structural Obstacles to Settlement of Land Use Disputes,* 91 B.U. L. REV. 227, 250 (2011).

"homevoter hypothesis." In short, he posits that municipal zoning, rather than primarily being a tool to protect individuals and the public from nuisances or a product of rational, comprehensive land-use planning, merely reflects incumbent homeowners' preferences and risk aversion.[62] With the use of zoning by homeowners for such rent-seeking ends,[63] Fischel's homevoters can be seen as having captured their local land-use regulation institutions. This phenomenon was aptly illustrated by a Connecticut zoning commission chair who stated that his commission was tasked with "managing a diverse portfolio of real estate assets on behalf of 6,500 investors—representing the 6,500 home and property owners" in its town.[64]

Since the 1960s the work of several zoning scholars has given rise to the property rights theory of zoning, which posits that rather than being a product of rational, comprehensive land-use planning, zoning is merely a reallocation of control over the use of property from landowners to a municipality's political majorities.[65] Nelson characterizes the work of the scholars who have explored and developed the theory as such, stating

> Fundamentally, the property rights theorists are saying that zoning represented nothing more or less than redistribution of property rights. This redistribution was carried out in the name of land use planning and other zoning myths and fictions. The practice of zoning, however, never bore much relationship to the theories under which zoning was justified.[66]

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[62] WILLIAM FISCHEL, THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES (2001) [hereinafter FISCHEL, THE HOMEVOTER HYPOTHESIS].
[63] *See* LEVINE *supra* note 1, at 95.
[64] LISA PREVOST, SNOB ZONES: FEAR, PREJUDICE, AND REAL ESTATE 11 (2013).
[65] *See* Nelson, *A Private Property Right Theory of Zoning, supra* note 38, at 719.
[66] Robert Nelson, *Marketable Zoning: A Cure for the Zoning System*, 37 LAND USE L. & ZONING DIG. 3, 4 (1985) [hereinafter Nelson, *Marketable Zoning*].

This theory, Nelson asserts, has "developed as a major challenge to, if not undercut all together, traditional theories of zoning"[67] such as the nuisance and planning theories, and calls for a "drastic re-thinking of the intellectual foundations for zoning."[68]

E. The Cathedral and Zoning's Inalienability

Viewing zoning as a form of property rights allows it to be analyzed through the prism of Guido Calabresi and Douglas Melamed's seminal work, "Property Rules, Liability Rules, and Inalienability: One View of the Cathedral," which provides a framework for analyzing the nature of the rules deployed by government to protect property interests. Calabresi & Melamed observed that to avoid "might-makes-right" scenarios when the interests of two or more people or groups conflict, government must decide which side to favor, which entitlements to protect, and whether to allow any or all of the groups to sell or trade such entitlements.[69] In other words, where two or more parties have conflicting property interests, the state must endow one side with an entitlement to prevail and then protect such entitlement through legally enforceable rules. These can be categorized as liability, property, or inalienability rules, the latter being defined as any restriction on the transferability, ownership, or use of an entitlement.[70]

In the land use context, liability rules allow one party to take another's property interest without previous consent. While eminent

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[67] *See* Robert Nelson, *Private Rights to Government Actions: How Modern Property Rights Evolve*, 1986 U. ILL. L. REV. 361, 367 [hereinafter Nelson, *Private Rights to Government Actions*].
[68] *Id.* at 366.
[69] Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1092. (1972).
[70] Susan Rose-Ackerman, *Inalienability and the Theory of Property Rights*, 85 COLUM. L. REV. 931, 931 (1985).

domain is the most common example, others include the diminishment of the value of the another's property with the operation of a nuisance. The injured party cannot prevent the offending party's actions, rather, it must be satisfied with some objectively (usually judicially) determined after-the-fact compensation. Property rules provide for the buying and selling of entitlements and interests by interested parties as well as enforcement by injunctive relief. A common example would be a voluntarily entered into restriction or covenant that limits the use to which a property can be put by a neighbor. The enforcement of the covenant is left to the discretion of the protected party who is free to release the restriction for whatever reason. Similarly, new restrictions that limit the uses to which their property can put can be created at the pleasure of willing parties.

In contrast, entitlements and interests protected by inalienability rules cannot be sold or waived by those parties protected by them, and parties who use a property in a disallowed way are subject to fines and the payment of damages to harmed parties. In Calabresi and Melamed's framework, zoning facially represents a decision by society to endow current residents of a municipality with an entitlement—namely the ability to dictate the nature, scope, and scale of land use within its jurisdiction—and to protect that entitlement with rules that, at least in theory, prevent the sale of rights to use land beyond the rights granted by zoning regulations. This creates the current situation where because a landowner's legal title is protected by property rules and freely alienable she can sell all or part of her property to a neighbor or anyone else but, in contrast, due to zoning's inalienability she cannot sell, with or without compensation,

any aspect of the protection provided by zoning regulations that control neighboring properties.[71]

Scholars sympathetic to the view of zoning as a collective property right, including Marion Clawson and Dan Tarlock, have noted that this inalienability is zoning's major defect.[72] Because zoning created collective property rights (and those rights have evolved insufficiently) without providing an adequate mechanism for their transfer,[73] as Clawson observed, "the actual holders of development and use rights could not sell them legally in the market" and "necessary and socially desirable changes in land use were blocked, or had to occur by extralegal means."[74] Nelson similarly noted that because

> the ownership of key property rights passed out of the hands of those legally entitled to sell these rights—(land and property owners—it became difficult to obtain the transfer of the rights when needed for land development. The result has been an improvised, arbitrary system for allocating development rights, which often causes inefficient and unattractive use of the land.[75]

Further, inalienability and other prohibitions on the voluntary transfer of property interests, reduce investment activity since they reduce the rewards of investment.[76]

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[71] Nicole Stelle Garnett, *Unbundling Homeownership: Regional Reforms from the Inside Out- The Unbounded Home: Property Values Beyond Property Lines*, 119 YALE L.J. 1904, 1912. (2010).

[72] *See* Nelson, *Private Rights to Government Actions, supra* note 67, at 364.

[73] ROBERT NELSON, ZONING AND PROPERTY RIGHTS: AN ANALYSIS OF THE AMERICAN SYSTEM OF LAND-USE REGULATION 95 (1977) [hereinafter NELSON, ZONING AND PROPERTY RIGHTS].

[74] *See* Nelson, *Private Rights to Government Actions, supra* note 67, at 366.

[75] *See* Nelson, *Marketable Zoning*, *supra* note 66, at 4.

[76] Arthur T. Denzau & Barry R. Weingast, *Foreword: The Political Economy of Land Use Regulation,* 23 URB. L. ANNUAL 385, 393 (1982).

Zoning's inalienability, it would seem, is ultimately "inefficient because it prevents people from getting what they want."[77] By precluding direct neighborhood negotiation and cooperation, zoning's Calabresian inalienability renders land-use decision-making based upon local knowledge, needs, and negotiation largely impossible, squandering opportunities for appropriate, demand-responsive densification and transition, even where there would be little, if any, negative implications for the general welfare.

The flip side to zoning's inalienability, however, is the relative predictability it provides homeowners (and other property owners) as to their neighborhoods' future conditions, something especially appealing to them given the importance of their houses to their financial well-being and their sense of home.

III. NIMBYism and Neighbors

A. Zoning as protector of property values

Much of the popular appeal of zoning is based upon its ability to restrict development. It allows homeowners to artificially inflate local housing prices by constraining the supply of housing available in their towns. Indeed, as a "change in zoning to permit higher-density uses—effectively a transfer of development rights from the community to a private party—brings the community no profit,"[78] they have a financial incentive to discourage new construction that would reduce the scarcity value of their asset.[79]

Further, it is conventional to argue that neighborhood effects or externalities, including the potential use of adjacent land are

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[77] ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS (5TH ED.) 169 (2008).
[78] *See* NELSON, ZONING AND PROPERTY RIGHTS, *supra* note 73, at 98.
[79] Matthew A. Kahn, *Do Liberal Cities Limit New Housing Development? Evidence from California*, 69 J. URB. ECON. 223, 223 (2011).

capitalized in the value of a property[80] and "[t]he process of capitalization follows, the preferences of individuals who are current and potential home buyers."[81] As Clawson wrote, "the use and the values of each tract of land depends more upon what is done on other tracts within the same urban complex than it does upon anything which can be done on the particular tract."[82] Factors that that are capitalized into home values include the presence of undesirable land uses in the neighborhood (e.g., factories, pollution, highways), municipal services, and regulations controlling housing production and the ability to build low income housing.[83]

Home values also reflect not only current conditions, but also the probabilities of future ones with an illustrative example being that a potential purchaser of a house will likely pay more for it if an adjacent field is zoned only for use as open space rather than for commercial or industrial use.[84] Similarly, "[i]n established neighborhoods a house that is much superior to adjacent houses will tend to sell for less than it should,"[85] and individual homeowners can suffer losses in property values with the introduction of multifamily dwellings into a neighborhood.[86]

Indeed, what made zoning "socially acceptable was that the individual property owner was compensated, along with his neighbors with new collective property rights to other new neighborhood

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[80] David M. Grether & Peter Mieszkowski, *Determinants of Real Estate Values*, 1 J. URB. ECON. 127, 134 (1974); Denzau & Weingast, s*upra* note 76 at 394; FISCHEL, THE HOMEVOTER HYPOTHESIS, *supra* note 62.
[81] Denzau & Weingast, s*upra* note 76, at 386.
[82] MARION CLAWSON, SUBURBAN LAND CONVERSION IN THE UNITED STATES: AN ECONOMIC AND GOVERNMENTAL PROCESS 367 (1971).
[83] Denzau & Weingast, s*upra* note 76, at 386.
[84] *See* Fischel, *Why are there NIMBYs?*, *supra* note 15, at 147.
[85] Robert Ellickson, *The Irony of "Inclusionary" Zoning*, 54 S. CAL. L. REV. 1167, 1200 (1981).
[86] Theodore M. Crone, *Elements of an Economic Justification for Municipal Zoning*, 14 J. URB. ECON. 168, 180 (1983).

properties."[87] As Jonathan Levine noted, "the regulations that bar me from realizing profits by tearing down my house and putting up an apartment also benefit me because they prevent my neighbors from doing the same thing."[88] This extends, obviously, to nonresidential uses, with Donald Kochan similarly observing that "the fact that my neighbor also cannot open a convenience store might very well create a net benefit for me because it increases the value of my home."[89]

In *Pennsylvania Coal Co. v. Mahon*, Justice Oliver Wendell Holmes used the phrase "average reciprocity of advantage" to refer to this notion that a land use restriction that burdens all land within a district may also benefit that land by virtue of the fact that all the land is equally restricted.[90] The nature of the link between a property's value and neighborhood conditions was explored in Lee Ann Fennell's 2009 book *The Unbounded Home,* which was premised on the idea that,

> the value of residential properties in metropolitan areas has become unbound from the four corners of the owned parcel. As the realtor's mantra of "location, location, location" suggests, homebuyers are often much less interested in the on-site attributes of real estate than the people, things, services, and conditions lying beyond what we continue to refer to as the property's boundaries. Residential property now serves not only as a resource in its own right but also as a placeholder for a quite different set of resources that are not, and

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[87] *See* Nelson, *A Private Property Right Theory of Zoning*, *supra* note 38, at 720.
[88] *See* LEVINE *supra* note 1, at 102.
[89] Donald J. Kochan, *A Framework for Understanding Property Regulation and Land Use Control from a Dynamic Perspective*, 4 MICH. J. ENV'T & ADMIN. L. 303, 313. (2015).
[90] Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

> cannot be, contained within the physical edges delineated by plat surveys.[91]

This interrelated nature of property provides a basis for Fennell and others' development of a working model of property that recognizes the role of externalities and metaphorically replaces property's "bundle of sticks" with a "bucket of water" that contains a "unified and undifferentiated whole representing all the things that one might do with one's property," which is neither pristine nor air-tight, and is "notoriously prone to leaks and sloshes"[92] which can negatively affect the area around it.

B. NIMBYism as Neighbors' Rational Response to Zoning Changes

As Fischel noted, "[h]omeowners are more likely to oppose development because of the nature of their asset. They must live in it, so there are personal stakes to be reckoned, and they cannot insure against devaluation from neighborhood effects," unlike that from fire, theft, etc.[93] Indeed, there are considerable expectations wrapped up in zoning and the neighborhood conditions and stability it preserves. Providing another explication of existing homeowners' disinclination toward zoning changes, Bradley Karkkainen argued that zoning can also be seen as protecting the value of a given property for its current use by incumbent residents, including "the consumer surplus that lies above and beyond the market price of the home."[94] For example, whereas the redevelopment of an area of single-family houses with multifamily dwellings would likely increase the value of properties in the area as they become potential sites for additional

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[91] *See* Fennell, *supra* note 4, at 2.
[92] *Id.* at 15.
[93] *See* FISCHEL, THE HOMEVOTER HYPOTHESIS, *supra* note 62, at 232.
[94] *See* Karkkainen, *supra* note 13, at 68.

apartments, it could decrease their market and use values as single-family houses because of the negative externalities from such nearby uses. [95]

Since in the face of such neighborhood change, homeowners must bear the full costs of any lost consumer surplus,[96] "[p]art of zoning's appeal lies in the fact that it allows homeowners to protect all the value [they] place in a home,"[97] including those more intangible benefits that flow from zoning's guarantee that neighborhoods won't change much over time. Thus, by preventing changes to what Karkkainen terms the "neighborhood commons" associated with a home, zoning can be seen as protecting certain collective values and neighborhood characteristics that also include surrounding streets, parks, institutions, and facilities.[98]

As such, zoning can indeed be second-best institution,[99] after insurance, for protection from potentially catastrophic financial and personal losses resulting from neighborhood change. Such concerns might seem especially tangible for those who have first-hand (or even second-hand) experience of the dramatic changes that were seen in many urban and inner-ring suburban neighborhoods in the second half of the twentieth century. Accordingly, rather than seeing the imposition of zoning as regulation or a taking, homeowners can reasonably see zoning as an exchange, albeit involuntary, of a quantum of property rights in one's own property for that in others' land, currently exercised collectively through municipal zoning institutions.

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[95] *Id*. at 72.
[96] *Id*. at 75.
[97] *Id*. at 68.
[98] *Id*. at 69.
[99] *See* FISCHEL, THE HOMEVOTER HYPOTHESIS, *supra* note 62, at 10; Fischel, *Why are there NIMBYs?, supra* note 15, at 145.

Given the foregoing, the continuation of current neighborhood conditions, including the right to be free from certain neighboring uses and types of structures, can reasonably be seen by individual homeowners as having been bought and paid for by having been capitalized into their homes' property values.[100] This perception of can be bolstered when they pay their municipal real estate tax bills and when they realize the limits zoning restrictions impose on their use of their own properties.

As Fischel noted, a "nation of homeowners is likely to be a nation of NIMBYs, and their anxieties are likely to be manifest in zoning laws."[101] That said, while NIMBYism is often derided as merely attempts to slam the neighborhood's door on new residents and land uses, since current zoning practice prevents neighbors from receiving direct compensation for changes to the zoning that protects their homes and communities, their children's education, and their financial well-being, it might be more usefully understood as a rational response to anticipated unfair, uncompensated losses in property values, the neighborhood status quo, and the consumer surplus incumbents enjoy in their homes, as well, as, importantly, the reciprocity of advantage that underpins the social contract upon which zoning rests.

Now, after more than nine decades during which expectations about zoning's effectiveness have been fully capitalized into home prices[102] can homeowners be realistically expected to embrace zoning and land-use changes that increase the density and the mix of uses that many associate with negative externalities, including a decreased value of their largest asset and the diminished enjoyment of

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[100] William Fischel, *Introduction: Four Maxims for Research on Land-Use Controls*, 66 LAND ECON. 229, 230. (1990) [hereinafter Fischel, *Introduction*].
[101] *See* FISCHEL, THE HOMEVOTER HYPOTHESIS, *supra* note 62, at 232.
[102] *See id.* at 51.

their homes? As homeowners have no real incentive to not oppose most zoning and land-use changes, the question perhaps shouldn't be why don't they support such changes but, rather, why would they?

IV. A Possible Solution- Compensation

A. A Tool for Solving NIMBYism?

It would seem that economists "have a handy tool for solving NIMBY problems,"[103] namely that, consistent with conventional economic analysis, monetary compensation could increase willingness to accept otherwise unwanted projects.[104] After all, as Downs noted, "[l]ong experience with human nature under an immense variety of circumstances indicates that most people resist major changes to the status quo, unless it is clear that those changes will produce very specific benefits for them."[105] More specifically in the land-use context, George Liebmann observed that "extreme rigidity and resistance to new uses arises in established neighborhoods whose residents are precluded from realizing any direct monetary benefit from their entry,"[106] and Fischel has written "nearby homeowners must be persuaded that [a] development does not leave them worse off, and the home owning taxpayer must likewise be satisfied with the fiscal impact."[107]

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[103] Bruno F. Frey & Felix Oberholzer-Gee, *The Cost of Price Incentives: An Empirical Analysis of Motivation Crowding-Out*, 87 AM. ECON. REV. 746, 747 (1997).
[104] Bruno F. Frey, Felix Oberholzer-Gee, & Reiner Eichenberger, *The Old Lady Visits Your Backyard: A Tale of Morals and Markets*, 104 J. POL. ECON. 1297, 1299 (1996).
[105] Anthony Downs, *Smart Growth: Why We Discuss It More Than We Do It*, 71 J. AM. PLAN. ASS'N 367, 369 (2005).
[106] *See* Liebmann, *supra* note 71, at 343.
[107] *See* FISCHEL, THE HOMEVOTER HYPOTHESIS, *supra* note 62, at 16.

Accordingly, as Edward Glaeser and Joseph Gyourko noted in a 2003 study of the effects of building restrictions on housing prices, since "current homeowners in high-cost areas are likely to lose substantially" were zoning to become less restrictive, to make such a change "politically feasible, it is crucial that any political reform also try to compensate the losers for this change."[108]

The potential importance of such an approach was emphasized more recently by Glaeser and Gyourko when they asked why are there not more policy interventions to permit more building in areas with high housing costs if the potential welfare and output gains from reducing regulation of housing construction are large?[109] They suggested that the answer is that "more fiscal resources will be needed to convince local residents to bear the costs arising from new development."[110] Therefore, since support from Fischel's homevoters is generally required for zoning changes to be enacted, it could be beneficial for political, efficiency, and equity purposes, and NIMBYism reduced, if some of the benefits of more permissive zoning could be realized by those most directly affected—incumbent abutting property owners—in the form of direct compensation.

The potential efficacy of compensation in ameliorating NIMBYism has been studied by scholars, albeit mostly in the context of siting socially necessary but locally unwanted land uses (so-called "LULUs"), such as power plants, airports, and solid waste facilities, prisons that are perceived as imposing costs on host communities but having regional or national utility. Michael O'Hare and Debra Sanderson suggested monetary compensation to overcome such

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[108] Edward Glaeser & Joseph Gyourko, *The Impact of Building Restrictions on Housing Affordability*, FRBNY ECON. POL'Y REV. 21, 35 (June 2003).
[109] Edward Glaeser & Joseph Gyourko, *The Economic Implications of Housing Supply*, 32 J. ECON. PERSP. 3, 27 (2018).
[110] *Id.* at 27.

facility siting problems, proposing a mechanism by which the amount of compensation for a "deserving individual" is arrived at via a mechanism in which "the victims can display meaningful exchange behavior."[111] Other facility siting literature of note includes research by Bruno Frey et al., in Switzerland that found that the use of price incentives tends not to increase support for such facilities as they can crowd out motivations related to civic duty regarding the facility.[112] The direct relevance and applicability of their findings to the question at hand is limited as, beyond any differences in Swiss and American attitudes toward such issues, it does not deal with compensation in the context of private development but a rather different situation, i.e., the siting of facilities that can lay some claim on public spirit. Indeed, Frey et al., also stated that "in policy areas where intrinsic motivation does not exist or has already been crowded out, the relative price effect, and thus the use of compensation, are promising strategies to win local support."[113]

B. How Could Compensation Be Provided?

The idea of compensating affected neighbors raises challenging questions, including but hardly limited to: from whom to whom should such compensation flow? What form should it take? What, or whom, should determine the level of compensation? In general terms, there are three plausible sources of compensation: state governments, private developers, and the federal government. There are also three plausible types of recipients: municipalities, "neighborhoods," and directly affected neighbors.

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[111] Michael O'Hare & Debra R. Sanderson, *Fair Compensation and the Boomtown Problem*, 14 URB. L. ANN. 101, 121 (1977).
[112] *See* Frey, Oberholzer-Gee, & Eichenberger, *supra* note 104, at 1301.
[113] *See* Frey & Oberholzer-Gee, *supra* note 103, at 754.

One governmental approach would be for states to provide compensation payments to municipalities as positive inducements[114] to adopt zoning that allows additional and/or denser residential development. Massachusetts offers several examples of such carrots. In 2004, the Massachusetts legislature passed the Smart Growth Zoning Overlay District Act,[115] which provides financial incentives for municipalities to adopt targeted zoning reforms encouraging transit-oriented and mixed-use development denser than would be allowed by existing zoning. The inducements take the form of state payments to participating local governments intended to cover some of the costs such development is expected to impose on municipalities (and are often cited by NIMBY opposition). Massachusetts also adopted M.G.L. ch. 40S, which directs additional funding to towns for net additional education costs arising from 40R-created housing. These efforts have seen some success with fifty-one 40R districts allowing over 22,000 units having been adopted in forty-two municipalities statewide, and over 3,700 new dwelling units having been built or permitted under the program, as of May 2019.[116] The carrot approach taken by 40R and 40S has been "an important departure from the ongoing supply- versus demand-side subsidy debate because they acknowledge that local governments, as well as households and developers, are interested parties in local housing markets."[117] Nevertheless, it has been observed that these mechanisms have not yet proved as effective as hoped since "the Boston market and other high

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[114] DEBORAH STONE, POLICY PARADOX: THE ART OF POLITICAL DECISION MAKING 266 (Rev. ed. 2002).
[115] Codified as MASS. GEN. LAWS ch. 40R.
[116] *See* Commonwealth of Massachusetts, Department of Housing and Community Development, 40R Districts/Activity (May 22, 2019), https://www.mass.gov/doc/40r-districts-activity-summary/download.
[117] Jenny Schuetz, *No Renters in My Suburban Backyard: Land Use Regulation and Rental Housing*, 28 J. POL'Y ANALYSIS & MGMT. 296, 317 (2009).

cost areas in the state have not seen meaningful surges in new housing development."[118]

Another approach would be for municipalities to act as clearinghouses for funds paid by project proponents in some form and distributed to neighborhood residents in one form or another. For example, Ryan Avent suggested that giving local residents a direct financial stake in new development could make it easier for cities to meet growing demands for space. To do so, property rights should be enforced rigorously but allocated differently by establishing a right for nearby neighbors of a project built under liberalized zoning rules to receive compensation for "the supposed costs of the development." Under Avent's scenario, developers would pay a density-based fee, with the municipality using the proceeds to either pay residents directly or fund investments in community projects.[119] In 2013, David Schleicher proposed facilitating Tax Increment Local Transfers (TILTs) that would transfer the incremental increase to municipality's tax base generated by new development to NIMBY homeowners to buy their support for new housing.[120]

Another approach identified by Glaeser and Gyourko, would be that, "(o)n pure efficiency grounds" the federal government provide fiscal resources "to convince local residents to bear the costs arising from new development."[121] However, they did not detail how such an arrangement would be structured, i.e., what resources (cash, infrastructure, etc.) should be provided to whom (municipalities, neighbors, etc.). The lack of such detail is perhaps an acknowledgement that enacting any such policy would be politically challenging as it would entail "the median taxpayer in the nation effectively

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[118] Glaeser & Gyourko, *supra* note 109, at 25.
[119] *See* Avent, *supra* note 14.
[120] *See* Schleicher, *supra* note 16, at 1727.
[121] *See* Glaeser & Gyourko *supra* note 109, at 27.

transferring resources to much wealthier residents of metropolitan areas like San Francisco."[122] Further, given that land use is traditionally an area of local concern and municipal governments jealously defend their prerogatives, it seems unlikely that many would welcome such federal involvement, even if it involved the provision of direct financial payments to host communities. While acknowledging the difficulties involved with finding ways to compensate affected neighbors, Glaeser & Gyourko nevertheless concluded that "[h]owever daunting the task, the potential benefits look to be large enough that economists and policymakers should keep trying to devise a workable policy intervention."[123]

C. Neighborhood Negotiation & Bargaining

The ability of these proposed government-focused approaches to counter NIMBY opposition from individual homevoters are limited by their very nature as they frame possible compensation in terms of collective group rights. Either the contemplated compensation, whether in the form of cash or public goods (and not unlike the mitigation payments discussed above), would accrue to municipalities and not directly to individual affected neighbors, or they would give those neighbors little agency and require them to, at best, content themselves with some amount established or negotiated by others.

Property rights theory would suggest in the alternative that, as "property rights achieve allocative efficiency by bargains and productive efficiency by internalization,"[124] some land-use development rights currently defined by zoning regulation could be better allocated by voluntary exchanges of such rights. Indeed, Gordon and

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[122] *Id*.
[123] *Id*.
[124] *See* Cooter & Ulen, *supra* note 77, at 114.

Richardson observed that, "[g]reater efficiency is available if communities could bargain directly with developers without the involvement of a third-party zoning board."[125] This is because where there are no impediments to bargaining parties can achieve the optimal mix of land use,[126] and "[o]nly when resources can be fully and voluntarily transferred may they move to their highest valued use."[127]

A useful conceptual difference might be that when zoning is thought of solely in the context of the police power, neighbors would be granting a waiver from a municipal regulation, but when zoning is seen as a property right, they would instead be selling an interest in that property right. This would be consistent with Clawson's suggestion that finding a way to internalize land-use externalities is one of the "major tasks regarding urban and suburban problems," and that what is needed is:

> (t)o devise legal measures to define the property rights that such flows of value from externalities create or encompass. If I have an economic interest in the appearance of my neighbor's house, then there exists a property value or aspect to that appearance, and there should be a legal right commensurate with the economic value. How can such a right be defined? Who owns it? Who has a reasonable interest governing its use, transfer, or alteration? Property rights arose mostly from, and for a long time mostly attached to, physical objects or to the use of physical objects. But property values may exist where there is little or no corresponding physical object, and legal rights may be established in such property. Before society can do much to maximize the as yet poorly defined external

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[125] *See* Gordon & Richardson, *supra* note 6, at 136.
[126] Denzau & Weingast, s*upra* note 76, at 395.
[127] *See id*. at 393.

> values from land uses in urban setting, it must find a way to define the property rights and to control their creation, transfer, increase or decrease, or modification in any way. [128]

Clawson declared this to be "an intellectual task for the lawyers, working closely with the economists."[129]

D. Neighbor Reallocation of Zoning Protections

Given zoning's history and use, and cognizant of Fischel's observation that municipal land use controls are best analyzed as collective property rights controlled by economically rational voters,[130] a productive and realistic approach to countering NIMBYism could be to more fully embrace zoning's nature as a property right. This could be done by modifying state zoning enabling acts to expressly reallocate some of the community property rights in zoning held by municipalities to those neighbors for whose protection from externalities was and remains a primary justification for many zoning regulations to neighbors, and to do so as alienable interests.

This proceeds from the premise that empowering neighboring property owners to alienate certain zoning rights and protections through bargaining, negotiating, and contracting for satisfactory compensation (financial or other) could simultaneously mitigate some of zoning's pernicious flaws and do so without the expenditure of governmental fiscal resources. Importantly, it would serve to further recognize and reinforce the distinction between the private and public aspects of zoning's protection by explicitly endowing property owners with the ability to waive regulations that limit or constrain the development and use of nearby land, such as the common

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[128] *See* CLAWSON, *supra* note 82, at 369.
[129] *Id.*
[130] FISCHEL, ZONING RULES!, *supra* note 53.

distinctions between single-, two-, and multi-family dwellings that early advocates saw as zoning's legal Achilles' heel (and contributed to Judge Westenhaver's characterization of zoning as a "strait-jacket" in his lower court *Euclid* decision).

Further, by facilitating the internalization of a project's benefits and costs by its proponents such a mechanism would create a more efficient zoning regime by incentivizing the maximization of wealth by allowing the shifting of such rights to those who value them more. This could also be more equitable than zoning's current inalienability because as Fischel noted (albeit in a different context) "the poor would probably gain from tradeable land-use rights."[131] For example, incumbent homeowners in gentrifying neighborhoods could realize significant benefits by exchanging excessive or unvalued protection for cash payments or similar permission that would allow the realization of greater profits when selling properties for more intense development. Also, increased densities in currently exclusionary jurisdictions could open housing opportunities in previously inaccessible neighborhoods.

Allowing landowners fuller enjoyment of property rights while simultaneously facilitating the compensation of incumbent neighbors who currently have every reason to oppose the loss of their zoning protections (and would otherwise likely become "NIMBYs") could, by yielding fairer outcomes help reduce neighborhood opposition since incumbent homeowners would benefit by being compensated for anticipated and perceived losses in both the market and surplus values of their homes. The latter is especially important since compensation for merely the reduction in the property value of one's home from a change in the kind or intensity of use of a nearby

[131] *See* Fischel, *Introduction, supra* note 100, at 235.

property may not necessarily cover the full measure of perceived losses.[132]

This in turn could break some of the log jams that so often prevent the creation of denser and more diverse development and allow a wider range of land uses than currently permitted. Perhaps most importantly, by providing a check on the municipal zoning practices, a compensation mechanism that devolved selected land-use decisions to directly affected abutters could, especially in areas now governed by overly restrictive and arguably exclusionary zoning regimes, facilitate market-responsive neighborhood transitions and revive traditional urban development and growth patterns by fostering the formation of more flexible land markets that allow voluntary spontaneous actions that allow the evolution of locally appropriate density levels.[133]

Possible examples abound. Since zoning operates mostly in a binary manner, i.e., a use or certain dimensional configuration is either allowed or prohibited in any given zoning district,[134] some existing zoning regulations likely overprotect property owners from uses and buildings they might not necessarily find particularly negative or may even prefer to have closer than existing zoning rules permit.[135] As Fennell noted:

> If zoning were perfectly calibrated to counteract spillovers and thereby produced an optimal state of affairs with respect to land use, we would not worry about its categorical nature or about barriers to bargaining. Concerns about the structural characteristics of zoning only become interesting and important if we believe

[132] *See* Karkkainen, *supra* note 13, at 66.
[133] Sandy Ikeda, *Economic Development from a Jacobsian Perspective* (Colloquium on Market Institutions and Economic Processes, New York University) 20 (2011).
[134] *See* Fennell, *supra* note 4, at 10.
[135] *See* Garnett, *supra* note 71, at 1912.

> that politically derived land use restrictions will fail to align in at least some circumstances with the social optimum. Such shortfalls introduce the possibility of mutually advantageous bargains between land owners and the community.[136]

To illustrate, a homeowner might not object if a neighbor wanted to build an accessory dwelling unit for an aging parent; give professional piano lessons in a house located in an area not zoned for commercial uses;[137] or convert a house in isolated residential zone into a neighborhood convenience store.[138] In such cases, the homeowner might be willing to waive enforcement of controlling regulations on the neighboring property if she was satisfactorily compensated by the mere existence, and her neighbor's enjoyment, of the previously proscribed yet socially beneficial use.

In cases where incumbent homeowners are not supportive of a proposed change, such as in the case of the replacement of a single-family house with a four-unit dwelling, they might nevertheless be willing to permit it if they realized a cash payment, reciprocal waiver, or some other mutually agreed upon compensation. Such an arrangement could also benefit project proponents willing to pay for exceptions to onerous regulations, [139] especially those who would be spared the costs and delays related to a lengthy (and political) public review process and potential litigation. Ultimately, where a proposed change to the neighborhood status quo could benefit both project proponents and potential NIMBY homeowners "we would expect that rational bargainers to come up with contract terms that

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[136] *See* Fennell, *supra* note 4, at 70.
[137] *See* BOGART, *supra* note 39, at 138.
[138] *See* FISCHEL, ECONOMICS OF ZONING LAWS, *supra* note 15, at 53.
[139] *See* FISCHEL, ZONING RULES, *supra* note 130, at 254.

maximize the net gain. If our objective is economic efficiency, that is … an attractive outcome."[140]

E. Neighbor and Neighborhood Compensation Proposals

While there is extensive academic and professional literature on many aspects of zoning, the concept of providing a formal mechanism by which individual affected neighbors could alienate certain zoning regulations has been explored by relatively few scholars. As Fennell noted, "there is almost never the openly acknowledged possibility that households could pay for the privilege of engaging in an unusual but especially valued use, such as adding a garage apartment."[141]

In an early discussion of the issue, Otto Davis et al., explored a "tentative" and "incomplete" proposal to shift the power to grant use variances from zoning boards of appeals to neighbors so that they could be,

> granted only by direct vote of property owners within the district. The rule for granting the variance might be, say, the unanimous consent of adjoining property owners and the consent of 90% of the remaining property owners in the area. Bribes would be legal, and compensation would be paid via bribes in order to obtain the vote of the required property owners.[142]

Recognizing that such a mechanism would introduce a game element into the variance process, the "only virtue" Davis saw was that it would likely provide an approximate measure of, and compensation for external diseconomies since for certain uses 'internal'

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[140] DAVID FRIEDMAN, LAW'S ORDER: WHAT ECONOMICS HAS TO DO WITH LAW AND WHY IT MATTERS 148 (2000).
[141] *See* Fennell, *supra* note 4, at 10.
[142] Otto Davis, *Economic Elements in Municipal Zoning Decisions*, 39 LAND ECON. 375, 386 (1963).

profit considerations may be such that compensation theoretically could be paid for external diseconomies they create. He cited as an example that a gasoline service station in an exclusive residential district might be able to compensate those who suffered losses from its external diseconomies and still make a profit.[143]

In 1969 Nicolaus Tideman proposed an "administered compensation scheme" that sought to combine flexibility and fairness to surrounding landowners.[144] When land-use changes are proposed, the proponent would propose a compensation plan for those within an area inclusive of those parcels whose property values would be affected by more than 0.1%, proportional to property value and inversely proportional to distance from the involved site. The change would be approved if a majority supported the change, with votes weighted by estimated effects.[145] Tideman saw a benefit of such a scheme being that property owners would be able to respond to market demands shifts, but only to the extent they compensated neighboring property owners for their diminished property values, with this ensuring that the full social costs of an activity would be internalized as part of its costs.[146]

In 1972, Tarlock argued that if those seeking zoning changes had to bargain directly with neighboring property owners the costs of zoning administration would be reduced, and efficiency gains rendered more certain. Toward that end, he proposed that "municipalities recognize the private, protective purpose of zoning, establish new forms of neighborhood private property rights to serve this

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[143] *Id*. at 378.
[144] T. Nicolaus Tideman, Three Approaches to Improving Urban Land Use 49 (1969) (Ph.D. dissertation, University of Chicago), cited in Tarlock *supra* note 9, at 147.
[145] *Id*.
[146] *Id*.

purpose, and that ordinary market trading be allowed in the rights."[147] Such a system would in effect, transform municipal zoning ordinances into initial covenant schemes and allow the "market or a close proxy determine subsequent reallocations of land."[148]

Other scholars have proposed abolishing zoning and allowing land-use externalities to be addressed with traditional negotiation-focused institutions like nuisance law and private covenants. In 1971, John M. Ross proposed the repeal of existing zoning regulations and a revived reliance on nuisance law bolstered with the expanded used of restrictive covenants to allow different land uses to facilitate better internalization of their costs of externalities through bargaining by and among neighboring landowners. Ross' proposed the creation of tax-supported regional commissions charged with the promotion and enforcement execution of restrictive covenants for already-developed areas and the incorporation of performance standards into said covenants.[149]

In 1973, Robert Ellickson critiqued zoning's inefficient and inequitable natures and, recognizing the absence of specific compensation devices for abutters as an especially problematic defect of zoning, proposed it be abolished. He further proposed that its function of balancing developments' benefits and negative externalities be addressed instead by a revival of state nuisance law via lawsuits and injunctions[150] and by allowing cash payments to resolve land-use conflicts. He further suggested that those who wanted to introduce a new use into a neighborhood could monetarily compensate

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[147] *See* Nelson, *supra* note 73, at 366 (discussing Tarlock *supra* note 9, at 147).
[148] *See* Tarlock, *supra* note 9, at 147.
[149] John M. Ross, *Land Use Control in Metropolitan Areas: The Failure of Zoning and a Proposed Alternative*, 45 S. CAL. L. REV. 335, 359 (1972).
[150] Robert Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 761 (1973) [hereinafter Ellickson, *Alternatives to Zoning*].

adversely impacted neighbors [151] to alleviate equity problems raised by traditional zoning.[152]

Robert Nelson explored what he labeled "marketable zoning" extensively. In 1985, he sketched out an idea of "neighborhood block sales," in which the owner or owners of the property in a neighborhood could request a rezoning to allow its redevelopment.[153] With his work rooted in the reallocation of zoning's collective property rights to the neighborhood level, he later expanded the concept, developing proposals to allow the shifting of many of the functions now performed by municipalities or homeowners associations in residential developments to proposed private neighborhood associations in existing neighborhoods.[154] Nelson saw this shift as an innovation that would facilitate the deregulation or privatization of zoning as these new private associations could "administer the collective controls over neighborhood quality now exercised through land use regulations at the municipal level."[155]

An innovative approach put forth by Fennell builds upon concepts of "alienable entitlements" and "making association alienable."[156] Fennell proposed introducing an options-based regime with a mechanism entitled ESSMO—"entitlement subject to a self made option."[157] Property owners would negotiate and agree in advance what the cost would be to establish an otherwise proscribed use and

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[151] Robert Nelson, *Zoning Myth and Practice–From Euclid into the Future*, in ZONING AND THE AMERICAN DREAM: PROMISES STILL TO KEEP 299, 307 (Charles M. Haar and J.S. Kayden eds. 1989).
[152] *See* Ellickson, *Alternatives to Zoning, supra* note 150, at 709.
[153] *See* Nelson, *Marketable Zoning*, *supra* note 66, at 4.
[154] Robert H. Nelson, *Privatizing the Neighborhood: A Proposal to Replace Zoning with Private Collective Property Rights to Existing Neighborhoods*, 7 GEO. MASON L. REV. 827 (1999).
[155] *Id*. at 829.
[156] *See* Fennell, *supra* note 4, at 154.
[157] *Id*. at 105.

what one who wanted to do so subsequently would be able to do so upon payment of the predetermined fee. Fennell acknowledged several flaws with this approach. The primary one, for the purposes of this discussion, is that it assumes that the collected fees would be paid into a centralized fund for the general benefit of defined community. As with conventional municipal zoning, benefits would accrue to a general coffer, not to directly impacted individuals; those who wanted to be free of the unwanted use who would be compelled to buy back the entitlement.[158] Fennell also acknowledged that given the complexity of the ESSMO, some might question whether its resulting efficiency gains are worth the trouble."[159] Also, it would seem to be best suited for newer, single developer communities with homeowner associations, not existing or less planned neighborhoods.

Several scholars have offered direct opposition to the idea of zoning regulations being alienable. In a discussion of the sale of zoning rights by municipalities, Fischel noted, that the very idea that zoning entitlements could be sold puzzles or horrifies planners and lawyers.[160] He partially attributed this response to the concern referenced above that it would run the risk of making zoning a "racket" as it would basically allow towns and cities to use the police power to impose regulations that they could then turn around and sell relief from them for a price. A few years later he would add that many economists would recoil at the notion, adding that ultimately "[t]he idea of selling zoning makes us uneasy because [it] breaks down the traditional barriers between public and private."[161]

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[158] *Id.* at 117.
[159] *Id.* at 118.
[160] *See* FISCHEL, ECONOMICS OF ZONING LAWS, *supra* note 15, at 70.
[161] *See* Fischel, *Introduction, supra* note 100, at 235.

Focusing more on the idea of some grouping of neighbors being empowered to sell zoning rights, Karkkainen was similarly unenthusiastic. Since zoning prevents changes to what he termed the "neighborhood commons" associated with a home, it can be seen as protecting certain collective values and neighborhood characteristics, including surrounding streets, parks, institutions and facilities. Further, while warning of the possibly high administrative costs of a compensation system, Karkkainen found the idea unsound and its establishment to be inadvisable as it would as be "deeply contrary to our most cherished democratic and legal traditions" and reinforce individual gain at the expense of shared community resources and might ultimately be destructive of the sense of community that zoning seeks to protect.[162]

Cullingworth discussed the idea in the context of Nelson's marketable zoning and declared it would not work.[163] Seeing neighborhood conflicts as only one of the issues that zoning addresses, Cullingsworth criticized and rejected the specter of neighbors' trading in zoning protections by asking questions that he apparently saw as answered by their very asking—"is the exclusion of unwanted uses and people to be regarded as a conflict between neighbors? Surely not: these are matters of public policy that cannot be dealt with in a financial arrangement."[164]

These objections have validity and should be duly noted. What should also be noted, though, is that these objections have long provided justification for the use of collective public power to impose the restrictive exclusionary and sprawl-inducing zoning ordinances that have been in effect across the country for decades and have

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[162] *See* Karkkainen, *supra* note 13, at 76.
[163] J. BARRY CULLINGWORTH, THE POLITICAL CULTURE OF PLANNING: AMERICAN LAND USE PLANNING IN COMPARATIVE PERSPECTIVE 226 (1993).
[164] *Id*.

resulted in many lamented outcomes, including, leaving many out of the housing market.

F. Legal Issues- the Police Power and Delegation

These proposals raise interesting legal questions that would need to be resolved to allow their implementation. The issue is especially complicated by the fact that since zoning has been traditionally rooted in the several state police powers to protect the public health, safety, welfare and morals, any shift that gave neighbors an enhanced role in zoning decisions and allowed them to be compensated for changes—thus giving them a different role than other residents—would need to also be made within established legal frameworks of and other requirements, including equal protection and due process.

That said, perhaps the most difficult questions raised by alienable zoning are related to whether endowing individual property owners (or groups thereof) to sell regulations adopted for public's, as well as their own, protection would represent an impermissible delegation of that power from governmental authorities to certain individuals. Indeed, the location of zoning within the police power raises important issues related to the legal doctrine of nondelegation as courts are very wary of the delegation of the police power, possibly because it "nearly eliminates the distinction between public and private,"[165] and they have traditionally invoked the doctrine to limit the scope and nature of the decisions that may be delegated to non-legislative entities.

The question of delegation arises in the context of so-called consent and protest statutes, the former requiring a certain percentage of a defined set of neighbors to approve of a certain use of a property,

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[165] *See* FISCHEL, ECONOMICS OF ZONING LAWS, *supra* note 15, at 73.

the latter allowing one or more neighbors to challenge an action by zoning authorities (and often triggering a requirement for a legislative supermajority to take the challenged action). The notion of endowing neighbors with enhanced influence was present at the creation of zoning, with examples including the local ordinance implicated in the *Stratton* decision (discussed below), which allowed neighboring landowners to waive an otherwise applicable regulation,[166] and that Section 5 of the model Standard Zoning Enabling Act published by the federal Department of Commerce contemplated that the owners of at least 20% of the land abutting a parcel to be rezoned could require a three-fourths vote, rather than a simple majority, of the local legislative body to approval the change.[167]

As early as 1921, around the time when the Standard Zoning Enabling Act presumed an enhanced role for neighbors in zoning, Howard Lee McBain argued that zoning's perceived nature as an exercise of the police power required the rejection of such practices, asking,

> Is it reasonable to vest in a group of property owners the power, upon request, to lift from an owner of neighboring property a prohibition that is otherwise imposed under the police power? The courts have rested the validity of the prohibitions contained in most of these ordinances upon the protection of the public health, safety, peace and morals. Let it be admitted, for the moment, that the owners of nearby property are more largely concerned than others in the protection of these interests in the neighborhood. Shall the owner of an isolated apartment house be permitted to erect and maintain a fire-trap with the consent of his tenants? Shall a grocer be allowed to sell deleterious

[166] *See* Stahl *supra* note 18, at 959.

[167] U.S. Department of Commerce-Advisory Committee on Zoning, *A Standard State Zoning Enabling Act* (Rev. Ed.) (1926).

> foods with the consent of his customers? Shall a person be allowed to conduct an indecent exhibition with the consent of his patrons? Merely to ask such questions is to answer them.[168]

This is consistent with the propositions that "[i]f a zoning regulation does serve the public welfare, then an exception to the rule cannot be sold,"[169] and a government's contracting away of the exercise of its police power generally constitutes an ultra vires act.[170]

However, the issue is complicated by a seemingly confused and contradictory line of Supreme Court decisions that make a muddle of these questions. In the first of the decisions, *Eubank v. City of Richmond*,[171] the Supreme Court rejected a zoning provision that allowed the owners of two-thirds of the property on a street to impose a minimum setback line on all parcels on that street. As explained by Kenneth Stahl, this decision, which seemingly repudiated the public choice perspective embraced earlier by the Illinois Supreme Court in *City of Chicago v. Stratton*,[172] was premised upon the fact that since the challenged provision did not include any standards or limitations it enabled some property owners to exercise the zoning power and control others' properties "solely for their own interests or even capriciously."[173]

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[168] Howard L. McBain, *Law-Making by Property Owners*, 36 POL. SCI. Q. 617, 636. (1921).
[169] *See* FISCHEL, ECONOMICS OF ZONING LAWS, *supra* note 15, at 71.
[170] *See* Sterk, *supra* note 61, at 238.
[171] Eubank v. City of Richmond, 226 U.S. 137 (1912).
[172] In *City of Chicago v. Stratton*, 44 N.E. 853, 855 (Ill. 1896), the Illinois Supreme Court upheld a so-called block-front consent ordinance adopted by Chicago in 1887 that banned livery stables within seventy-five feet of residential districts unless all property owners within six hundred feet approved in writing, finding that so enabling immediately interested parties was appropriate since "(i)n matters of purely local concern the parties immediately interested may fairly be supposed to be more competent to judge of their own needs than any central authority." Stahl, *supra* note 18, at 958 (citing City of Chicago v. Stratton, 44 N.E. 853, 855 (Ill. 1896)).
[173] *See* Stahl, *supra* note 18, at 958.

A mere five years later the Supreme Court seemed to salvaged *Stratton*[174] with its decision in *Thomas Cusack Co. v. City of Chicago*[175] upholding zoning that allowed the otherwise forbidden erection of a billboard with the written approval of the owners of the majority of the frontage on the street. The Court distinguished the ordinance in *Eubank* from that in *Cusack* by noting that while the former served to empower neighbors to impose restrictions, the latter empowered them only to lift an otherwise applicable restriction.[176] This difference was crucial because, as the Court noted,

> The plaintiff in error cannot be injured, but obviously may be benefited by this provision, for without it the prohibition of the erection of such billboards in such residence sections is absolute. He who is not injured by the operation of a law or ordinance cannot be said to be deprived by it of either constitutional right or of property.[177]

Addressing the delegation issue directly, the Court said that permitting the prohibition against the installation of billboards to be lifted with the consent of those who would be most affected by the waiver,"[178] i.e., neighboring owners, was "not a delegation of legislative power, but is, as we have seen, a familiar provision affecting the enforcement of laws and ordinances."[179]

Then, in 1928, two years after *Euclid*, in *Seattle Title Trust Co. v. Roberge* the Supreme Court addressed a Seattle zoning ordinance that provided that a "philanthropic home for … old people shall be permitted in first residence district when the written consent shall

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[174] *Id*. at 959.
[175] Thomas Cusack Co. v. City of Chicago, 242 U.S. 526 (1917).
[176] *See* Stahl, *supra* note 18, at 959.
[177] *Cusack*, 242 U.S. at 530.
[178] *Id.* at 531.
[179] *Id.*

have been obtained of the owners of two-thirds of the property within four hundred (400) feet of the proposed building."[180] Noting that the ordinance did not provide for any other authority to construct the proposed home in the absence of the neighbors' approval, and that city's Superintendent of Building was bound by the decision or inaction of such owners, the Court construed the ordinance as subjecting an allowed use to the approval of a supermajority of certain defined neighbors. The Court framed the legal question before it thusly: whether "the delegation of power to owners of adjoining land to make inoperative the permission, given by (the challenged zoning provision) as amended, repugnant to the due process clause?"[181]

Framing the neighbors' power as restrictive rather than permissive dictated the outcome. Once the Court characterized the challenged provision as authorizing neighbors to forbid an otherwise allowed use rather than authorizing them to allow an otherwise forbidden use, it followed that it would be struck down as a standardless delegation of a police power. As the *Roberge* neighbors were not controlled by any legislatively established standards, and since failure to give consent was not subject to review and therefore final, they were free "to withhold consent for selfish reasons or arbitrarily," thus subject the home's developer to their will or caprice.[182] Finding such delegation "repugnant to the due process clause of the Fourteenth Amendment,"[183] the Court struck down the neighbors consent provisions as "unnecessary and unreasonable upon the use of private property or the pursuit of useful activities."[184] In doing so

[180] Seattle Title Trust Co. v. Roberge, 278 U.S. 116, 122 (1928).
[181] *Id*. at 121.
[182] *Id*. at 122.
[183] *Id.*
[184] BERNARD H. SIEGAN, PROPERTY AND FREEDOM: THE CONSTITUTION, THE COURTS, AND LAND-USE REGULATION 103 (1997).

the Court seemed to ignore its own language in *Cusack* that since the prohibition of the sought use was absolute without challenged consent provision the plaintiff could only be benefitted by the neighbor consent provision. Perhaps in an effort to rationalize its different treatment of the similar consent provision in *Roberge*, the Court made a rather unpersuasive attempt at distinguishing the cases "on the basis that the billboards were recognized as a nuisance whereas the old age home was not."[185]

Given their different outcomes, some have seen in this line of cases a suggestion that consent provisions are valid if they lift a zoning restriction, but are invalid if they impose a new one.[186] Indeed, it is notable that immediately after *Roberge* a legal commentary discussing the constitutionality of neighbors consent provisions in light of that decision and *Eubank* and *Cusack* stated that "[i]n cases where the question is strictly one of consent of the property owners expressed by action, it is clearer that they are merely permitted to waive a statutory right passed chiefly for their protection."[187] That said, Liebmann examined decisions in neighbor consent cases in subsequent decades and found inconsistencies in upholding or invalidating consent provisions, and that courts "have not even been consistent in cases involving petitions rather than consent provisions, despite the *Eubank* case."[188] In another survey of such cases, Stahl found that the "majority of courts cite *Roberge* and *Eubank* as providing the applicable rule that direct delegation of the zoning power to neighborhood groups is prohibited, and either

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[185] George W. Liebmann, *Delegation to Private Parties in American Constitutional Law*, 50 IND. L. J. 650, 676 (1975).
[186] *See* Stahl, *supra* note 18, at 961 n 88. *See also* F. Rebecca Sapp, *Delegation of Land Use Decisions to Neighborhood Groups*, 57 UMKC L. REV. 101, 107 (1988).
[187] Harold C. Havighurst, *Property Owners' Consent Provisions in Zoning Ordinances*, 36 W. VA. L.Q., 175, 181 (1929).
[188] *See* Liebmann, *supra* note 185, at 679.

ignore or distinguish *Cusack*," while courts that instead uphold such provisions "cite *Cusack* and … either distinguish or ignore *Eubank* and *Roberge*."[189]

Stahl rejected the suggestion that allowing neighbors to impose restrictions is invalid but allowing them to waive restrictions can be valid is questionable as it entirely disregards *Roberge* (which invalidated a waiver provision) which, as the most recent of the three Supreme Court decisions, is likely the most authoritative and upon which courts have invalidated other neighborhood waiver provisions.[190] He also rejected any distinction between waivers and impositions imperceptible and formalistic since, regardless of how they are styled, they both serve to directly empower landowners to determine whether or not particular land uses could be located near the properties.[191]

As Stahl stated, "[m]aking sense of this trio of cases proves exceedingly difficult."[192] He further noted that Frank Michelman examined *Eubank*, *Cusack* and *Roberge* and "ultimately concluded that they could not be reconciled."[193] As such, it is unlikely that a unified legal doctrine regarding neighbor consent statues can be divined from these three Supreme Court decisions or their progeny. What does seem obvious though, is that an ordinance that can be construed as delegating regulatory authority to neighboring property owners would be subject to considerable scrutiny by the courts.

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[189] *See* Stahl *supra* note 18 at 960.
[190] *See id.*, at 961 n 88.
[191] *Id.*
[192] *See id.* at 960.
[193] *See id.* at 961.

V. Toward Alienable Zoning

A. LAZRs- Locally Alienable Zoning Regulations

Toward the goal of addressing NIMBYism, the problems related to zoning's inalienability, and the lack of compensation for neighboring property owners affected by land-use and zoning changes, the remainder of this Article, explores legal, economic, and policy issues, opportunities, and impediments related to the adoption and administration of what I have entitled "Locally Alienable Zoning Regulations" (LAZRs). As proposed, LAZRs would be sub-municipal, market-enabling bargaining mechanisms that allow certain zoning protections with debatable connections to the general welfare to be bought and sold by and among neighboring property owners through Coasian bargaining and negotiation in exchange for direct compensation such as cash payments, reciprocal waivers, or other benefits. In terms of Calabresi & Melamed's framework discussed above, such zoning regulations would shift from being categorized as inalienable to being considered property rules.

Like Tarlock's 1972 proposal, the LAZR approach would recognize the private, protective purpose of zoning,[194] and maintain the existing zoning regime while also allowing market trading in new neighborhood private property rights.[195] As with Tarlock, local zoning ordinances would largely be rendered into initial covenant schemes, allowing the "market or a close proxy determine subsequent reallocations of land."[196] The LAZR approach would differ from Tarlock's, however, in that in would vest the ability to sell zoning in individual affected property owners, not municipalities or

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[194] *See* Nelson, *Private Rights to Government Actions, supra* note 67, at 366 (discussing Tarlock, *supra* note 9, at 147).
[195] *Id*.
[196] *See* Tarlock, *supra* note 9, at 147.

neighborhoods. By giving individual property owners something to sell to those seeking required zoning relief, the LAZR approach could have several substantial benefits. Land-use efficiency could be expected to improve as projects' externalities would be internalized by negotiation among interested property owners. It would provide real inducements for affected neighbors to accept denser and more mixed uses created by allowing them to share in some of the value created by such projects and now realized only by project proponents and, sometimes, municipal treasuries. Also, and perhaps most importantly, LAZR mechanisms could increase fairness by allowing those neighbors to be compensated for changes in neighborhood conditions and anticipated losses in property and surplus values.

This approach attempts to integrate aspects of both the Pigouvian and Coasian paradigms.[197] This is appropriate as "Coase's arguments and Coasians' empirical studies suggest that the important point is not making a choice between zoning and non-zoning, but the institutions of either zoning or non-zoning," with the relevant questions being rather when and how to intervene for government to minimize inefficiencies and social inequities and how effective is the intervention.[198]

B. Evolution of Individual Property Interests in Zoning

As Oliver Wendell Holmes noted, "[b]efore you can sell a right, you must be able to make a sale thinkable in legal terms."[199] Accordingly, since "[t]he delimitation of rights is an essential prelude to

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[197] Lawrence Lai Wai Chung, *The Economics of Land-Use Zoning: A Literature Review and Analysis of the Work of Coase*, 65 TOWN PLAN. REV. 77, 87 (1994).
[198] *See* Qian, *supra* note 10, at 32.
[199] *See* Nelson, *Private Rights to Government Actions, supra* 67, at 382.

market transactions,"[200] to be able to sell something, one should in fact "own" it, i.e., have some claim or entitlement to it, for it is when a "property right is clearly assigned, its owner may strike a bargain to sell it."[201] As such, a mechanism to render municipally adopted zoning regulations alienable by protected individuals should properly be rooted in a recognizable property right. In the context of alienable zoning regulations, this would require, as called for by Clawson, the definition of the property rights that "flows of value from externalities create or encompass,"[202] and that new corresponding ownership interests be recognized and assigned.

An initial question is how could the speculative value of zoned property that was taken by zoning authorities as an exercise of the police power and held as a collective property right by municipalities be properly allocated to, and made alienable by, neighboring private property owners? A rationale for recognizing individually alienable property rights in zoning might be provided by an extension of the collective property rights theory of zoning, with a theoretical basis for such an extension perhaps found within the work on the development and evolution of property rights by Harold Demsetz and Robert Nelson, both of whom have written about the cause and processes by which new property rights develop and are recognized.

Demsetz's 1967 article "Toward a Theory of Property Rights" has been described as "[t])he point of departure for virtually all efforts to explain changes in property rights."[203] In it, Demsetz articulated a theory that property rights are created to internalize harmful and beneficial effects on the actor who makes the decisions, that is, the

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[200] *See* Chung, *supra* note 197, at 84 & 92 (citing Ronald H. Coase, *The Federal Communications Commission,* 2 J. L. ECON. 879, 903 (1959)).
[201] *See* Cooter & Ulen, *supra* note 77, at 101.
[202] *See* CLAWSON, *supra* note 82, at 369.
[203] Thomas W. Merrill, *Introduction: The Demsetz Thesis and the Evolution of Property Rights*, 31(S2) J. LEGAL STUD., S331, S331 (2002).

owner.[204] Writing in the context of communal ownership[205] that shares characteristics of, but is not identical to, collective property rights (including that changes to communal property rights require agreement among all users), Demsetz theorized that a transition to private property can occur when the "gains of internalization become larger than the cost of internalization,"[206] including "the transaction costs involved in establishing the property right and the legal system designed to protect that right."[207] Ultimately, Demsetz argued, the "emergence of new property rights takes place in response to the desires of interacting persons for adjustment to new cost-benefit possibilities"[208] when it "becomes economic for those affected by externalities to internalize benefits and costs."[209]

Nelson has written extensively about the property rights aspects of zoning and has theorized that "[t]he concept of zoning has actually represented the evolution of a new property right—in effect a private right—which has occurred in the typical informal and indirect fashion of property right evolution."[210] In 1986, he put forth a "theory of modern property right evolution" to explain how government action can evolve into a private property right.[211] Nelson identified the first step in the creation of "new property" as when the demand for the use of a resource creates a congestion problem and a perceived need for social control, which, in the United States, usually takes the form of government regulation. Obviously, zoning can be

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[204] Harold Demsetz, *Toward a Theory of Property Rights,* 57(2) AM. ECON. REV. 347, 347-50 (1967).
[205] Defined by Demsetz "a right which can be exercised by all members of the community;" e.g., common grazing or hunting grounds). *Id*. at 350.
[206] *Id*. at 350.
[207] *Id*.
[208] *See id*.
[209] *See id*., at 354.
[210] *See* Nelson, *A Private Property Right Theory of Zoning*, *supra* note 38, at 713.
[211] *See* Nelson, *Private Rights to Government Actions, supra* note 67, at 374.

seen as such a response to the urbanization of the late nineteenth and early twentieth centuries with its accompanying land-use conflicts.

The second step in Nelson's evolution is when:

> The initial recipients of use rights gain political strength and gradually acquire greater and greater effective security in their use rights. They oppose government attempts to change the terms and conditions of their use rights, as well as attempts by the government to impose significant fees or charges. In the fragmented American political system, with its highly decentralized power and great weight of organized user groups, the preferences of existing users generally prevail. At some point, the dominant influence of user groups becomes accepted as the norm and existing users have acquired de facto private property rights.[212]

This can be taken as a fair description of both Fischel's Homeowner Hypothesis and the NIMBYism in suburban municipalities that results from the political dominance of homeowners and in the diamond-like permanence of single-family zoning. Nelson's theory holds that at this stage the collective property rights represented by zoning are seriously incomplete since they are not legally tradeable and saleable.[213]

Nelson theorized that the third step would be realized when the de facto private property rights created by zoning were made alienable, with the government recognizing the legal right to buy and sell use rights. While he envisioned such rights being contracted by neighborhood-level groups rather than individual property owners, it is just such a transition that the present paper contemplates.[214]

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[212] *Id.*

[213] *Id.*

[214] *Id.* at 375. Note, Nelson's fourth step, when the relevant "government regulatory agency formerly transfers use rights to the private user and then ceases its

Zoning as practiced has satisfied aspects of both Demsetz and Nelson's theories. First, since some projects that might create economic benefits that exceed the burdens they might place on adjoining property owners are forbidden by zoning, mismatches between what is allowed and what would be built in zoning's absence create, as described by Demsetz, new cost-benefit possibilities that would make it economic for those affected by neighbors' externalities to internalize benefits and costs.[215] Second, per Nelson, homeowners can see themselves as having gained "de facto private property rights"[216] in the neighborhood conditions created and protected by the current zoning over which they are the dominant influence. Further, as discussed above, they can also see such rights as having been bought and paid for through the imposition of zoning on their own properties, by having been capitalized into their homes' purchase price and through the assessments reflected in their municipal real estate tax bills.[217]

As a result, individual homeowners and other property owners can perceive themselves as possessing ownership of two distinct interests tied to their land: (1) the legal title in the property and the buildings located on it and (2) those "de facto private property rights" in current neighborhood conditions. Put another way, property owners can reasonably perceive possessing the right to use their land as allowed by zoning and a correlating property interest in zoning's protections from neighboring structures and uses that are not allowed by zoning. The latter interest provides them with benefits, such as low density, low scale, residential-only neighborhoods, that

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regulatory activities … [a]t this point the user holds an ordinary property right, and the laws and procedures applicable to other ordinary property govern the exercise of this right" (*id.*) is not contemplated by this article.

[215] *See* Demsetz, *supra* note 204, at 354.

[216] *See* Nelson, *Private Rights to Government Actions, supra* note 67, at 374.

[217] *See* FISCHEL, THE HOMEVOTER HYPOTHESIS, *supra* note 62, at 45-49.

they would be are reluctant to lose. However, because their interest in those rights are secured only indirectly by collective property rights held by their municipality and, as mentioned above, zoning prevents private negotiation and resolution,[218] the collective property rights represented by zoning are, per Nelson's theory, seriously incomplete given their Calabresian inalienability, making it is difficult if not impossible to facilitate a project's full internalization of the negative externalities it will impose on abutters.

C. What Would LAZRs Look Like in Practice?

Often using Massachusetts as an example, this Part explores how a LAZR mechanism could be adopted and implemented. Despite zoning being an exercise of state police powers, it is nevertheless a useful and proper approach to use a single state for the purpose of making generalizations given that there is a common national framework for zoning. This is a product of states' zoning regimes largely sharing a common origin in the model Standard State Zoning Enabling Act promoted by Hoover's Commerce Department in the 1920s; the similarities shared by state constitutions; and the courts' application of common law principles, which seek to identify and apply previously decided precedents to new controversies.[219] It would seem that the legal viability of a LAZR mechanism would be determined by how it addressed three questions, namely, (a) which regulations could and should be made alienable, (b) by which neighbors, and (c) by what process?

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[218] *See* Qian, *supra* note 10, at 32.
[219] *See* FISCHEL, ZONING RULES!, *supra* note 53, at 72-73.

1. Which Regulations?

Given zoning's justification as an exercise of the police power, it enjoys a presumption of having been validly enacted to protect the public welfare, and the basis for its inalienability is evident to the extent it is so used. Indeed, as noted above, "(i)f a zoning regulation does serve the public welfare, then an exception to the rule cannot be sold."[220]

In practice, the courts have allowed nearly unlimited municipal-level control of land use so long as it is accompanied by some assertion that some public interest or nuisance prevention justifies the action.[221] However, a perusal of municipal zoning ordinances can reveal many regulations with unclear connections to the protection of the public welfare, e.g., those that function primarily to protect incumbent property owners' property values, serve primarily aesthetic purposes, and, especially, those with predominantly exclusionary effects. The rationale for their inalienability is less clear. Because of this, any effort to make certain zoning protections alienable would need to, while acknowledging the legal fiction that zoning regulations have been adopted to protect the public interest, recognize that while many do indeed protect the public welfare, and some protect the public welfare and private interests concurrently, others protect merely neighbors' private interests.

Some guidance can be derived from Ellickson's 1998 proposal for a neighborhood-empowering reform of zoning. Noting that zoning regulations mainly govern parcel and building dimensions, parking requirements, and other land uses with limited spillover effects, Ellickson proposed the creation of sub-municipal "Block

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[220] FISCHEL, ECONOMICS OF ZONING LAWS, *supra* note 15, at 71.
[221] Edwin S. Mills, *The Attrition of Urban Real-Property Rights*, 12 INDEP. REV. 199, 201 (2007).

Improvement Districts" empowered to grant variances from such regulations, perhaps excluding those few zoning provisions that are intended to prevent neighborhood-wide negative externalities, such as limits on extraordinary building heights."[222]

Fennell's book *The Unbounded Home* provides additional guidance. Given that property's most salient attribute is the power to include some while excluding others, Fennell explored applying property theory to associational rights and the possibility of "making association alienable."[223] Viewing property as an "associational envelope of sorts," Fennell identified areas of "inalienable association rights"—entitlements that cannot be sold, i.e., those protected by Calabresi and Melamed's inalienability rules. Among these are land-use controls adopted by municipalities to protect health, safety, and morals, e.g., preventing overcrowding by controlling the number of occupants of a structure. As Fennell put it, we would take a dim view of a municipal official who accepted a cash payment to not enforce such rules.[224] Similarly, individuals and households have an inalienable, constitutionally protected right to be free of housing discrimination based on protected characteristics (i.e., race, national origin), and we would not accept the notion of selling the right to live in a given building or neighborhood in exchange for a cash payment.[225] Fennell also offers the flip sides of these situations as "inalienable entitlements."[226] Individuals and households cannot override inalienable health and safety regulations; nor can they purchase the right to do so. Similarly, the ability to discriminate against

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[222] Robert C. Ellickson, *New Institutions for Old Neighborhoods,* 48 DUKE L.J. 75, 99 (1998).
[223] *See* Fennell, *supra* note 4, at 154.
[224] *Id.* at 151.
[225] *Id.*
[226] *Id.* at 152.

members of a protected class cannot be purchased from those who would be excluded.[227]

In between these, however, is a middle category of what Fennell called "alienable associational entitlements" over which a decision-maker might be given conditional or negotiable rights over a particular associational choice.[228] These would include most residential choices (e.g., those not implicating constitutionally protected ends, such as religious exercise or expression) as well as land use controls that address externalities and aesthetics which, while they are not without value (and which might solve some collective action problems), they "by no reasonable stretch of the imagination could be said to preserve health, safety, or morals" and, as such, "there is no good reason to make them inalienable." [229]

One example of a zoning regulation that would seem to have both public and private aspects would be minimum front setback requirements (like those in *Eubank*) that prevent construction within a defined distance from a lot's front property line. These requirements are of value to owners of abutting properties along, and directly across, the street. The municipality itself also has some interests in front setbacks, given its control of the establishment and maintenance of adjacent public ways and concerns related to access, public safety sightlines, etc. Another obvious area of shared private and public concern is height regulations. While the externalities associated with height, generally the creation of shadows and blocking of sunlight, are generally not considered legitimate interests prevented by zoning per se, their avoidance does provide significant benefits to abutters. At the same time, building heights also have considerable implications for public safety as limited by the capabilities of a

[227] *Id*. at 152.
[228] *Id*.
[229] *Id*. at 153.

municipality's firefighting equipment and personnel. Yet, it would be inappropriate for a fire department's procurement practices to be used as a growth control mechanism, and such concerns would in many cases be better addressed through mitigation negotiated by project proponents and municipalities in parallel to any negotiations with neighbors.

However, similar public interests cannot be perceived as clearly with other zoning regulations, for example, minimum side and rear setback requirements. While often justified by concerns about the spread of fires, pestilence, etc., such concerns can be better addressed through building and fire code requirements. By requiring the purchase of larger lots and the banning of generally more-affordable building types such as semi-detached dwellings and row houses, those setback regulations serve largely to achieve certain aesthetic and exclusionary goals that redound to the reciprocating benefit of side or rear abutting property owners who, if they wanted more generous setbacks would otherwise simply be required to purchase larger lots or build smaller homes themselves.

A similar dynamic surrounds minimum lot size requirements. This workhorse of zoning plays a key role in inflating housing prices and engendering sprawl by limiting opportunities for developing compact, especially multifamily, dwellings. Minimum lot sizes have become a potent constraint on the development of new housing in expensive areas, like the greater Boston region, that have very little undeveloped land and large lot requirements that reduce the opportunities to subdivide land into developable properties.[230] Yet, interestingly, a 2002 hedonic study by Glaeser and Gyourko found little difference between the cost of a house on a 10,000 square foot lot and

[230] Edward L. Glaeser & Bryce A. Ward, *The Causes and Consequences of Land Use Regulation: Evidence from Greater Boston*, 65 J. URB. ECON. 265, 268 (2009).

the value of one on a 15,000 square foot lot."[231] This implies that there is little or no additional value sought or derived by the purchase of larger lots that conventional suburban zoning generally requires.

A more specific identification of zoning regulations appropriate for alienation by neighbors could be informed by the 1982 report issued by the President's Commission on Housing. Recognizing that "many municipalities have used [the zoning] power in ways that unnecessarily restrict the production of housing and increase its costs," the Commission sought to "protect property rights and to increase the production of housing and lower its cost."[232] It recommended that "[t]o correct improper use of this power, States should adopt constitutional or legislative enabling provisions that prohibit restrictive local zoning except where land-use regulation is necessary to satisfy a 'vital and pressing' governmental interest."[233] Crucially, the Commission's report stated that purpose of this proposed standard, which it intended to apply only to housing, was to "limit substantially the imposition of exclusionary land use policies, since exclusion is clearly not an acceptable governmental interest."[234]

Consistent with that perspective, the Commission stated that "all decisions related to size of lot, size or type of housing, percentage of multifamily, or other housing types and locations would be left to the market, unless government intervention is justified by the locality as serving a vital and pressing governmental interest,"[235] which it generally defined as "protecting health and safety, remedying unique environmental problems, preserving historic resources, or

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[231] Edward Glaeser & Joseph Gyourko, *Zoning's Steep Price*, 25 REGULATION 24, 30 (2002).
[232] President's Commission on Housing, The Report of the President's Commission on Housing, 200 (1982).
[233] *Id.*
[234] *Id.*
[235] *Id.* at 201.

protecting investments in existing public infrastructure resources."[236] It more specifically identified the interests the that should be protected by zoning as including,

> adequate sanitary sewer and water services; flood protection; topographical conditions that permit safe construction and accommodate septic tank effluence; protection of drinking-water aquifers; avoidance of nuisance or obnoxious uses; off-street parking; prohibition of residential construction amidst industrial development; and avoidance of long-term damage to the vitality of historically established neighborhoods.[237]

The Commission recommended that its proposed standard be enacted by the states which, should avoid its abuse, by specifically defining "vital and pressing governmental interests, thereby leaving to the genius of federalism the ultimate contours of this standard," and that "a locality should have the burden of proving that any zoning restriction it imposes on housing meets the new standard in later judicial review."[238]

2. Which Neighbors?

In 1973, Ellickson wrote that "[i]f it is possible to define the class of people primarily concerned with whether [a disallowed use and/or structure] is built, efficiency can be achieved without government interference with the neighborhood decision."[239] As a focus of this Article is the appropriate role of neighbors in land-use decisions, the scope and meaning of that and related terms need to be appropriately defined and institutionalized for that purpose. This important given that, as several scholars have noted, zoning changes

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[236] *Id.* at 200.
[237] *Id.* at 200 n 2.
[238] *Id.* at 200-201.
[239] *See* Ellickson, *Alternatives to Zoning, supra* note 150, at 710.

only effect small areas;[240] externalities from non-conforming uses have very small impact radii;"[241] and the "effects of land use changes are generally 'highly concentrated in some distribution around the sites of changes.'"[242]

The area or radius of impact might be may be estimated by the level of neighborhood participation in zoning hearings, which is doubtlessly highly correlated with perceptions of potential damage to property values.[243] A study of Skokie, Illinois, found that the probability of neighboring landowners participating at zoning hearings declined by 50% for every additional eighty feet separating the neighbor from the site in controversy.[244] Another empirical study identified the possibility that commonly identified negative externalities' "neighborhood effects are so local that they are essentially a 'next door' phenomenon" and asserted that "if the externalities are so local, then the entire method of modern zoning would seem to be in need of reconsideration."[245]

Given that the radius of impact of non-conforming land uses seem to be limited, the basis for determining which neighbors should have the ability to alienate zoning protections might be found in conventional practices related to the provision of legal notice of proposed zoning changes and relief and their relationship to the legal concept of "standing," the right to make a legal claim or seek judicial enforcement of a duty or right.[246] In general, before any zoning

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[240] GEORGE LIEBMANN, THE GALLOWS IN THE GROVE: CIVIL SOCIETY IN AMERICAN LAW 192 (1997).
[241] *See* BOGART *supra* note 39, at 139.
[242] *See* Tarlock *supra* note 9, at 146 (citing Tideman *supra* note 138 at 47).
[243] *See* Ellickson, *Alternatives to Zoning, supra* note 150, at 767 n 287.
[244] *See* Tideman, *supra* note 144, at 84.
[245] John P. Crecine, Otto A. Davis, & John E. Jackson, *Urban Property Markets: Some Empirical Results and Their Implications for Municipal Zoning*, 10 J. L. & ECON. 79, 93 (1967).
[246] BLACK'S LAW DICTIONARY 1413 (7th ed. 1999).

change is adopted, ranging from comprehensive rezonings to minor variances, neighboring landowners must receive notice of the proposed change.[247] In turn, those

> neighbors often have standing to challenge settlements between the municipality and a developer. In most jurisdictions, if a municipality grants a variance or rezones land, immediate neighbors have standing to challenge the variance or the zoning amendment. Perhaps because of this established doctrine, cases in which neighbors challenge settlement agreements rarely even discuss the standing issue. … Even in cases where courts ultimately sustain a settlement against a neighbor challenge, neighbor standing is often assumed.[248]

For example, Massachusetts state statute M.G.L. chapter 40A, section 11 requires that notice of a public hearing for a special permit and variance petition be mailed to "parties in interest," defined as all "abutters, owners of land directly opposite on any public or private street or way, and abutters to the abutters within three hundred feet of the property line of the petitioner."[249] These parties in interest are entitled to a rebuttable presumption that they are "persons aggrieved" under M.G.L. chapter 40A and unless the presumption is challenged by the defendant and a plaintiff abutter is unable to "establish by direct facts and not by speculative personal opinion that his injury is special and different from the concerns of the rest of the community,"[250] the abutter will likely be deemed to have standing in litigation appealing the zoning action.

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[247] *See* Sterk, *supra* note 61, at 238.
[248] *Id.* at 236.
[249] This is in addition to its publication in a local "newspaper of general circulation, … posting in the city or town hall," and mailing to the petitioner, the local planning board, and abutting cities &/or towns.
[250] Standerwick v. Andover Z.B.A., 447 Mass. 20, 33 (2006).

With the Massachusetts legislature having established the standard for parties seeking standing in zoning disputes, the state's courts have crafted a jurisprudence that grants standing to a limited range of parties while denying it, in both the interest of judicial economy and recognition of the costs to project proponents of frivolous lawsuits, to parties who allege only speculative or contrived injuries,"[251] or injuries that are found to be outside the scope of concern of the zoning bylaw.[252] As a result, only those who can assert a plausible claim of a definitive violation of a private right, a private property interest, or a private legal interest[253] are considered "persons aggrieved" of a decision granting zoning relief such as special permits or variances.

Therefore, the recognition of abutters as parties in interest with presumptive standing is practical recognition that the unique position they possess confers upon them some special status unique from that of the general public, and that that their concerns are among the interests most directly affected by a proposed use. Implicit in this is that those who are not parties in interest have less of a protected interest than those who are direct neighbors and abutters.[254]

3. Possible LAZR Mechanisms

A LAZR-based compensation system could be made applicable to the full spectrum of residential uses and development not permitted under existing zoning regulations, from small additions to

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[251] Riley v. Janco Central, Inc., 38 Mass.App.Ct. 984 (1995).
[252] Carstensen v. Cambridge Zoning Bd. of Appeals, 11 Mass.App.Ct. 348 (1981).
[253] Harvard Square Def. Fund Inc. v. Plan. Bd. of Cambridge, 27 Mass.App.Ct. 491 (1999).
[254] This interestingly creates the current situation where neighbors are allowed to sue and reach settlements after a zoning change or some form of zoning relief is granted but are not able to reach the same settlement before such a change is made and avoid litigation.

multifamily dwellings, as well as, perhaps, some uses such as home occupations and small commercial generally compatible with residential neighborhoods. The concept of "parties in interest" and its implicit acknowledgment that neighboring property owners have interests more direct and substantial than others could be used as a basis of LAZR mechanism premised upon the foundational principle that a proposed land use, especially additional housing in areas now effectively closed to it, that is not opposed by potentially affected neighbors should face a relatively simple and predictable path. Toward those ends, state zoning enabling acts[255] could be amended to assign affected neighbors the ability to waive some of zoning's myriad regulations, particularly those related to residential uses, subject to some level of review by local zoning authorities and contingent on meeting applicable health and building codes, environmental and historic preservation regulations.

A range of possible mechanisms and processes is conceivable, dependent on the degree of control allocated to neighbors. Common to them would be a general legal and procedural structure—a project proponent would acquire interested neighbors' individual property rights in the zoning protections to be waived by obtaining their consent to the required zoning relief. The neighbors whose consent would be necessary and sufficient could be defined as those property owners entitled to receive legal notice of a public hearing on zoning matters.

The mechanism could also be specifically tailored to the nature, scale, and complexity of projects. For example, a rear addition that extends into a lot's required rear setback might only require the consent of the directly adjacent rear and side abutters. Similarly, for construction within a right side set back, approval might similarly only

[255] *E.g.*, MASS. GEN. LAWS ch. 40A.

be needed from the right side and rear neighbors (and perhaps those directly across the street). It could be expected that in many of such situations, neighbors would be sympathetic and supportive of reasonable changes. Larger projects, like those that would increase the number of dwelling units (e.g., the replacement of a single-family house with a four-unit dwelling) might involve a more complex negotiation process. Such a scenario would likely be initiated with a potential developer approaching the abutters and indicating an intent to compensate them in exchange for their consent.

The involved abutters, acting either individually, as blocs of individuals, or as a unified group, could strategize and would have the prerogative to respond in any number of ways, including rejecting the overture outright. Abutter behavior would be expected to vary widely, depending on many factors, including individual preferences and personalities, neighborhood cohesion and solidarity and, of course, the proposed project's expected positive and negative externalities and their resulting effects on neighboring property values.

The proposed project could be shaped by ensuing negotiations. The proponent and neighbors would reveal their preferences, prices, and openness to exchanging interests and compensation. Perhaps most interesting is the possibility of compensation packages that include the exchange of mutual waivers and consents that would facilitate the redevelopment of multiple properties. The negotiated bargains would reflect the level and form of compensation each neighbor is willing to accept, and that the proponent is willing to pay, for the regulations to be lifted.

Given the LAZR mechanism's general applicability, developers not tied to a specific site (e.g., a redeveloping homeowner) could pursue negotiations for any number of locations in any number of neighborhoods and municipalities. Combined with the acquisition of the titles to the properties to be developed, acquiring LAZR

waivers from abutters would be a form of site assemblage that would expand the development potential of any parcel. With the ability to negotiate and conclude agreements with various abutter groups, developers could pursue locations that they believe represent attractive development opportunities considering relative costs and potential market values.

Where negotiations were successful, mutually agreed upon agreements would be executed by the proponent and all the required neighbors. These agreements would be private contractual agreements between the parties, and their terms, including the scope, scale, or type of any compensation, would not be of legitimate interest to zoning authorities (and not subject to their review or approval). The execution of the agreements would be evidenced by certified statements of the interested neighbors' non-opposition and consent to the required zoning relief in a form acceptable to the municipality and recordable at the relevant deed registration office. Site plans, architectural drawings, and other controlling documents could be appended thereto, consistent with the local practice for special permits and variances. The project proponent would then be able to submit the certified statements to the relevant municipal zoning authority.

From that point, one option would be for the process to largely follow that which is conventionally used for zoning relief. The petition would be scheduled for a public hearing of the relevant municipal board within the statutorily required timeframe. Any non-property owners identified as parties in interest,[256] would receive notice of the proposed zoning relief by mail and appropriate notice would be given by publication.

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[256] In Massachusetts, for example, "the planning board of the city or town, and the planning board of every abutting city or town." MASS. GEN. LAWS CH. 40A §11.

The certified petition would evidence that all interested neighbors are satisfied that the proposed use or structure does not raise concerns for them regarding possible externalities, nuisances or negative neighborhood effects, and, even if it did, such concerns have been addressed through discussion and negotiations by the property owner and the neighbors. The zoning authority's review would be limited to determining whether and how any public interest would be negatively affected by the proposed project. The absence of neighborhood opposition would not be binding upon the zoning authority who, if and when it saw a denial to be appropriate, could issue one. The decision of the municipal zoning authority to grant or deny a petition would be, as with a special permit, appealable to the court system. This would subject the parties to the usual litigation and settlement costs and delays, and it would be expected that the courts would accord the traditional judicial deference to the local decision under the heightened standard of review. While it could also be expected that in the event a petition ultimately fails any compensation would be retained by the unsuccessful project proponent, such matters, and alternate ways of approaching them, would likely be negotiated terms of any agreement between the proponent and specific neighbors.

The strengths of this system would include that it would be similar to existing processes while also giving a nod to the "private, protective" aspects of zoning by narrowing the zoning authority's scope of review to purely public concerns, giving affected neighbors an enhanced role, and creating a mechanism for their direct compensation. Downsides would include that, like special permits, granted petitions would be vulnerable to delay by appeal by third parties (who, nevertheless, would likely have difficulty establishing standing in many scenarios). In effect, the only thing that the project proponent would be buying with the compensation of neighbors would be the

limiting of the zoning authority's scope of review (and the neighbors' forgoing of legal action). While this would not be without value, the resulting contingent nature of the LAZR waiver could only act to diminish its value to the project proponent, which would in turn decrease the compensation offered and diminish the likelihood that either the proponent or the neighbors would see the process as worth the transaction costs involved. In short, its main shortcoming might be that is that it feels more like process than property.

A more robust alternative would be a more rigorously property rights-oriented approach that would entail modifying state zoning enabling acts to expressly reallocate ownership of some of the community property rights in zoning held by municipalities to neighbors as alienable interests. This would serve to further recognize and reinforce the distinction between the private and public aspects of zoning's protection by explicitly endowing property owning parties in interest with the ability to waive regulations that limit or constrain the development and use of residential uses.

Procedurally this would involve, like the previous scenario, the filing of a petition specifically indicating the required relief accompanied by certified statements of non-opposition from all statutorily required neighboring property owners. The process would diverge from that described above (as well as from current practice) with an initial review of the petition conducted by municipal planning staff, perhaps in consultation with leadership of the zoning authority, pursuant to specific standards included in the adopted rules and regulations of the authority. Petitions for many small projects and intrinsically non-controversial issues like setback intrusions, moderate height increases and the creation of accessory dwelling units, could likely be handled administratively and allowed to obtain building permits. In cases that involve more intense or larger scale development, e.g., those viewed as excessive for the specific site,

neighborhood or municipality, the petition could be referred to the zoning authority for a public hearing.

However, as one of the purposes of the LAZR mechanism would be to counter excessive regulation and overzoning, especially when used for exclusionary purposes, it is suggested that to deny a LAZR petition the zoning authority have the greater burden of establishing, per the recommendation of the above-referenced 1982 Presidential Commission on Housing, that continued enforcement of the zoning proposed to be waived is "necessary to achieve a vital and pressing governmental interest," ideally as defined in advance by state statue or local ordinance.

Like most governmental actions, any resulting decision could be appealed in court. That said, there would be a crucially important asymmetry to potential appeals. Denials of LAZR petitions would be far more vulnerable to appeals than approvals would be since with the latter as all the parties with presumptive standing to appeal, i.e., the interested neighbors and the municipality, would be in support of the waiver.[257] In appeals, those challenging the approval would, by definition, not be recognized parties in interest and would therefore have a significantly steep uphill climb to establish standing for an appeal (they would nevertheless retain recourse in the nature of nuisance suits against projects that prove to interfere with their use and enjoyment of their own properties). This difference would increase the value of LAZR waivers to project proponents and neighbors and could make them a powerful, although not unchecked, force against excessive and exclusionary zoning and NIMBYism.

Upon the reaching of the end of any mandatory appeal period or conclusion of any and all unsuccessful appeals, the LAZR agreement

[257] In the case of a site that borders an adjoining town, that municipality might have standing to oppose the action.

would be recorded at the relevant deed registration office on the titles of all the involved properties, and the proponent would be entitled to a building permit for the project. The developer would provide the agreed-to compensation per the agreement terms and be able to commence construction.

4. LAZRs as Complements to, Not Substitutes for, Existing Zoning

An important aspect of LAZR mechanisms is that they would be complements to, rather than a substitute for, existing zoning procedures. All existing zoning would remain, and in the absence of neighbor approval a proponent could still make an application through the existing process. This should allow a LAZR mechanism avoid pitfalls created by the *Eubank-Cusack-Roberge* jurisprudential morass as it would recognize the legal difference between allowing certain neighbors to waive a regulation and making a use subject to their consent.

First, as with the ordinance upheld in *Cusack*, a LAZR mechanism would merely allow otherwise prohibited uses if the interested neighbors consent to lift the prohibition and thus waive the protection it granted them.[258] As such, it would give neighbors the ability to expand, not constrain, others' use of their property rights. Second, as project proponents who did not obtain the required neighbor consent could always avail themselves of the conventional zoning process, and because the municipality itself would retain the authority to deny a LAZR waiver upon making a" vital and pressing governmental interest" finding, the neighbors would not be final decisionmakers with unchecked veto power. The LAZR mechanism would therefore address the concerns of the *Roberge* Court's that the ordinance struck down in that case did not have a provision for

[258] *See* Havighurst, *supra* note 187, at 181.

review of the neighbors' failure to give consent, thus rendering them "free to withhold consent for selfish reasons or arbitrarily."[259]

Such a system would not be completely without precedent. In Massachusetts, it would bear some parallels to aspects of other land use review processes—the Approval Not Required (ANR) process and the historic preservation review process. The former is used where a property owner submits a plan to a municipal planning board for the division of a property into two or more new lots. Where all the proposed lots meet statutory minimum frontage requirements (ostensibly established to ensure adequate vehicular access), the board must endorse the plan. The effect of an ANR endorsement is to inform the register of deeds that the board was not concerned with the plan[260] and to exempt the proposed division from the provisions of the state Subdivision Control Law.[261]

Another possible precedent is the review process implemented pursuant to the Massachusetts Historic Districts Act[262] under which property owners seeking to make alterations to properties located in designated historic districts apply to the local historic preservation commission for approval. Where a proposed exterior alteration is of minor significance or minimally visible, the town historic preservation commission may send a so-called "10-day letter" to abutters. A full public hearing on the proposed alterations take place only if any of the neighbors who were entitled to receive the notice raised objections within ten days. If no objection is raised commission approval is often issued administratively. This process is not substantially different from neighbor-approved LAZR petitions enjoying a streamlined approval process.

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[259] Seattle Title Trust Co. v. Roberge, 278 U.S. 116, 122 (1928).
[260] Smalley v. Planning Board of Harwich, 10 Mass.App.Ct. 599 (1980).
[261] MASS. GEN. LAWS CH. 41, §§ 81K-81X.
[262] MASS. GEN. LAWS CH. 40C.

Massachusetts also sometimes allows neighbors to waive a land-use prohibition. Prior to 1983, M.G.L. chapter 138, section 16C gave churches and schools the ability to block the issuance of a liquor license for any location within a five hundred-foot radius. Challenged as an improper standardless delegation of legislative authority (as well as a violation of the establishment of religion clause of the First Amendment to the Constitution), the statute was upheld by the Massachusetts Supreme Judicial Court with its decision in *Arno v. Alcoholic Beverages Control Commission*.[263] The *Arno* Court analyzed the delegation question in light of the *Eubank* and *Cusack* decisions. It analogized the state statute in question with the zoning provision in *Cusack* that survived a similar claim of an invalid delegation of legislative power, seeing both as ordinances that "prohibited specific uses, but permitted waiver of the restrictions with the consent of a majority of the parties most affected."[264] The Massachusetts court upheld the challenged statute, declining to find it an improper delegation of power to neighbors, by applying what it termed the "distilled essence of Cusack," i.e., " if the effect of a consent provision is to legislate a restriction it is invalid, but if it serves merely to permit the waiver of a restriction created by the legislative body, which has provided for such a waiver, it is upheld."[265]

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[263] Arno v. Alcoholic Beverages Control Comm'n, 377 Mass. 83 (1979). The U.S. Supreme Court would later, in a separate case, find giving neighboring churches veto power over liquor licenses unconstitutional as a violation of the establishment clause. *See* Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982)

[264] *Arno,* 377 Mass. at 89.

[265] *Id.*

D. Concerns and Considerations

1. Possible Stakeholder Attitudes

Crucial to any discussion regarding LAZR mechanisms is how the concept might be perceived by various relevant groups and stakeholders. For example, since the implementation of LAZRs could be interpreted as deregulation, libertarian and property rights groups might support them. Since they would provide a check on exclusionary zoning practices, anti-housing segregation organizations might also support them. Support for LAZRs might also come from advocates of Smart Growth, New Urbanism, and other zoning reform efforts that encourage development of wider varieties of housing types and diversity of residents. Environmentalists might embrace LAZR mechanisms as they capture some of the "embodied efficiency" of using existing and more densely occupied buildings rather than using new materials.[266] Other possible supporters include nongovernmental environmentalists, urban planners, and other local government officials, as well as private real estate developers, who might see the advantages to increasing residential densities. These groups could also oppose LAZRs for varying reasons, including concerns about the effects of the partial reallocation and decentralization of land-use decision-making.

Other groups could bring more heft to the discussion. Some opposition could come from local governments, manifest both as opposition from elected municipal officials and institutionally as a reflection of the views of their electorates acting collectively. This is especially true in municipalities that have traditionally zoned to exclude two-family houses or other multiple dwellings. Local politicians'

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[266] DAVID OWEN, GREEN METROPOLIS: WHY LIVING SMALLER, LIVING CLOSER, AND DRIVING LESS ARE THE KEYS TO SUSTAINABILITY 208 (2009).

public opposition would likely be premised on a defense of local autonomy and on opposition to incurring the costs linked to increased population densities (education, public safety, etc.). They would also, albeit less publicly, likely oppose the adoption of LAZR mechanisms as a reduction of their influence. As William Bogart noted, since politicians have little incentive to reduce their control over land use, new restrictions are more likely to be introduced rather than existing ones being repealed.[267] This is a rational position as the "imposition of these controls affords local officials substantial political advantages" since they create the potential for "politically directed transfers of income" as well as "political gain through variance or changes in restrictions."[268] However, other local officials might also support LAZRs. It is possible that Deborah Stone's "Facts"-based policy instrument[269] might come into play here, as an accounting of the potential property tax revenues that could be realized from denser residential developments might in some situations be more likely to pay their own way than single family homes.[270] Also, the use of LAZR petitions would allow such development to be built without the involvement of, and resulting political culpability, of incumbent officials.

The role of incumbent residents is even more nuanced. When outside of the radius of the compensated "interested neighbors" of a LAZR-allowed neighborhood change, a resident might view the mechanism with ambivalence or worse. This view could be exacerbated by fears of negative social and municipal fiscal impacts from such changes. On the other hand, residents might be more receptive to the mechanism when considering the options and possible

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[267] *See* BOGART *supra* note 39, at 141.
[268] *See* Denzau & Weingast, *supra* note 76, at 401.
[269] *See* Stone, *supra* note 114, at 305.
[270] *See* Karkkainen, *supra* note 13, at 51.

benefits they could realize individually. Indeed, the most effective group in support LAZRs could be homeowners who would see themselves as potentially deriving gains not only from using the LAZR mechanism to build or do something otherwise not allowed upon the sale or redevelopment of their properties, but also from, for example, the ability to reduce net monthly housing costs substantially by creating a second, rent-producing dwelling unit on their property. LAZR mechanisms might therefore prove quite attractive to many overburdened homeowners, as well as to banks and lenders where they saw it as increasing mortgaged homes' property values.

Further, by facilitating compensation for neighbors from other property owners who want to do so such things, LAZRs could be a force for neighborhood stability by helping long-time residents stay in their homes. This effect would be especially true where LAZRs allowed incumbent homeowners in "gentrifying" neighborhoods who do not intend to sell or redevelop their property to nevertheless realize benefits from neighborhood changes while staying in their homes by negotiating with those who want to build responsive to a changing market.

Also, LAZR mechanisms could also be more equitable than the current inalienability of zoning regulations. First, by allowing projects to be self-mitigating, they could increase fairness for incumbent homeowners by minimizing any demoralization costs imposed on those most affected by changes to their neighborhoods by compensating them with some portion of the economic gains created by those changes.[271]

[271] It should be recognized, however, that some demoralization costs might still be felt by uncompensated neighbors from farther afield who feel aggrieved by the changes.

Second, among others, and as noted above, "the poor would probably gain from tradeable land-use rights."[272] This would be for several interrelated reasons. As discussed above, existing lower-income homeowners in gentrifying areas could share in the economic benefits of more intense development, whether they remain in, or sell, their home. Further, by increasing the possibility of denser and more diverse development, especially in those areas now governed by arguably exclusionary zoning regimes, LAZRs could also open myriad possibilities for now-rare alliances of incumbent homeowners and another important stakeholder group- developers and home builders. This relationship could be crucial as the latter group is often the sole representatives of the interests of those who would be likely residents of the denser housing types that now would be made more possible. As they do not have any voice in the municipalities that exclude them, developers would by proxy allow them to compete for urban and suburban land in those municipalities.

That said, the home building industry would also have some cause to oppose LAZRs. First, they would inject some unpredictability into development patterns, a concern that could be shared by banks and other mortgage holders. Second, they might harbor concerns about the degree to which the ending of the common prohibition of two-, three- and multi- unit dwellings from single-family zones would expand the housing supply by creating comparatively inexpensive housing units within existing structures could lower the demand for new housing construction.

2. Questions that LAZRs Might Prompt

LAZRs would undoubtedly raise a range of questions. An initial concern would be that neighbors could use their additional power over

[272] *See* Fischel, *Introduction*, *supra* note 100, at 235.

zoning with racial and income-based discriminatory effects as they might perhaps decline to enter into LAZR agreements based upon bias against a builder or the expected residents of the development. However, this concern should be understood in the context of LAZRs being complementary to, and not replacements for, existing zoning. Neighbors and builders alike would have the discretion to negotiate mutually beneficial deals to allowing for site-specific lifting of exclusionary zoning requirements. Indeed, property owners would have no obligation to enter into any agreement to waive their zoning protections, and project proponents would have no obligation to pay them to do so. This is not dissimilar to how property owners have no obligation to sell any property (eminent domain situations excepted) and builders have no obligation to acquire any specific property. That said, because by their very nature LAZR mechanisms could only be used to lift restrictions, not impose new ones, and because they could be used to develop any parcel, they would act as a check on municipal-level exclusionary zoning practices and serve only to create new opportunities for diverse forms of housing where none now exist, not reduce them.

Another concern with LAZRs would be that when negotiating neighbors would assert that the harm they would suffer would be profound and require considerable compensation, adding significant costs to development. Developers would likely then pass along the cost of that compensation to homebuyers or renters in the form of higher home prices or rents, making housing more expensive and the production of affordable housing even more difficult. This concern is warranted given the endowment effect, which, in short, holds that the price at which someone is willing to sell a right is considerably higher than that which he or she would pay to purchase it.[273]

[273] *See* BOGART, *supra* note 39, at 134.

As discussed, with zoning, incumbent property owners may see themselves as endowed with a right to a neighborhood free of uses and structures prohibited by local ordinances. This assumption would seem to risk giving rise to a significant willingness to pay/willingness to accept or "offer/ask" disparity where those already in possession of something demand a great deal than they would offer to pay for the same entitlement if they did not currently possess it.[274] The endowment effect could also be intensified by homeowners who would perhaps overly self-assess the value of their homes and enjoyment of their neighborhoods,[275] leading to absurdly high compensation requests.

A concern that LAZRs would increase housing costs might also be raised by the possibility that homeowners would have limited willingness to alienate zoning protections for reasonable compensation because

> once compensation is granted, the downside risk if the development's neighborhood effects remains with the neighbors. … The NIMBY problem is not their demands to be left whole via compensation of some sort. It is their unwillingness to accept even that compensation because of their high anxieties about unforeseen effects.[276]

This concern raises the specter that neighbors seeking unrealistic compensation, or those who want to prevent the proposed development outright, would simply hold out and refuse to give consent to sell at any price. This initially seems warranted as key to the LAZR

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[274] Jack L. Knetsch, *Environmental Policy Implications of Disparities Between Willingness to Pay and Compensation Demanded Measures of Values,* 18 J. ENV'T ECON. & MGMT, 227, 230 (1990).

[275] *See, e.g.*, Abraham Bell & Gideon Parchomovsky, *Takings Reassessed*, 87 VA. L. REV. 277 (2001).

[276] *See* FISCHEL, ECONOMICS OF ZONING LAWS, *supra* note 15, at 149.

concept is a recognition of the subjective nature of such calculations and of the need to recognize the surplus value of both home and neighborhood to NIMBY-prone homeowners above whatever the market value off their properties might be.

However, there are several reasons why a LAZR mechanism would unlikely make housing overall less affordable. First, since LAZR petitions could be pursued for just about any parcel, the number of properties in a metropolitan area potentially used for the desired use, say, multifamily housing, would dramatically increase. LAZRs would create a vast market of buyers, sellers, and locations, and, in turn, competition among neighbors and neighborhoods willing to accept compensation for denser nearby development. This new market would deny monopoly power to any single property owner or specific group of property owners (as well as to municipalities) since a project proponent would a have a wide selection of possible sites and each would have a unique set of abutters and interested neighbors. Such competition would tend to temper compensation requests.[277]

Second, LAZR mechanisms' voluntary nature would be a further check on excessively high compensation demands and holding out by homeowners with unrealistically high assessments of their properties.' As a project proponent could always use the conventional zoning system, neighbors that held out for excessive compensation could find themselves faced with the possibility of a proponent

[277] An obvious exception to this would be where someone wanted to develop a specific property and would therefore be vulnerable to a specific set of neighbors who might seek unrealistic levels of compensation. However, many such situations would likely involve incumbent residents seeking to expand their current dwellings, or increase the number of dwelling units on their lots, and would therefore likely have pre-existing personal relationships with the interested neighbors who might be generally amenable to the changes or open to forgoing compensation or negotiating reciprocal waivers.

seeking and being granted the required relief (e.g., a special permit, rezoning, etc.) from municipal zoning bodies, with no compensation being received by them. This would, it should be noted, create the possibility of interesting situations where competing public and private interests are in tension, with a proponent negotiating with municipal authorities and the interested neighbors simultaneously, likely having a downward effect on compensation demands. Third, the rendering of so many parcels available for more dense residential uses would likely also reduce the premium currently placed on the comparatively limited number of properties presently zoned for multi-residential use in many metropolitan areas.

Rather than exerting upward pressure on housing costs, LAZRs could possibly decrease housing costs by increasing the housing supply of and spreading development costs (albeit including neighbor compensation) across more dwelling units. It would do this while also countering the market-deforming effects of zoning and allowing the transmission of price signals related to the revealed preferences of homeowners for the subjectively determined surplus values they place on the neighborhood conditions protected by current zoning regulations.

Another question raised by the LAZR mechanism's embrace of the idea that homeowners have recognizable economic interests in the appearance of their neighbors' houses,[278] is that if neighbors can be compensated for changes that are perceived as negative, should compensation also flow the other way. In other words, should property owners who undertake changes that are perceived as positive to a neighborhood or increase surrounding property values receive compensation from current neighboring property owners who would benefit from the changes?

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[278] *See* CLAWSON, *supra* note 82, at 369.

However, key to the LAZR mechanism is its voluntary nature. Neighbors would be compensated for their surrender of property interests they have in certain zoning protections, not for a change in market value per se. Since no property rights, collective or individual, held by others are implicated by homeowners or developers making improvements to their own properties, no compensation from neighbors whose property values would be collaterally increased would be required. Indeed, to require neighbors to compensate a property-improving neighbor would seem to create a form of a Calabresian liability rule where the latter could impose on the former certain costs over which they would not have any control or input.

That said, LAZRs would create a framework for neighboring property owners, especially in distressed neighborhoods, to strategically cooperate to share costs or make joint investments where the improvement of one or more properties could have beneficial effects for other neighboring properties. These contributions could be worked into the structure of negotiated compensation packages. In fact, interested neighbors might be rationally motivated to request little or no direct compensation to allow an abutting property to be improved in a way that created significant positive externalities for the waiving property owners. Agreements could also provide that the waiving property owners make payments, representing some portion of the appreciation in their property values they might have enjoyed because of the changes, to the project proponent. These payments could be made at any time or times agreed to by the parties (e.g., at project inception, upon the sale of the waiving property, and/or any other agreed upon points). The flexible nature of the LAZR mechanism and the private negotiation it would engender would have great potential for the creation of a wide range of

innovative approaches to neighborhood development structuring, coordination, and timing based on abutters' shared interests.

Another consideration is whether LAZRs would share a potential problem that Fischel identified in the context of allowing the sale of zoning rights by municipalities. He expressed general misgivings about that proposed practice, concerned that the sale of regulations would make a government "appear more like a protection racket, and not one that operated for the benefit of its citizens."[279] Fischel warned that, given their current monopoly on zoning, granting municipalities full "property rule" protection for zoning regulations, i.e., allowing cities and towns to sell zoning rights, would give them an incentive to establish excessively strict "supernormal" land-use regulations that would prevent even development consistent with already existing neighborhood conditions for the purpose of extracting economic rents from builders.[280]

However, allowing the sale of zoning protections within a LAZR system would have a different effect that would reflect the divergence of public and private interests intrinsic to zoning. Since under a LAZR regime the potential benefits from selling zoning protections would redound to specific affected neighbors, not municipalities, cities and towns would likely have less incentive to adopt and maintain excessively restrictive regulations since doing so would create opportunities and incentives for specific neighbors to sell their consent for even larger compensation from developers who want to exceed them.

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[279] *See* FISCHEL, ECONOMICS OF ZONING LAWS, *supra* note 15, at 71.

[280] *See id.* at 192. To counter this, he proposed an alternate zoning regime that would grant municipalities alienable property rule protection only for what he defined as normal and subnormal land-use regulations (those that permit development at a scale at or below currently existing conditions) and merely extend liability rule protection for such "supernormal" regulations, i.e., allowing developers to buy their way out of excessive, exclusionary zoning regulation.

Gaming out possible responses by local zoning authorities raises concerns that some municipal zoning authorities could manipulate ordinances and adopt stricter regulations that benefit incumbent property owners by creating value for them by giving them more to sell and allowing them to negotiate larger compensation. Ultimately though, the fear of being undercut by interested neighbors with a financial incentive to waive zoning regulations could have the effect of encouraging municipalities to adequately zone for multifamily dwellings in areas deemed appropriate for such use by planning and zoning authorities. It could also encourage a contemporary variant of "zoning by streetcar" as municipalities could locate public improvements such as schools, recreational facilities, sewers and water service, and streets, transit services and transportation facilities to direct future development.

Further, LAZRs would raise larger questions of how subsequent zoning changes by a municipality should be viewed. For example, should the adoption of more restrictive zoning trigger a requirement for some kind of payment by those property owners who would benefit from the additional protection? Perhaps, but that seemingly could be addressed through municipal real estate tax assessments. Conceivably legislatures and courts could apply the "vital and compelling governmental interest" standard when considering the validity of challenged zoning changes going forward.

Yet another concern that could be raised about LAZRs is that some homeowners not included in the LAZR process would wake up some morning surprised to find a four-unit dwelling being built in their previously exclusively single-family neighborhood. However, as discussed above, the radius of expected impacts of land uses is relatively small and hews closely to that encompassed by the property owned by interested neighbors. While the effect of introducing LAZRs into the American property market after decades of

institutionalized zoning is obviously difficult to project, it can reasonably assumed that the demand for such higher density housing exists only in certain, limited areas. Many metropolitan areas are substantially composed of areas where the cost of constructing such new housing would be higher than the market price housing would command and no rational, profit-seeking developer would undertake such projects in those areas.[281] Just as water finds its own level, if left to its own devices and freed from overzoning, development will likely also find its own level, densifying areas where it makes the most sense, likely in high-demand municipalities and neighborhoods where housing prices exceed construction costs. In fact, an expected outcome of the adoption of LAZR mechanisms would be denser residential development where it is currently demanded but not allowed, and it not be unduly impeded by the NIMBYism of those who would not be substantially affected by it.

Still another possible concern about (or criticism of) alienable zoning could be whether its compensation aspect would render it a system of "bribes." Perhaps the most cogent response would be an acknowledgement that the system would indeed contemplate bribes, with the caveat that this is true only in the same sense one is "bribed" to sell one's house, car, or anything else. When one sells something it is exchanged for money or some other compensation. As the LAZRs mechanism is based on the allocation of individual property rights in zoning to neighbors, neighbors who accept compensation to waive zoning regulations would merely be selling those property interests, just as they can now sell their houses, their properties and/or any portions thereof.

Lastly, the LAZR mechanism might raise fears grounded in concerns over coercion, majoritarianism, and a lack of fairness among

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[281] *See* BOGART, *supra* note 39, at 138.

neighbors. It is possible that the neighbor-to-neighbor interaction might be a cause of discomfort, and raise the possibility of intimidation, "corruption" and the trading of favors. However, it is the very involvement of local government in land use that has already institutionalized such interactions, whether informally or at public hearings. Many of those seeking some form of zoning relief are already encouraged by municipal planning staffs to discuss the issue with neighbors. This practice is reinforced by the fact that zoning authorities often approve applications citing lack of opposition. Also, by encouraging such interplay early in the process, the proposed system further incentivizes proponents to go to neighbors first, which could lead to negotiations and mutually satisfactory agreements that hammer out many potential issues upfront. Since it would provide a framework for conversations about the proposed changes, some homeowners might mutually support each other's applications as a friendly quid pro quo in recognition of a similar present or future need. All in all, interaction between neighbors can also be superior to situations where boards approve applications where little or no authentic negotiation or discussion has occurred whatsoever between neighbors, often leaving an impression that perhaps a proponent cut a deal with the board, contributing to neighbors' feelings of powerlessness and that the system is rigged.

VI. Conclusion

This Article has attempted to apply law, economics, and property theory to identify specific, practical modifications of existing zoning institutions to address NIMBYism. It has explored the compensation of neighboring incumbent property owners based upon a recognition of individual property rights in zoning that they could sell,

subject to superior collective property rights held by the municipality, in exchange for negotiated compensation.

The intent of LAZR mechanisms would be to allocate the gains from LAZR-facilitated development so that everyone is made better off, thus rendering social gains, such as improved and an expanded housing supply and market-responsive neighborhood transitions that more accurately respond to changing demographics, environmental conditions, and market demands. Importantly, it could do so while simultaneously allowing landowners fuller enjoyment of property rights and protecting the interests of the neighbors most directly affected by such changes while also providing a needed check on excessive and restrictive zoning practices.

As a radically traditional approach, the adoption of LAZR mechanisms would be a recognition that much of what was lost in the twentieth century impulse to impose government regulation on land use was the societal benefit of the application of local knowledge[282] on urban development. Further, LAZRs could, consistent with the principle of subsidiarity, which calls for the delegation of authority to the smallest competent jurisdictional unit, be an example of the "importance of localized knowledge and norms in drafting enduring solutions."[283]

While the implications of such a departure from current zoning practices might seem daunting, the implementation of LAZR mechanisms can be a test of whether our metropolitan areas can be strengthened by allowing them to again growing spontaneously,

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[282] Or, as Jane Jacobs called it, "locality knowledge."

[283] David Brooks, *The Localist Revolution- Sometimes, It Pays Off to Sweat the Small Stuff,* N.Y. TIMES, (July 19, 2018), https://www.nytimes.com/2018/07/19/opinion/national-politics-localism-populism.html?action=click&module=Associated&pgtype=Article&region=Footer&contentCollection=David%20Brooks.

guided by individual incremental actions, rather than being trapped and deformed by the strait-jacket Judge Westenhaver warned of almost a century ago.