

# ZONING: A REPLY TO THE CRITICS

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## I. INTRODUCTION

In November 1993 voters in Houston narrowly rejected a referendum to establish zoning in that city.<sup>[1]</sup> This was the third time in a half-century that Houston voters had rejected zoning. Thus Houston remains the only major city in the United States without zoning. To zoning's supporters, Houston represents an unenlightened backwater that has stubbornly resisted the tide of twentieth century land use regulation. To zoning's critics, Houston stands as a lonely beacon of economic rationality, or at least a living laboratory in which alternatives to zoning can be fairly tested.<sup>[2]</sup>

Extensive academic literature critical of zoning has accumulated in the last twenty years, beginning with Bernard Siegan's landmark 1970 study lauding Houston's non-zoning approach,<sup>[3]</sup> and followed shortly thereafter by Robert Ellickson's broader theoretical critique of zoning.<sup>[4]</sup> Subsequent academic literature has been almost as uniformly critical of zoning<sup>[5]</sup> as public policy has been uniformly in favor of it. Although few academic defenders of zoning have stepped forward, governmental decision-makers have proceeded with zoning apace, apparently untroubled by the academic onslaught. By some estimates, 9,000 municipalities, large and small, in every region of the country and representing at least 90% of the nation's population, have zoning schemes in place.<sup>[6]</sup> The closeness of last November's vote, and Houston's status as the only major holdout against zoning, can give little cheer to zoning's critics. No trend toward abolishing zoning appears on the horizon, and indeed, non-zoning in Houston hangs by a thread.

Why is this? How do we account for the fact that this nearly universal feature of local government enjoys such disrepute in academia? Are local governments simply in the grip of irrationality? Have local officials hoodwinked the public on a massive scale? Or have the academic critics somehow missed the mark?

This article argues that the academic critiques of zoning, though based on insights that have some validity, are often overstated. They simply prove less than their authors think they prove. In particular, this article argues that in some circumstances, such as in mature neighborhoods in large urban centers, zoning can be a rational and justifiable public policy response to very real problems and can be made to work at least as well as any of the alternatives the critics propose.<sup>[7]</sup> The analysis of this article is descriptive in part, illustrating zoning at its best, in rather limited circumstances.<sup>[8]</sup> Yet principally this article is normative, discussing zoning as it might be made to work, in a way that is justifiable and that meets many of the objections offered by its critics. Therefore, the purpose of this article is not to offer a general defense of zoning. Its task is the more modest one of showing that many of the critiques, despite the broad claims of their authors, should not be taken as general indictments of zoning, but rather as indicators of particular dysfunctions that must be addressed if zoning is to work effectively.

## IV. ZONING: ANOTHER LOOK

### *A. Zoning To Protect The Neighborhood Commons*

This article contends that both supporters and critics of zoning have misconceived the nature of zoning. Zoning is only partially about protecting individual property owners against the effects of "spillovers" or negative externalities that adversely affect the market values of their property.<sup>[79]</sup> Specifically, zoning protects a homeowner's consumer surplus in a home and in the surrounding neighborhood, that lies above the market value of that home. This consumer surplus has essentially been overlooked and is fundamental to an understanding of zoning.

Arguably, protecting against the effect of negative externalities on market values can be achieved more efficiently by providing property owners with what Guido Calabresi and A. Douglas Melamed call "liability rule" protection.<sup>[80]</sup> Armed with such protection, neighbors would either bargain with would-be developers to achieve efficient outcomes or bring suit to recover their losses.<sup>[81]</sup> On its face, however, zoning appears to function as what Calabresi and Melamed call an "inalienability rule," categorically prohibiting any development proscribed by the zoning ordinance.<sup>[82]</sup> As numerous commentators have suggested the reality is much different. In fact, zoning functions more like a "property rule," allowing neighborhood residents (or their governmental representatives) to enjoin a proposed development that does not conform to current zoning, while leaving room for the would-be developer to "buy" the entitlement to build through design concessions, campaign contributions, and the like.<sup>[83]</sup> But property rule protection in this kind of situation theoretically allows property owners (or the municipality acting as their proxy) to hold out for more than the damages they would actually suffer (in the form of reduced market values for their property) from the proposed development.<sup>[84]</sup>

Yet the notion that property owners should merely be protected by a liability rule compensating them for the loss in market values suffered at the hands of a new development does not square with our intuitions about the entire package of values zoning seeks to protect. Consider this example, which is a true story from Houston. In a quiet residential neighborhood, a new neighbor moves in and promptly opens a loud marble-grinding business in his backyard. This forces neighbors to contemplate either expensive (and probably only partly effective) sound-proofing of their homes, or moving out. As a long-time neighborhood resident put it: "He's cutting and grinding and polishing all day. It's nuts."<sup>[85]</sup> Most people would feel the long-time resident has a legitimate grievance, and that merely compensating him for any decreased market value of his home is not an adequate remedy. Clearly one's home is more than a monetary investment.

Zoning in urban neighborhoods is not merely a system for protecting the market values of individual properties,<sup>[86]</sup> but rather is a device to protect neighborhood residents' interests in their entirety, including consumer surplus in their homes, as well as their interests in what this article calls the neighborhood commons.<sup>[87]</sup>

Although typically not addressed in the literature, which generally discusses only objectively measurable market values, the notion of consumer surplus in an individual parcel of property is quite straightforward.<sup>[88]</sup> The concepts of "home" in general, and "home ownership" in particular, are areas where consumer surplus are particularly important.<sup>[89]</sup> What distinguishes a mere "house" from a "home" is the consumer surplus we have in the latter. "Home" provides continuity, security, familiarity, and comfort for our most intimate and satisfying life experiences. The intimately bound ideas of home and family strike deep emotional chords in our culture. Since most people feel that these values cannot be reduced to dollars, people tend to be

especially sensitive when the use and enjoyment of the home is threatened.[\[90\]](#) In part, this reflects the importance of a homeowner's financial stake, which typically represents a substantial part of that homeowner's net worth. If the only concern were to protect financial investments, however, monetary compensation for any loss of market value would be acceptable. Part of zoning's appeal lies in the fact that it allows homeowners to protect *all* the value we place in a home, including the consumer surplus that lies above and beyond the market price of the home.

The failure of zoning's critics to account for the importance of "home" to the homeowner suggests that their critiques are based on an incomplete cost-accounting. But the notion of individuals' consumer surplus in their homes, by itself, is not sufficient to explain or justify zoning. An adequate account of zoning must also deal with the *collective* values zoning seeks to protect. Zoning is a device that protects a neighborhood from encroachments by land uses inconsistent with its character, regardless of the positive or negative effects of a proposed development on the market values of individual properties.

Neighborhoods are not just made up of individual parcels, but include collective resources comprising a neighborhood commons,[\[91\]](#) and the property rights of an urban neighborhood dweller typically consist both in specified rights in an individual dwelling and inchoate rights in a neighborhood commons. This commons consists of open-access (but use-restricted) communally-owned property, such as streets, sidewalks, parks, playgrounds, and libraries. It also includes restricted-access but communally-owned property, such as public schools, public recreational facilities, and public transportation facilities.

It further includes privately-owned "quasi-commons" to which the public generally is granted access, but with privately-imposed restrictions as to use, cost, and duration. These generally include restaurants, nightspots, theaters, groceries, and retail establishments.[\[92\]](#) It will include (risking the appearance of an oxymoron) "private commons," like churches, temples, private schools, political organizations, clubs, and fraternal and civic organizations. These are essentially private associations, but are characterized by some substantial degree of open access to members of the community.[\[93\]](#) Finally, the neighborhood commons will include other intangible qualities such as neighborhood ambiance, aesthetics, the physical environment (including air quality and noise), and relative degrees of anonymity or neighborliness.

These features together make up the "character" of a neighborhood. They are what give the neighborhood its distinctive flavor. A purchaser[\[94\]](#) of residential property in an urban neighborhood buys not only a particular parcel of real estate, but also a share in the neighborhood commons. Typically, differences in the neighborhood commons may be as crucial to a decision to purchase as differences in individual parcels.[\[95\]](#)

To some extent, differences in the neighborhood commons will be reflected in the market values of individual parcels.[\[96\]](#) If, for example, other things being equal, neighborhood A has better public schools and more desirable parks than neighborhood B, property in neighborhood A will have a higher market value than similar property in neighborhood B. But because different people value different features in a neighborhood, not all such neighborhood differences will be reflected in property values.

For many people, a high level of consumer surplus may attach to particular features of a neighborhood commons.<sup>[97]</sup> I may be particularly attached to my church, for example, or to a particular local club or political organization, or to a particular spot in a local park where I am accustomed to walk at sunset. These values are highly subjective and may not be widely shared by people who have never lived in the neighborhood, so they may add little or nothing to the market value of the property. Moreover, these resources are for the most part non-fungible and therefore irreplaceable. To me, enjoying the use of these resources is precisely what it means to live in my neighborhood. In addition to protecting the market value of my home and my consumer surplus in that particular piece of real estate, I will naturally want to protect those collective resources of my neighborhood that I care about most, whether they are reflected in the market value of my property or are part of my consumer surplus.<sup>[98]</sup> These values can be almost priceless, especially for long-term neighborhood residents. Like one's home, one's neighborhood may be centrally bound up in one's definition of self and sense of his or her place in the world.

Apart from consumer surplus, even those neighborhood features that are capitalized in market value come in different mixes from neighborhood to neighborhood. I may be more concerned about parks and less concerned about public transportation, and you vice-versa. While better parks and better public transportation may both make positive contributions to market values, I may prefer a neighborhood with good parks and mediocre public transportation, while you prefer a neighborhood with good public transportation and mediocre parks. Properties in the two neighborhoods may be similarly priced, but you and I will place entirely different values on the characteristics unique to each neighborhood.

Some neighborhood differences are simply inconsistent. For example, I might prefer a quiet, neighborly, low-density neighborhood of single-family homes, with access to parks and good neighborhood schools; you might prefer the faster pace, excitement and anonymity of a high-rise condominium in a high-density neighborhood featuring interesting restaurants, bistros, music venues, and trendy boutiques. Yet my house and your condo may have identical market values because some people are willing to pay the same price for my house as others are willing to pay for your condominium. In this example, the individual properties are themselves not interchangeable, but additional subjective value attaches to the features of the neighborhood that we each find desirable.

However, some of the same neighborhood features that add value to your property in your neighborhood might detract value from my property in my neighborhood. A hot new jazz club, for example, might be a welcome addition in your lively, trendy neighborhood, but would be a nuisance in my quiet neighborhood. To some extent, the spillover effects on your individual property are different; noise, traffic congestion, and heavy pedestrian traffic are presumably of less concern to you.

This example illustrates that *some* land uses are incompatible with the neighborhood commons that current property owners have come to rely on. It further illustrates that negative externalities are contextual. A land use that would have severe negative externalities in my neighborhood may be an amenity in your neighborhood.<sup>[99]</sup>

It is not always the case, however, that inconsistent uses will lower *market* values. Suppose my quiet single-family neighborhood is located within a few blocks of some successful high-rise developments. Absent some system of land-use control, a developer might acquire the previously single-family parcels adjacent to mine, and proceed to put up more high-rises. The value of my *house* may go down because of spillover effects from the new high-rise, but the value of my *land* may increase, as my property becomes attractive as a potential site for additional high-rise developments.<sup>[100]</sup> Under a market value based system, I would be entitled to no relief since my property is worth exactly what it was before. Yet under these circumstances many homeowners would feel aggrieved by this development. In part this is because the direct spillovers (e.g., noise and aesthetics) would interfere with the use and enjoyment of my home. To recoup that loss by selling my home would subject me to the additional cost and inconvenience of moving.<sup>[101]</sup> More importantly, however, my loss of consumer surplus in this particular home would go uncompensated.<sup>[102]</sup>

Additionally, my neighbors and I may be equally concerned about the effect of the new high-rise development on the neighborhood. The coming of the first high-rise means, at least initially, more intensive uses of the neighborhood commons (e.g., streets, sidewalks, on-street parking, public transportation facilities, etc.) which means that more people are competing for diminishing shares of fixed resources (e.g., on-street parking). Again, since land prices may rise, the result may be that I suffer no net financial loss.<sup>[103]</sup> But what I suffer now (in addition to my uncompensated loss of consumer surplus in my own home) is a loss of consumer surplus in my interest in the neighborhood commons. In short, the neighborhood is taking the first step toward becoming something other than the neighborhood where I chose to live. Although difficult to place in quantitative terms, the loss is great.

What's wrong with this? Well, nothing, I suppose, unless you were that homeowner who had been quite happy with your home and neighborhood but now find them to be no longer what they were. Of course you can move, but it may not be easy (and in some crucial respects is impossible) to replicate those features of your old home and neighborhood that made your life what it was.

Zoning is aimed at preventing, or at least limiting, precisely these kinds of changes in the use of property that are disruptive of a neighborhood's character because they are inconsistent with current uses of the neighborhood commons.<sup>[104]</sup> These include changes in density, as well as shifts from residential to commercial or industrial uses.<sup>[105]</sup>

Furthermore, inconsistent uses of neighborhood commons are not limited to residential neighborhoods. Seymour Toll argues that although advocates of New York's first zoning ordinance tried to justify it in terms of protecting property values and instituting comprehensive planning, the impetus to enact the ordinance came largely from the desire of Fifth Avenue retailers to protect themselves against incursions by garment manufacturers.<sup>[106]</sup> To be successful the retailers needed a particular kind of neighborhood commons, one with many high-quality retail establishments in close proximity to one another, with a sufficient critical mass to attract shoppers. This area also needed to be free from competing uses that would detract from the ambiance their affluent customers preferred.<sup>[107]</sup> Now it may well be that the encroaching garment manufacturers reduced the market value of retail properties along Fifth Avenue, but

equally plausible is that the demand for loft manufacturing space drove up the price of properties along Fifth Avenue. In either case the market value of property along Fifth Avenue was not really the central concern. Instead, the impetus for New York's original zoning ordinance came from a desire to maintain Fifth Avenue as a particular kind of neighborhood commons—one in which it was possible for carriage-trade retailers to conduct their business.[\[108\]](#)

This insight is implicit in the writing of Eric Steele, who concludes that zoning is only partially concerned with "aggregate welfare economics."[\[109\]](#) In a mature urban setting, Steele argues, zoning instead serves principally to "conserve viable [residential] communities."[\[110\]](#) While Steele is correct that zoning does function to preserve viable residential communities, this may actually *contribute to* aggregate welfare by allowing neighborhood residents to preserve their consumer surplus in their neighborhoods and in their individual homes.[\[111\]](#)

If zoning serves to protect not just market values but the consumer surplus of neighborhood residents in their homes and neighborhoods, then why isn't a liability rule a more efficient substitute? The answer is obvious: consumer surplus is notoriously difficult to measure.[\[112\]](#) Faced with that problem, homeowners' consumer surplus might simply be ignored, and they would only be compensated for losses of market value.

In that case, homeowners are forced to bear the full costs of lost consumer surplus, whatever that cost may be.[\[113\]](#) If consumer surpluses in our homes and neighborhoods are small, this may make little difference; but the converse is also true. First, where the surpluses are high, current neighborhood residents would be made to bear a substantial part of the cost of new developments. Second, many unzoned neighborhoods would become less stable. Home owners, fearing potential risks, would have reduced incentives to invest in their homes and neighborhoods and greater incentives to move to areas where they perceive the risks of unwelcome development to be lower.[\[114\]](#)

Another possibility would be to rely upon a liability rule, while also adding some fixed amount or percentage to the damages award to account for lost consumer surplus.[\[115\]](#) Fixed damage schedules are likely to be highly inaccurate, however. Some homeowners would then be severely undercompensated for their loss of consumer surplus, and others dramatically overcompensated.[\[116\]](#)

Calabresi suggests that in such circumstances where it is simply too costly (or impossible) to calculate the subjective value of a loss, "specific deterrence" (either a property rule or an inalienability rule) may be justified.[\[117\]](#) Since the true costs are unascertainable there is no way to decide how to allocate them fairly or efficiently. In effect, we must decide whether to err on the side of developers (by adopting a rule that ignores or discounts homeowners' consumer surplus) or on the side of homeowners (by adopting a rule that protects their consumer surplus). If, as I have argued, consumer surplus in one's home and neighborhood is likely to be quite substantial, a "specific deterrence" rule may be the preferable approach, on grounds both of fairness and efficiency.[\[118\]](#)

But what kind of "specific deterrence" approach should be adopted? In addressing this question we are once again confronted with zoning's ambiguity: while zoning appears facially similar to

what Calabresi and Melamed call an inalienability rule it appears to function in practice like something more akin to a property rule. The municipality (theoretically acting on behalf of neighborhood residents) may stop a proposed development inconsistent with the zoning scheme, and the developer may "buy" the development rights through various kinds of concessions.<sup>[119]</sup>

Some critics have suggested that zoning ought to be refashioned into something more explicitly resembling a property rule in the Calabresian sense.<sup>[120]</sup> These critics propose that zoning ought to be "freely alienable," that is, that neighborhood residents should be allowed to sell zoning rights for cash, in-kind compensation, or what ever equitable trade-off is deemed appropriate.<sup>[121]</sup> In addition to the high administrative costs of such a system,<sup>[122]</sup> it is unsound on other grounds. Compensating individuals in cash for their willingness to sacrifice community resources may be utility-maximizing in the short run. In the long run it reinforces norms of individual gain at the expense of shared community resources, which ultimately may be destructive of the sense of community that zoning aims to protect. More fundamentally, such a system is deeply contrary to our most cherished democratic and legal traditions.<sup>[123]</sup> For these reasons, such a system seems to be inadvisable.

This article has argued that, although ultimately we can never be certain, zoning may be welfare-maximizing.<sup>[124]</sup> Since we must decide amidst uncertainty, we should choose the course that appears most likely to simultaneously protect the welfare of current neighborhood residents and reinforce community values, resources and institutions (which themselves contribute to the welfare of current and future neighborhood residents). We should also recognize that the limits of our knowledge mean that our initial choice of zoning regulations may sometimes be wrong. Sometimes a neighborhood may be willing to accept a proposed development not permitted by the regulations in exchange for other benefits. By limiting the terms of that bargain to community benefits, however, we retain community-reinforcing norms.<sup>[125]</sup> Zoning thus can be seen as a peculiar kind of property rule—one in which developers can in limited ways "buy" the rights to develop contrary to the zoning entitlement, but only by compensating the community for its loss.

In this idealized model zoning gives current neighborhood residents a kind of "right of prior appropriation" over the neighborhood commons. This right trumps the right of other property owners to use their land in ways that interfere with, or are inconsistent with, current uses of the neighborhood commons. Developments may proceed as long as they are either consistent with current uses of the neighborhood commons, or in ways the neighborhood has agreed in advance (through the political process) to allow. This protects the expectations of neighborhood residents. Moreover, neighborhood residents have the right to change course and to agree to modify the rules to permit developments facially inconsistent with the presumptive prohibitions. But the only compensation that may be offered or accepted for such exceptions is compensation that benefits the community as a whole, i.e., that preserves a healthy and vibrant commons.

### *B. Normative Implications*

This analysis has several further normative implications. First, zoning should not be understood solely as a means of protecting property market values. Instead, it protects values that may be only partially captured in market values. Second, it suggests that zoning should not be

understood principally as a tool of rational/scientific urban planning. Indeed, the visions of planning bureaucrats may sometimes stand in sharp contrast to the values of neighborhood residents, who seek to protect the neighborhood in which they have chosen to live. This analysis further suggests that rather than seeking to impose a rigid uniformity over all residential neighborhoods, zoning should seek to accommodate diversity among neighborhoods.

Not all neighborhoods are alike, nor should they be. The whole point of urban land use zoning is to allow people to live in the kind of neighborhood they want. Imposed uniformity defeats that goal. Some residential neighborhoods, for example, may be more tolerant of certain kinds of, or higher concentrations of, commercial activities than others.<sup>[126]</sup> Thus a zoning scheme should be designed with a sensitivity toward the neighborhood context, taking into account the particular needs, interests, and desires of the residents of particular neighborhoods.<sup>[127]</sup>

A zoning scheme also should not attempt to freeze a neighborhood in time. Despite the apparent conservatism inherent in the notion of "protecting" a neighborhood against inconsistent changes in land uses, this does not imply that all changes are unwelcome.<sup>[128]</sup> For instance, a new restaurant may be entirely consistent with neighborhood residents' vision of the kind of neighborhood in which they have chosen to live, while a new liquor store may be inconsistent with that vision.<sup>[129]</sup> A properly designed zoning scheme should attempt to predict, from consultation with current neighborhood residents, what kinds of changes would be welcome in a particular neighborhood and accommodate those changes while presumptively (though not conclusively) ruling out other changes.

Such a prediction is bound to be at best only an estimation for several reasons. First, there are obvious epistemic limitations. No clear, objective measures of the preferences of neighborhood residents exist, and in the absence of detailed information about particular, concrete choices, residents themselves are likely to be unable to articulate their preferences. Perhaps the best evidence of these preferences is what currently exists in the neighborhood, which is why it seems eminently sensible that zoning should have started by simply incorporating the status quo of land uses into regulations.<sup>[130]</sup>

Second, neighborhood values can change over time. This can be the result of such factors as the change of individual interests and points of view, the fluctuation in attractiveness of particular kinds of residences and businesses due to market conditions, and the influx of new residents, as well as the departure of old residents. Third, at some point a proposed development of an unanticipated kind may come along that is seen by neighborhood residents as consistent with the vision they had of their neighborhood all along, although the use falls outside what is permitted under the current zoning scheme.<sup>[131]</sup> Fourth, it is possible that a proposed development prohibited under the existing zoning scheme could be so beneficial to the neighborhood that it would cause neighborhood residents to change their vision of what their neighborhood should be. Current neighborhood residents should not be rigidly bound by the preferences of *past* generations.<sup>[132]</sup>

This underscores the need for flexibility in zoning.<sup>[133]</sup> Zoning should accommodate changes over time, through mechanisms that encourage individual variances and amendments *when*

*supported by neighborhood residents*, as well as periodic comprehensive updates of the zoning scheme to reflect larger-scale shifts in neighborhood values.

### *C. Zoning And Bargaining*

A zoning scheme, because it is inherently rule-like, may appear fundamentally incompatible with this kind of fine-grained contextual sensitivity to neighborhood preferences and flexible accommodation of changes over time. Rather than conceiving of zoning as consisting of legislative-type rules, we should understand zoning as establishing mere presumptions or baseline rules that precipitate and provide a convenient substantive starting point for negotiations between developers and representatives of neighborhood inter ests.[\[134\]](#)

In a Coasean world, free of transaction costs, such bargaining would take place even in the absence of a zoning scheme.[\[135\]](#) But in our world such bargaining is unlikely because the transaction costs, and more particularly the problems of coordination among dozens or hundreds of neighborhood residents and property owners who would be affected by a proposed development, are simply too great. Zoning, however, can actually facilitate such bargaining and reduce information costs (an important part of transaction costs) in several ways.

Foremost, zoning establishes brightline rules under which some categories of land uses are automatically permitted. As a practical matter, bargaining is therefore unlikely to be necessary in these cases. The Coase theorem, of course, tells us that in the absence of transaction costs, bargaining to efficient outcomes will take place whatever the initial assignment of property entitlements. The transaction costs involved in organizing neighbors to oppose a proposed development that meets current zoning requirements, however, are sufficiently high that in most cases the developer can proceed with reasonable confidence. In these cases, zoning acts as a positive short-hand signal of the community's likely acceptance of the proposed development.

Secondly, zoning establishes categories of proposed land uses which are presumptively prohibited, signaling to the developer that the proposed development must win approval of the municipality, acting as the neighborhood's representative, in order to proceed.[\[136\]](#) The developer will then bargain for such approval (so long as the developer expects the costs of such bargaining, including both transaction costs and the costs of any additional concessions likely to be required to win approval, will be less than the benefits to the developer of the proposed development).[\[137\]](#)

Third, by empowering an identifiable party to grant variances, amendments, and/or wholesale revisions of the zoning scheme, the zoning ordinance identifies a single party with whom the developer can initiate bargaining without the need to identify and bargain individually with all potentially affected homeowners. This promotes efficiency of both time and money.

Fourth, by placing bargaining power directly in the hands of elected officials (or, alternatively, in the hands of persons accountable to elected officials) zoning creates political incentives for the neighborhood's representative to bargain on the neighborhood's behalf.[\[138\]](#)

Finally, by initiating such bargaining, zoning opens channels for the transfer of information between the developer and the neighborhood. The neighborhood acquires the necessary information about the proposed development needed to gauge whether the proposed development is consistent with neighborhood interests, while the developer learns more about the needs and interests of the neighborhood and can gauge whether, given the costs and benefits, it is sensible to proceed.<sup>[139]</sup> Thus, zoning can actually reduce transaction costs, by supplying and channeling information useful to both community residents and potential developers.<sup>[140]</sup>

#### *D. Zoning As A Participatory Democracy*

The core functions of zoning can best be served if zoning is decentralized<sup>[141]</sup> and participatory.<sup>[142]</sup> A decentralized and participatory neighborhood zoning process, which gives neighborhood residents a direct voice in zoning decisions affecting their neighborhood, is critical for several reasons. First, neighborhood residents, not planners or elected officials, are in the best position to evaluate their own consumer surplus in their homes and in their neighborhoods. To the extent zoning is designed to protect these values, the most effective way to elicit that information is through residents' participation in neighborhood zoning decisions.<sup>[143]</sup> Second, decentralized and participatory zoning is essential to shift zoning decision-making out of the "interest group" paradigm—in which neighborhood residents are just one of a number of competing interest groups, and a weak and disorganized one at that—into something more akin to the "median voter" model in which decision-making more clearly reflects neighborhood preferences.<sup>[144]</sup> Third, as I shall argue below, citizen participation is essential to combat bribery and the corrupting influence of political contributions by developer interests.

It must be mentioned that there is also a cost associated with increased citizen participation. As Fischel points out, citizen participation involves large numbers of people in some level of the negotiation process, making bargaining cumbersome and difficult.<sup>[145]</sup> This is partly a function of sheer numbers; but it also reflects the fact that idiosyncratic and self-seeking voices ("cranks") will have an opportunity to disrupt the bargaining.<sup>[146]</sup> Thus, we may expect that, other things being equal, the transaction costs of bargaining will be higher with more citizen participation.

Perhaps the best that can be said in response is that if, as I have suggested, citizen participation is the only way to elicit the true preferences of neighborhood residents, there can be no such thing as truly "efficient" decision-making in local land-use decisions. From the point of view of a developer, a well-placed bribe or campaign contribution may appear to be a more efficient transaction than a lengthy and messy process of neighborhood hearings and complex public negotiations. Yet as Fischel points out, from a utility-maximizing standpoint such a solution is not likely to be efficient at all (and certainly not equitable) because it ignores the relevant preferences of neighborhood residents who will be affected by the development.<sup>[147]</sup> Thus, the high transaction costs of community participation appear to be the price to be paid to ensure that the interests of neighborhood residents are adequately taken into account.

Just how this decentralization and participation should be accomplished is a more difficult question. Elections are too costly and cumbersome a process.<sup>[148]</sup> While Nelson proposes turning the zoning power over to formally constituted neighborhood associations, this is probably too extreme a solution, in part because it too is costly and difficult to administer.<sup>[149]</sup>

In addition, because it is difficult to sustain high levels of community participation in such formal structures, they are subject to capture by cranks.

To some extent this is an inherent feature of participatory politics.<sup>[150]</sup> But in my view a more appropriate balance can be achieved by leaving ultimate decision-making power in the hands of an official elected to represent the neighborhood.<sup>[151]</sup> This official must then sort out the cranks from the truly representative voices. The existence of this type of official can create more opportunities for democratic participation through required public notice and neighborhood hearings,<sup>[152]</sup> and through ongoing structures of community representation in neighborhood zoning negotiations and decision-making, albeit in an advisory capacity.<sup>[153]</sup>

### *E. Corruption And Favoritism In Zoning*

The problems of corruption and favoritism, which were identified in Part III, must be addressed in any normative account of zoning. To some extent, these are problems associated with government generally,<sup>[154]</sup> and especially local government.<sup>[155]</sup> If local government does tend toward corruption, it may appear sensible at first glance to strip local government of the zoning power (and any other powers it can do without), especially if an alternative regulatory scheme can accomplish the same ends with a lower risk of corruption.<sup>[156]</sup> When corruption and favoritism crop up periodically in other areas of local government, the problem usually brings about a call for prosecution of the individual offenders, institutional reforms, and more effective policing, not abolition of the police department, the judiciary, the building code, or whatever institution may have committed the offense. Is zoning somehow different? The critics might suggest that corruption is so prevalent in zoning that the institution simply cannot be salvaged. Further, they contend that such large financial interests are at stake in zoning decisions that corruption is particularly tempting.<sup>[157]</sup>

I submit that zoning, while a particularly important power of local government, is not so different from other powers and institutions of local government. We should be concerned about corruption and work to eradicate it. Our response to corruption in other areas, in the form of swift and tough prosecution of offenders, more effective policing, institutional safeguards, and requirements of openness in transactions, should apply here as well.<sup>[158]</sup> Zoning may also require special policing, for example, through a special state agency with broad investigatory powers, established solely to monitor and investigate zoning corruption cases.

Ultimately, as with other avenues of municipal corruption, what matters most is effective policing from the bottom up through effective participatory democracy. As Steele has documented, the Chicago suburb of Evanston, with its tradition of citizen participation, has not experienced graft and influence-peddling in the zoning process.<sup>[159]</sup> It would be a mistake to assume that this is purely a function of the size of the municipality or the result of suburban homogeneity. Other municipalities in the Chicago metropolitan area of the same size or even smaller are notoriously corrupt,<sup>[160]</sup> and Evanston is one of the most diverse communities in the metropolitan area.<sup>[161]</sup> But on the whole, graft becomes impossible (or at least ineffective, and therefore not worthwhile for the developer) under the watchful eyes of the citizenry and its active involvement in the zoning process.<sup>[162]</sup>

Ironically, just around the turn of the last century a great wave of Progressive Era reform swept over municipal politics offering centralization and professionalization of big-city government as the solution to parochialism and petty graft. But centralization came at the cost of removing citizens in the big cities from active involvement in the day-to-day workings of their municipal government, and removing public officials from the watchful eyes of the citizenry, thus increasingly subject to the influence of organized interests.<sup>[163]</sup> Today a new wave of reform is needed, at least in the processes of zoning but perhaps in other aspects of municipal government as well. This time, I suggest, the reform should aim at increasing citizen participation.

## V. CONCLUSION

This article has argued that, by limiting their analyses of zoning costs and benefits to monetizable values, both defenders and critics of zoning have substantially missed the mark. While zoning does have significant effects on the market values of individual parcels, and larger-scale economic consequences as well, a complete cost accounting must also consider zoning's role in protecting crucial, non-monetizable values. These include each homeowner's surplus in his or her home, as well as neighborhood residents' interest in preserving the unique set of common neighborhood resources—the neighborhood commons—upon which they rely. Far from being trivial, or mere ancillary values, "home" and "neighborhood" are central components of our identities. Precisely because these values are notoriously insusceptible to objective valuation, we afford them property rule protection in the form of zoning laws.

Thus conceived as a means of protecting the legitimate interests of current neighborhood residents, zoning regulations should be flexible to change over time, sensitive to unique neighborhood concerns and contexts, and based upon a participatory process. Citizen participation both gives voice to the interests of current neighborhood residents and provides the most effective safeguard against corruption of the zoning process.