Chapter Two

Markets, Politics, and Planning in Land Use Law: An Initial Look at Relative Institutional Competence

The central issue of land use policy is how power over physical space should be apportioned between private landowners and government regulators. Few observers approach this issue free of ideological baggage. Stalwarts of public regulation regard government as an essential check on the environmental damage that self-interested landowners might cause if left alone; in addition, many regard the process of civic engagement as a valuable end in itself. Stalwarts of markets, by contrast, regard public regulation as a coercive system that commonly makes urban outcomes worse, not better. There is, however, overwhelming evidence that neither government planners nor market forces are universally trustworthy. This suggests that land use conflicts may be best resolved through an amalgam of institutional arrangements — markets, politics, hierarchies, and various mixtures thereof. In short, land use law is an ideal context for appraising relative institutional competence.

This chapter begins by drawing on economic analysis to explore how private landowners themselves might succeed (or fail) in controlling spillover effects from land use activities. Much neighborly interaction occurs largely beyond the shadow of the legal system. For example, landowners may employ gossip, status rewards, and other informal social devices to enforce norms of neighborliness. Because this is a legal casebook, however, the pertinent issue is how law might be used to facilitate bottom-up systems of interneighbor coordination. While we introduce this important topic here, we defer examination of the legal details of decentralized systems of land use coordination to Chapter 6. There we treat nuisance law (private law rights that a neighbor may have against a landowner's annoyance) and covenant law (interneighbor contracts). Public officials such as judges and legislators are intimately involved in these private law systems, but largely in the role of enabling private coordination, not in the role of prescribing or proscribing land uses.

What happens when private coordination of neighbors fails? The middle portion of this chapter provides an overview of a rival system of land use control — local government. In the main, the American system of local government devolves power to tens of thousands of relatively small local governments that, in turn, devolve power over land to lay boards usually controlled by neighbors and homeowners. How efficient and fair is this system of control? This chapter provides an overview of arguments and evidence that these local governments do a good job of

representing homeowning neighbors or others with immobile stakes in the jurisdiction, but not necessarily a great job of representing renters, low-income households, or nonresidents who might be affected by the local government's decisions. Building on this account of local politics, this chapter provides an overview of the zoning ordinance — how it has changed since it first became widespread during the 1920s and how its interpretation might be affected by considerations of policy or general norms of law.

Finally, this chapter concludes with an analysis of planning expertise as an alternative mechanism by which land use decisions could be made. Local governments frequently have planning departments staffed by full-time employees with expertise in land use planning. These planners often take the lead role in drafting a prescriptive and predictive comprehensive plan predicting how the jurisdiction's population and economy will change in the future and recommending regulations and infrastructure to respond to these changes. State law sometimes requires local governments to prepare such plans and may even require zoning and other land use regulations to be consistent with the plan that is approved by the local legislative body. Should expert planning rather than either land markets or local politics decide land use disputes? The materials at the end of this chapter explore the nature of the planning process, describe the legal framework governing the preparation of a comprehensive plan, and present both defenses and critiques of expert coordination of land development, contrasting it with local politics and land markets as alternatives for allocating uses of land.

A. *Economic Analysis of Land Use Conflicts*

Economics provides a theory of the purposive behavior of private landowners, the primary targets of land use regulatory systems. Economists classically assume that a person is self-interested and makes rational choices among available opportunities. See Jack Hirshleifer, The Expanding Domain of Economics, 75 Am. Econ. Rev. 53 (Dec. 1985) (providing a concise description of the classical economic model and its limitations). Beginning in the 1980s, economists began drawing on psychology, sociology, and other disciplines to enhance the realism of the classical paradigm. See, e.g., Christine Jolls, Cass R. Sunstein & Richard Thaler, A Behavioral Approach to Law and Economics, 50 Stan. L. Rev. 1471 (1998) (stressing the limits of individuals' cognitive capacities, self-control, and selfishness); Behavioral Law and Economics (Cass R. Sunstein ed., 2000). Self-interestedness, although softened by kinship altruism, reciprocal altruism, and the like, nevertheless remains a core attribute of *homo economicus*.

1. *The Potential of Decentralized Decisionmaking*

When can neighbors succeed in coordinating the uses of their land without the aid of a central planner? By analogy, to what extent can a civilization create a language, a culture, or an economy without top-down direction?

Charles E. Lindblom, The Intelligence of Democracy

3–6 (1965)[1]

A simple idea is elaborated in this book: that people can coordinate with each other without anyone's coordinating them, without a dominant common purpose and without rules that fully prescribe their relations to each other. For example, any small number of people can through a series of two-person communications arrange a meeting of them all; no central management is required, nor need they all have originally wanted to organize or attend the meeting. When two masses of pedestrians cross an intersection against each other they will slip through each other, each pedestrian making such threatening, adaptive, or deferential moves as will permit him to cross, despite the number of bodies apparently in his way. Similarly, the representatives of a dozen unions and the management of an enterprise can coordinate with each other on wages and working conditions through negotiation.

On an immensely larger scale coordination also is often achieved through mutual adjustment of persons not ordered by rule, central management, or dominant common purpose. An American consumer of coffee and a Brazilian supplier are so coordinated. The market mechanism is, both within many countries and among them, a large-scale, highly developed process for coordinating millions of economically interdependent persons without their being deliberately coordinated by a central coordinator, without rules that assign to each person his position relative to all others, and without a dominant common purpose. Market coordination is powered by diverse self-interests. Scholars can hardly fail to note the possibilities of coordination through mutual adjustment of partisans in the market, for a long tradition of theory has produced an increasingly refined explanation of the process.

Development of common law may be another example. The law as laid down by different judges is coordinated, at least in part if not entirely, because the judges have an eye on each other. They are, of course, bound greatly by rules, but on those points at which new law is required, one cannot wholly explain its coordination as no more than a result of rule observance. As to whether judges hold to a dominant purpose or, on the other hand, to diverse purposes hidden under abstract language is a matter of dispute. In any case common-law development, like the other examples, suggests possibilities for coordination through mutual adjustment.

Similarly, to speak a language is to follow rules. But innovations in language — usages that depart from existing rules — are coordinated by mutual adjustment among persons who have no necessary common interest, not even in the improvement of the language. Each person on his own reacts in one way or another to an innovation; the result is that the innovation either fails or is given an agreed meaning or use. It has then been made a coordinate part of a complex system for communication.

The first striking fact about this simple idea is that although significant examples of coordination through mutual adjustment are easy to find and coordination through mutual adjustment is the subject of a body of theory in economics, many informed persons either in effect deny that it is possible or treat it as of little consequence. . . .

The pedestrian of our example and the coffee consumer or supplier play their coordinating roles in mutual adjustment without being aware of it — that is, they do not ordinarily see their problem as one of coordination and, in any case, do not deliberately discharge a coordinating function. What coordination is achieved is not in their minds,

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nor governed by their minds' concern with coordination. Yet William Yandell Elliott has written, "If a government is ever to be coordinated, it must be coordinated in the minds of the people who authorize it and those who operate it, from the top to the bottom of the structure."[3] The statement comes close to denying the fact of coordination through mutual adjustment — at least in government.

Reinhold Niebuhr has said:

> Human society therefore requires a conscious control and manipulation of the various equilibria which exist in it. There must be an organizing centre within a given field of social vitalities. This centre must arbitrate conflicts from a more impartial perspective than is available to any party of a given conflict. . . .[4]

It appears that for some reason, despite the obvious usefulness of mutual adjustment elsewhere, it is its coordinating role in politics that is doubted — doubted even in a pluralist society with a pluralist theme in much of its political philosophy and science. . . .

Note on Coordination from Below

Witold Rybczynski, City Life 90 (1995), offers a musical metaphor for the decentralized evolution of a town:

> [The layout of Woodstock, Vermont, reveals] a subtle sort of urban design, but it is design, design that proceeds not from a predetermined master plan, but from the process of building itself. A rough framework is established, with individual builders adapting as they come along. If Parisian planning in the grand manner can be likened to carefully scored symphonic music, the New England town is like jazz. Admittedly, it's a very restrained jazz — pianist Bill Evans, say, not Fats Waller. But like jazz, it involves improvisation, and as in jazz, this does not mean that the result is accidental or that there are no rules.

2. *The Possibility of Coasian Bargaining*

An activity on one site may affect the utility of neighboring sites. A self-interested land user might fail to take these externalities into account. The classic work on how the presence of externalities may prevent competitive markets from achieving efficiency in resource allocation is A.C. Pigou, The Economics of Welfare (4th ed. 1932). Otto A. Davis, Economic Elements in Municipal Zoning Decisions, 39 Land Econ. 375 (1963), is an early application of the theory to land use issues.

Pigou and other classical economists drew a distinction between external costs and external benefits. If uninternalized, either type can lead to inefficiency — on the one hand, too many bad uses, and on the other hand, too few good ones. (The viability of this distinction between negative and positive externalities is explored in conjunction with nuisance law at pp. 000.)

3. William Yandell Elliott, United States Foreign Policy, a report of a study group for the Woodrow Wilson Foundation (New York, Columbia University Press, 1952), p. 66.

4. Reinhold Niebuhr, The Nature and Destiny of Man (New York, Scribners, 1949) II, p. 266.

The Pigovian view of externalities had to be rethought after the appearance of Ronald Coase's classic article, The Problem of Social Cost, 3 J.L. & Econ. 1 (1960). In brief, Coase argues that, in a world of costless market transactions, there would be no externalities because any outsiders affected by a land use activity would bring home those effects by, for example, offering to pay the land user to alter the activity. Coase's article soon spawned a rich literature, much of it emphasizing the implications of the fact that transaction costs in fact are positive.

Neil K. Komesar, Housing, Zoning, and the Public Interest

in Burton A. Weisbrod et al., Public Interest Law: An Economic and Institutional Analysis 218, 219–21 (1978)

. . . Consider a tract of land which contains nine five-acre parcels of the form set out in Figure 2-1.

The parcels are lettered to indicate their owners. Assume now that E wishes to erect five high-rise units each containing twenty apartments; that each of his eight neighbors would prefer that E build only single family houses on one acre plots; that each of the neighbors values the less dense use of E's land by $1,000 (that is, each neighbor would be willing to pay E that sum if E would promise to build only five single-family homes); and that E in turn would gain $6,400 from the high-rise development relative to the less dense use.

The total loss to the neighbors from E's proposed land use, $8,000, exceeds the gain to E, $6,400. But there is still reason to believe that E would build the apartments. There are two means by which "external" costs — external to E's decision — may be internalized by E; that is, included by E in his own cost-benefit analysis. First, E may gain pleasure from benefiting others and may therefore include all or part of his neighbors' losses as his own. In the present instance, if E "felt" more than $6,400 worth of the neighbors' losses, he would not build the apartment houses. Second, the neighbors might bring their losses to E's attention by offering him payment to desist from building the apartments. Thus, if E

A	B	C
D	E	F
G	H	I

FIGURE 2-1

were offered any amount in excess of $6,400, his own cost-benefit analysis would favor the less dense housing choice — single family homes. In legal terms, he would sell his neighbors an interest in his land — a covenant restricting his land use.

The question becomes how or whether E would be made to consider his neighbors' losses. In the transaction-costless world of Ronald Coase, this removal of the potential externality would occur instantaneously. The neighbors would compensate E an amount ranging from $6,400 to $8,000 in exchange for his promise to restrict his land use to five single family houses. Without the extreme Coase assumptions, however, it remains uncertain whether the neighbors will succeed in purchasing the land use restriction from E. There are eight neighbors, none of whom is threatened with sufficient loss to justify the minimum restriction price of $6,400. Each of the neighbors would prefer that another set of neighbors purchase the restriction, producing a "free rider" situation.[6] There may be substantial costs involved in organizing the eight neighbors, determining and levying their share, and bargaining with E, in addition to the incidental costs for lawyers, filings, and so on. If these costs are sufficiently high to block the purchase of the land use restriction, a potential private market failure is present. It is a "failure" because, despite the fact that the "social" or aggregate loss from the proposed apartments exceeds the "social" or aggregate benefits, the private market would still produce the less desirable apartment use. The failure is "potential" since it remains to be seen whether there is an alternative solution from either the public or the voluntary sector that will produce the restriction at costs that are less than the costs of unrestricted land use.[7]

There are several alternative public solutions. First, the neighbors might seek a judicial determination that E's multiple dwellings would constitute a "nuisance" — public or private — and therefore should be enjoined. Nuisance actions are sometimes employed to stop such externalities as smoke or particle pollution, but the nuisance approach generally is not employed in connection with residential use.

Second, the neighbors might attempt to prevail on a legislative or administrative authority to employ an eminent domain power, which could "take" the apartment building use from E and pay E the value of the lost use, an amount determined by the authority. If the nine tracts were a political and taxing jurisdiction (an assumption soon employed more extensively), if each neighbor were in a similar tax position, and if the "correct" value were determined, the eminent domain solution would closely approximate the "Coase" or private solution.[9] The public entity, with its power to impose costs (taxation) and perhaps its economies in factual investigation, would be substituted for private bargaining at presumably lower transaction costs. While the "compensation" scheme might have some

6. If any seven neighbors — for example B, C, D, F, G, H, and I — each expended slightly less than $925 each, they could in combination exceed the minimum price necessary to restrict E without the inclusion of the eighth, A. A would be particularly fortunate if this occurred; he would be saved from E's undesired land use without any expenditure on his part. Here A would be a "free rider." If the process worked just as described, it might produce an unfair distribution of the benefits of the restriction, but it would at least produce the socially preferred land-use pattern. However, each of the neighbors would like to be in A's position and, therefore, each has an incentive to wait to see if the others will purchase the restriction. If each waits, none will act, the restriction will not be purchased, and the socially preferred land-use pattern will not be observed. This ramification of the free rider problem is a form of "prisoners' dilemma" (see note 14).

7. In our hypothetical, the social value of the removal would be $1,600. Presumably, the costs of the public solution would have to be less than $1,600 to justify such a solution.

9. The two solutions would be identical if no tax were imposed on E, *qua* taxpayer, in the process of raising the funds to compensate E, *qua* landowner.

marginal function in the housing restriction case, there are several reasons to believe it will be far less frequently used than the third form of public solution: zoning.[10] Since zoning is the most widely used — and the most controversial — public solution, we will discuss it in some detail.

The Zoning Process

The zoning process controls land use without attempting direct compensation for any losses imposed by the controls. We will examine several models of the zoning process and the general form of land use restrictions that each is likely to produce. To aid in the analysis a few facts will be added to the hypothetical. Assume that in addition to preferring one-acre single-family homes to multi-unit dwellings, each of the neighbors would prefer vacant land (open space with the natural setting of trees, flowers, and the animals of the forest) to one-acre single-family homes; that each neighbor would receive benefits from such a use of $500; and that E would lose $6,000 if such a restriction were imposed.[11]

The Omniscient Dictator: Allocative Efficiency Criteria. Assume first that land-use decisions are made by a dictator who has the ability to determine costlessly the relative values of many land-use arrangements. He is hired by the 45-acre jurisdiction defined by our nine tracts of land and instructed to seek the most efficient allocation of resources. In particular, he is told to impose land-use restrictions only where the aggregate benefits of the restriction to the citizens of the community exceed the aggregate losses. Given the hypothetical, he would presumably impose the one-acre, single-family restriction, but refuse the more stringent "open space" restriction.[12]

The Majoritarian Model. Assume that the jurisdiction puts each zoning decision to a public vote and the restriction is imposed if a majority (over 50 percent) of the voters favor it. Given the hypothetical, it is quite likely that the more stringent open space restriction would be imposed. There are eight voters who are benefited by the open space restriction and only one who is harmed. The fact that E's harm is greater than the neighbors' benefit is not determinative. The outcome described assumes that E is unable to purchase the votes of at least four of his neighbors, and that the neighbors do not view the vote as a precedent that can produce a future decision of sufficient adversity to them. The presence or absence of

10. One important reason lies in the costs of the compensation scheme — the administrative costs, not the transfer payment. Where a complex land-use regulation is involved, it is difficult to assess the value of the loss and to separate real from illusory claims. In an important sense, the reluctance of courts to declare losses associated with governmental activity as "property" losses and therefore compensable under the Fifth or Fourteenth Amendments of the U.S. Constitution probably lies in a sense of the complexity of assessing the loss. For a similar treatment, see Frank I. Michelman, Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165–1258 (1968).

A second reason for the preference of the "zoning" over the "eminent domain" approach stems from the "majoritarian" bias discussed subsequently. Even if the administrative costs associated with compensation were zero, the majority, which may make the decision, may prefer to see a distribution of the benefits and costs of the public program that is favorable to them. Here it is the transfer, not the administrative costs, that controls the decision. Where the courts determine that such a legislative process indeed took place, the courts are likely to override the legislative decision, because it produces a non-cost-justified, unfair distribution of costs and benefits. See, for example, Vernon Park Realty v. City of Mount Vernon, 121 N.E.2d 517 (N.Y. 1954).

11. It should be emphasized that the restriction to single-family use (over open space) and the restriction to multi-family use (over single-family) are not overlapping, but rather are cumulative. Thus, the loss to E of a restriction to open space is the sum of the loss from the restriction from multi-family to single-family ($6,400) *relative to multi-family use* and the loss from the restriction from single-family to open space ($6,000) — $12,400 in total

12. As seen previously, the restriction from multi-family to single-family has a net "social" benefit of $1,600 ($8,000–$6,400). The restriction from single-family to open space would have a net "social" loss of $2,000 ($4,000–$6,000) and therefore would not be imposed.

laws against vote selling, the size of transaction costs involved in bargaining for and purchasing a sufficient number of votes, and the tastes of the neighbors are all factors that determine the stability of the conclusion. It is sufficient, for the present, to note that it is possible and even substantially probable that the majoritarian system would have the bias suggested.

The Influence Model. Assume that the decision is again made by a dictator, but not an omniscient one. The dictator in fact has none of the information necessary for his land-use decision. He bases each decision solely on the arguments of the interested parties. Assume further that the effectiveness of the argument is a function of the expenditures by the interested parties on investigators, lawyers, and economists, and that there are positive economies of scale in the production of effective argument.

Given the hypothetical, it is now possible that no restriction will be imposed. To the extent that the costs of organization keep the neighbors from pooling their efforts, the information they produce about the single-family house restriction may be less than that produced by E, despite the greater total amount at stake for the neighbors. This would be so because they would duplicate efforts and because each would be faced with the relatively high cost of small scale. In addition, the "free rider" and "prisoner dilemma" problems may lead each neighbor to await the efforts of the others, with the result that the neighbors will produce little or no expenditure to affect the land-use decision.[14]

Note on the Coase Theorem and Bargaining Among Neighbors

1. *The relevance of the allocation of property rights.* In The Problem of Social Cost, Coase asserts that the shifting of legal entitlements from one party to another does not affect the allocation of resources as long as transaction costs are zero. An extension of Komesar's example helps to illustrate Coase's theorem. Assume first that E has the right to build multifamily structures. If bargaining were costless, Komesar shows that the neighbors would band together to purchase a restrictive covenant forbidding multifamily structures on E's land. The neighbors would be willing to bid up to $8,000 to purchase the covenant, and E would insist on a payment of at least $6,400 (his valuation of multifamily use rights); the ultimate sales price would lie between those two figures. Now assume that the law is changed so as to entitle each of the neighbors to enjoin E's construction of apartments. Coase asserts that the result would still be that no apartments would be built. Although E would offer up to $6,400 to purchase the neighbors' rights, they would insist on at least $8,000 and therefore no deal would be struck.

In Komesar's example, E's land would be most efficiently used for single-family dwellings. (Efficient, that is, according to Kaldor-Hicks criteria, explained at page 000.) If use of the land were to be further restricted to open space, that restriction would harm E by $6,000 but help his neighbors by an aggregate of only $4,000. How would Coase argue that (given his assumptions) single-family houses would be built on E's land regardless of whether (a) E had the right to build those houses; or (b) (the less obvious case) the eight neighbors each had the right to enjoin house construction on E's land?

2. *Wealth effects.* Economists now agree that Coase failed to observe that shifts in legal entitlements, by altering the wealth of affected parties, may influence how much the

14. The term "prisoners' dilemma" arose from a case in game theory where two players must collude for rational benefit, but because of lack of knowledge, each player will perform a less-than-optimal action that will result in less gain than could have been obtained by collusion. The term itself came from an application of the theory to the questioning of suspects in a crime. For a discussion of an application of the "prisoners' dilemma" in the area of land use and urban renewal see Otto A. Davis & Andrew B. Whinston, The Economics of Urban Renewal, 26 L. & Contemp. Prob. 105–112 (1961). Its relationship to free rider problems is pointed out in note 6.

parties value particular entitlements. For example, suppose that E's eight neighbors initially each had the right to enjoin construction of multifamily units on E's land. Assume Komesar is correct when he states that each would insist on being paid at least $1,000 before selling that right to E. Now suppose that these entitlements were shifted to E by operation of law without compensation being paid to the neighbors. This legal shift would make each neighbor poorer by $1,000. Because they would now be poorer, they would have to husband their remaining wealth more carefully and might now choose to bid less than $1,000 each to stop multifamily construction on E's land. Suppose each would now bid only $500. They would then be able to raise an aggregate bid of only $4,000 — less than the $6,400 they would need to buy back the entitlement from E (assuming E's asking price had not increased on account of his added wealth). In this case, the optimal allocation of E's land would have been determined by the original allocation of rights among the parties. Multifamily units would be the Pareto optimal allocation if E had originally been granted the entitlement to build them, but single-family units would be the Pareto optimal allocation if E's neighbors had been given an original entitlement to insist on them. See Harold Demsetz, Wealth Distribution and the Ownership of Rights, 1 J. Legal Stud. 223, 228 (1972); Mark Kelman, Consumption Theory, Production Theory, and Ideology in the Coase Theorem, 52 S. Cal. L. Rev. 669 (1979).

3. *The assumption of zero transaction costs.* In a world of no transaction costs, all land use conflicts would be settled efficiently by bargains between neighbors and, in the eyes of many economists, there would be no role for the city planner other than to coordinate the location and use of public lands. The assumption of zero transaction costs that underlies Coase's theorem is similar to the common assumption in theoretical physics of no friction between bodies. As an empirical matter, both assumptions are false. As Coase himself stresses, even the simplest of land use conflicts does involve transaction costs — the burdens of organizing, gathering information, negotiating, and so on. Little is known about the magnitude of these costs in actual situations. If the settlement of localized conflicts between neighbors were to entail only trivial transaction costs, planners would have a difficult time showing why their involvement in such conflicts is justified. On the other hand, if transaction costs indeed prove to be high even in localized disputes, the case for some form of governmental regulation is stronger.

4. *Social conditions conducive to cooperation among neighbors.* When a potential land use conflict arises at a particular site, landowners and residents of the immediate neighborhood may know more than city officials do about the merits of various resolutions of the conflict. In addition, they are likely to have sharper incentives than planners do to resolve the dispute cooperatively. See pp. 000. On the other hand, as Komesar notes, transaction costs may prevent members of a neighborhood from reaching a cooperative result.

The more closely knit a group of residents and landowners, the more likely they are to succeed in exercising informal social controls to settle land use disputes at the micro level. For members of an informal group to be closely knit, they must (1) have good information about both the current situation and who has done what in the past; and (2) be enmeshed in continuing relationships that enable each of them to informally punish uncooperative actions and reward cooperative actions. See generally Robert C. Ellickson, Order Without Law: How Neighbors Settle Disputes 167–83 (1991) (proposing theory derived from study of neighbors in rural Shasta County, California). As the numbers of neighbors affected by a conflict grows, these conditions are less likely to be met and bottom-up cooperation becomes more difficult.

Valuable studies of actual neighbor interactions include M.P. Baumgartner, The Moral Order of a Suburb (1988) (examining a small city in Westchester County, New York); Gideon Parchomovsky & Peter Siegelman, Selling Mayberry: Communities and

Individuals in Law and Economics, 92 Cal. L. Rev. 75 (2004) (on resolution of conflicts created by polluting power plant in Cheshire, Ohio); Mark D. West, The Resolution of Karaoke Disputes: The Calculus of Institutions and Social Capital, 28 J. Japanese Stud. 301 (2002) (investigation into noise disputes in Japan). In general, field investigators find that neighbors turn to lawyers and litigation only as a last resort.

5. *Other limitations of Coasian analysis*. Commentators have challenged Coase's sense of how people bargain, his assumption that people typically look to the legal system to determine their entitlements, and his assumption that a forgone gain of a given amount is the equivalent of the loss of that same amount. For readings on these points, see Robert C. Ellickson, Carol M. Rose & Bruce A. Ackerman, Perspectives on Property Law 200–33 (3d ed. 2002).

6. *An application: rights to sunlight*. Judges have applied common law principles to decide whether erection of a structure that casts a shadow on a neighbor's solar collector is an actionable nuisance. See pp. 000. In addition, a number of states have enacted statutes that bear on this issue. See, e.g., Cal. Pub. Res. Code §§25982–86 (West 2004) (enacted 1978). Would you expect the number of solar collectors in use to vary with the substance of these common law doctrines and statutes? Compare Melvin M. Eisenstadt & Albert E. Utton, Solar Rights and Their Effect on Solar Heating and Cooling, 16 Nat. Res. J. 363, 414 (1976) (arguing that use of solar equipment will come to a standstill unless rights to sunlight are established by law), with Stephen F. Williams, Solar Access and Property Rights, 11 Conn. L. Rev. 430 (1979) (anticipating that Coasian bargaining would minimize influence of solar-access laws), and with Ellickson, Order Without Law, supra, at 273 (predicting that most adjoining homeowners would apply informal norms, not legal rules, to resolve disputes over solar access).

Note on Possible Economic Rationales for Zoning

1. *Market failure versus government failure*. The Komesar excerpt implies that zoning can enhance the efficiency of land use when the zoning process, flawed as it is, outperforms the interneighbor bargaining process, flawed as it is, in internalizing externalities arising from incompatible land uses. As Komesar observes, the identification of market imperfections does not by itself make a case for government intervention. Under both the "majoritarian" and the "influence" models of politics, a government would choose an inefficient zoning classification for E's land. Moreover, the government fails for much the same reason that markets fail — because high transaction costs interfere with cooperation. In the case of politics, the "transaction costs" are really the costs of cooperating with others in public decisionmaking — the costs of mobilizing constituents who, because governmental action is a public good, might be tempted to free-ride off of their fellow citizens' political efforts. Komesar also points out that, because it may be costly to administer government programs, some market imperfections may be best left untouched.

2. *Distributive justice*. The effects of private ordering and government land use regulations inevitably are uneven. Some persons come out ahead, while others suffer losses. Are land use controls plausible instruments, particularly in comparison to broad taxation and welfare policies, for pursuing goals of distributive justice? Studies of the distributive effects of actual planning and zoning systems include Paul Cheshire & Stephen Sheppard, The Welfare Economics of Land Use Planning, 52 J. Urb. Econ. 242 (2002) (asserting that the planning system in southern England imposes significant net costs and is slightly

regressive); Jeremy R. Groves & Eric Helland, Zoning and the Distribution of Land Rents: An Empirical Analysis of Harris County, Texas, 78 Land Econ. 28 (2002) (focusing on differential effects on land values). See also the sources, cited at pp. 000 and pp. 000, on the effects of zoning systems on housing prices.

3. *Evidence of Externalities*

William A. Fischel, The Economics of Zoning Laws

234–37 (1985)

The approach of externalities and zoning studies is to take the traditional justification for zoning at face value and see whether its underlying assumptions are valid. The traditional story, at least as it is understood by economists, is that zoning is necessary because in the absence of public controls, activities that adversely affect the value of housing will locate in residential neighborhoods. Other purposes of zoning may be advanced, but preservation of residential amenities appears so often in the literature that it seems reasonable to focus on the apex of the traditional pyramid.

Studies investigating this claim usually find a residential neighborhood that has some nonconforming land use and then compare its housing prices with the prices in a similar neighborhood that lacks the nonconforming use. If the first neighborhood's housing prices are lower than those in the second, it means that buyers of housing viewed the nonconforming use as a nuisance to be avoided and lowered their offers for the site. If this effect is found, many researchers conclude that zoning is justified in order to separate nonconforming uses. If there appear to be no systematic differences between the two neighborhoods, zoning is not justified.

Note that I have changed the question around here. "Does zoning have an effect?" has been subtly replaced by "Is zoning justified?" Many people seem to think that these are the same questions, and they quote different studies indiscriminately. I will argue that the externalities studies do not conclusively answer either question.

It will help nonspecialists to understand my criticism of these studies to learn something about their basic procedure. The technique ordinarily employed is to take a sample of houses or census tracts (at least 40) and employ a statistical technique called multiple regression analysis to determine the "price" of the house. In everyday speech we often refer to the value of a house and its price as the same thing. We speak of a house priced at $80,000, for example. But that is not a satisfactory approach to a good as complex and variable as a house.

A house is a composite of many attributes. These include lot size, number of rooms, square feet of interior space, number of bathrooms, size of the garage, type of flooring, extent of insulation, neighborhood and community characteristics, and proximity to jobs, shopping, and schools. The economists' approach to measuring these attributes is the hedonic price index, in which a house's value is thought to be the sum of the value of each attribute.

The empirical question is how important each attribute is. This is where multiple regression analysis comes in. A simple example would be as follows:

$$\text{House Value} = a\,(\text{number of rooms}) + b\,(\text{lot size}) + c\,(\text{miles to employment}) + d\,(\text{distance to pulp mill})$$

The coefficients *a*, *b*, *c*, and *d* are to be estimated by the regressions, while the attributes (number of rooms, lot size, miles to employment, and distance to pulp mill) constitute the data for the sample. The coefficient estimates impute a dollar value to the attribute. For example, the estimate of coefficient *a* might turn out to be $4,129, meaning that at the mean of the sample, an extra room adds $4,129 to the value of the house, other things held constant. Standard statistical tests are applied to the coefficients to see whether they can be accepted as significantly different from zero.

Now consider what one would expect from performing a statistical experiment like this and how the results can be interpreted. We would ordinarily expect coefficients *a* and *b* to be positive: more rooms and a bigger lot are attributes that people are willing to pay to have. Coefficient c would usually be negative: as people move farther from their place of employment, they must suffer the increased expense and irritation of long-distance commuting. Coefficient *d*, the one relevant to the externalities and zoning studies, is expected to be positive; the closer one gets to a pulp mill (or a commercial district, a busy highway, a dilapidated structure, a high-crime neighborhood) the greater is the disamenity effect and the less potential buyers will value the site.

Researchers who undertake these studies are often surprised to find that coefficient *d* is not significantly different from zero or, if it is significant, how small it seems to be relative to the noise made at zoning hearings about such prospective uses. From these results, some investigators have concluded or implied that externalities are not very important. (I use the term "externalities" . . . to mean spillovers, regardless of whether property rights in them can be established. This is what most empirical studies take it to mean.) This conclusion is probably not warranted. . . . [E]mpirical studies usually underestimate the importance of negative neighborhood effects. . . .

Suppose in the example . . . that the employment center is the pulp mill. This creates a conflicting incentive on the part of potential buyers of the house (who plan to work in the pulp mill or in some other firm nearby). They will want to live near the mill in order to reduce commuting costs, but not too near, in order to keep away from its disamenities. It might well turn out that the estimates of both coefficients *c* and *d* are very low or insignificant, because one offsets the other. This will not always be the case, though, especially in large urban areas, where jobs may be located in many different places. Moreover, careful sample selection can overcome this problem if the researchers are aware of it.

There are other reasons why coefficient *d* might be low. Suppose that construction of the pulp mill is proposed after the nearby houses are built. The residents of the neighborhood object to the construction of the mill at a zoning board hearing. As a result, the pulp mill owners take some steps to reduce the nuisances or to compensate the neighbors.

There are several methods by which the neighbors might be compensated. The mill might provide a park or some other public facility. It might give money to local charities to finance summer camp programs for children in the area. Alternatively, the community authorities might redirect some of the property taxes paid by the mill for special services for the neighborhood.

Each of the aforementioned compensations is directed at the neighborhood rather than at specific individuals. Compensation thus "runs with the land." When a prospective buyer (or tenant) arrives, he will perceive the nuisance effects of the mill, lowering his offer to buy, but he will also perceive the compensatory benefits, raising it right back up. Unless the compensations are separated from the nuisance effects — something few studies attempt to do — the estimate of the importance of nuisances will be too low.

I do not want to be nihilistic about studies of the effects of nuisances on surrounding property values. With the right sample and careful specification, the hedonic price index approach should reveal reasonable estimates of willingness to pay for neighborhood and

community amenities. Moreover, other techniques, such as interview surveys about prospective changes in land use, can reveal some information. Answers to these questions are surely valuable for planning purposes.

I wish to address a different question now: What do studies of the importance of externality have to do with the justification for zoning? Suppose that a study using impeccable statistical techniques showed that some nonconforming use had no appreciable effect on neighboring property values. Would this be an argument against zoning? Not necessarily; the reason that the nonconforming use had no effect might be that the area in question was subject to zoning. Zoning authorities may have seen to it that it stayed innocuous or that it satisfied neighboring residents that the benefits to them clearly outweighed the costs. The use of zoning (or even the prospect of zoning) might be precisely the reason why spillovers are hard to detect. The real question is whether zoning results in a more satisfactory use of land than does some other system.

If this is the question, would not the discovery that spillovers do affect property values be an indictment of zoning? Again, it does not necessarily follow. Just because one land parcel's value is reduced does not mean that total welfare is reduced. Suppose that zoning authorities ignore the objections of neighbors and allow a mill to be constructed on a certain site. Neighbors' property values are reduced by $20,000; however, the utilization of that particular site by the mill allows the value of paper production to rise by $50,000. Is this situation undesirable?

Note on Research on Externalities

1. *Why external effects may be hard to detect.* As Fischel mentions, some older studies have reached the conclusion that externalities from discordant land uses are not significant in urban land markets. See, e.g., John P. Crecine et al., Urban Property Markets: Some Empirical Results and Their Implications for Municipal Zoning, 10 J. L. & Econ. 79 (1967); S.M. Maser et al., The Effects of Zoning and Externalities on the Price of Land, 20 J. L. & Econ. 111 (1977).

As Fischel notes, such studies of nearby uses' negative effects on property value must overcome the problem of buyers anticipating that the government will do something to address those negative effects. See also Ronald E. Grieson & James R. White, The Existence and Capitalization of Neighborhood Externalities: A Reassessment, 25 J. Urb. Econ. 68 (1989). (noting that a house situated next to a commercial district might not sell for less because buyers bid on such land in anticipation of possible rezoning to commercial use). Given that buyers anticipate changes in regulations, how easy will it be to judge whether buyers' expectations of property values are independent of their assessment of governmental actions?

2. *Which uses make good neighbors?* Many scholars, especially those analyzing suburban samples, have found that values of single-family houses are sensitive to neighboring land uses. E.g., Christian A.L. Hilber, Neighborhood Externality Risk and the Homeownership Status of Properties, 57 J. Urb. Econ. 213 (2005) (finding that neighborhood externality risk substantially reduces the probability that a housing unit is owner occupied); See generally The Economics of Urban Amenities (Douglas B. Diamond, Jr. & George S. Tolley eds., 1982). But how sensitive? Studies confirm the obvious intuition that commercial, industrial, and utility facilities like utility transmission towers, garbage dumps, and traffic noise depress housing values. Joseph A. Herriges et al., Living with Hogs in Iowa: The Impact of Livestock Facilities on Rural Residential Property Values. 81 Land Econ. 530 (2005) (finding a negative effect on home values near livestock feeding

operations); Jeffery E. Zabel & Dennis Guignet, A Hedonic Analysis of the Impact of LUST Sites on House Prices, 34 Res. and Energy Econ. 549 (2012) (finding a decrease in home values by more than 10 percent near leaking underground storage tanks (LUSTs)); John B. Braden et al., Waste Sites and Property Values: A Meta-Analysis, 50 Envt'l and Res. Econ. 175 (2011) (analyzing 46 studies showing that all classes of waste sites affect real estate prices); Marcel A.J. Theebe, Planes, Trains, and Automobiles: The Impact of Traffic Noise on House Prices, 28 J. Real Est. Fin. & Econ. 209 (2004); Stanley W. Hamilton & Gregory M. Schwann, Do High Voltage Electric Transmission Lines Affect Property Value?, 71 Land Econ. 436 (1995); Arthur C. Nelson et al., Price Effects of Landfills on House Values, 68 Land Econ. 359 (1992). An 11-story office tower, however, was found to impose the more complex pattern of external costs and benefits anticipated by Fischel's pulp mill example — negative effects to nearby buildings but positive effects on buildings 1,000 meters away. See Thomas G. Thibodeau, Estimating the Effect of High-Rise Office Buildings on Residential Property Values, 66 Land Econ. 402, 403 (1990). There is no consensus on the neighborhood effects of group homes for persons with physical or mental disabilities. Compare George Galster et al., Supportive Housing and Neighborhood Property Value Externalities, 80 Land Econ. 33 (2004) (finding positive effects on the value of property located 1,000 to 2,000 feet away) and Peter F. Colwell et al., The Effect of Group Homes on Neighborhood Property Values, 76 Land Econ. 615 (2000) (finding negative effects on value of nearby property). Likewise, there is little consensus about whether subsidized housing improves, reduces, or has no effect whatsoever on nearby property values. For a review of the literature, see Michael H. Schill et al., Revitalizing Inner-City Neighborhoods: New York City's Ten-Year Plan, 13 Hous. Pol'y Debate 529 (2002) (reporting positive effects in the case of New York City's inner-city program). For some conflicting studies, see Deven Carlson et al., The Benefits and Costs of the Section 8 Housing Subsidy Program: A Framework and Estimates of First-Year Effects, 30 J. Pol'y Analysis & Management 233 (2011) (finding an overall net benefit to society); Wenhua Di et al., An Analysis of the Neighborhood Impacts of a Mortgage Assistance Program: A Spatial Hedonic Model 29 J. Pol'y Analysis & Mangement 682 (2010) (finding that a mortgage assistance program in Dallas had no negative effects on neighboring property values, and a modest positive impact); Ingrid Gould Ellen & Ioan Voicu, Nonprofit Housing and Neighborhood Spillovers, 25 J. Pol'y Analysis & Management 31 (2006); Joseph S. DeSalvo, Neighborhood Upgrading Effects of Middle-Income Housing Projects in New York City, 1 J. Urb. Econ. 269 (1974) (finding that the Mitchell-Lama projects enhanced the value of city neighborhoods); with Donald C. Guy et al., The Effect of Subsidized Housing on Values of Adjacent Housing, 13 AREUEA J. 378 (1985) (finding that suburban §221(d)(3) and §236 projects had negative impacts). See also Amy Ellen Schwartz et al., The External Effects of Place-Based Subsidized Housing, 36 Reg. Sci. Urb. Econ. 679 (2006) (generally finding significant and sustained positive effects, perhaps partly as a result of the elimination of prior disamenities).

3. *Relevance*. There is little solid information about how various land uses affect the value of neighboring property. If that is so, how can courts (to anticipate some issues to come): (1) measure damages in nuisance cases; (2) determine when covenants should be terminated because of changed neighborhood conditions; (3) decide whether zoning restrictions meet constitutional or statutory requirements of rationality; and (4) review special assessments or subdivision exactions imposed on landowners to recoup the benefits conferred by public facilities? Are the views of real estate appraisers and brokers — the usual experts consulted when property valuations are in dispute — a sufficiently reliable basis for such decisions?

B. The Governmental Resolution of Land Use Conflicts

As Komesar notes, some sort of collective decision — "zoning" — might be necessary to resolve land use conflicts because transaction costs prohibit a private bargain. But Komesar's models of politics — "omniscient dictator," "majoritarian," and "influence" — are hypothetical and abstract. A more realistic account of the structure of land use politics is set forth below, starting with an explanation of the stage on which those political dramas are enacted — local governments.

1. The Legal Structure of Local Governments in the United States

Public land use regulation in the United States traditionally has been mainly the province of local governments. The 2010 Census of Governments tallied a total of 39,044 *general-purpose governments* — 3,033 counties, 19,492 municipalities, and 16,519 townships (including the "town" governments in the six New England states, Minnesota, New York, and Wisconsin). All of these governments possess some form of regulatory power. In addition, there are 50,532 *special districts* (37,381 special districts other than school districts and 14,561 school districts): These governments receive some share of tax revenue from the persons living within their boundaries that they use to finance some specialized service — education, fire protection, water and sewers, parks, mosquito abatement, and so forth. While special districts do not typically regulate land use, their control of services like water, sewer, and education can have important influence on the private use of land. On the varieties of local government, see George W Liebmann, The New American Local Government, 34 Urb. Law. 93 (2002).

What sorts of powers do each of these governments have to control land? Generalization is hazardous because the answer depends on the laws of each state. But the following rough overview conveys the essentially decentralized character of land use regulation in most states.

a. Counties and Towns/Townships

Counties and townships (also called "towns) can loosely be grouped together as the "default" local governments in the sense that, if local residents do not take the initiative to create a custom-tailored "chartered" municipality, then they are governed by the "off-the-rack" county and township government provided by state law. The powers and boundaries of counties and townships are defined by state statute or constitution and typically cannot be varied by local residents.

Counties are the largest of the local governments, typically encompassing several other local governments and hundreds of square miles within their boundaries. (The average New York county, for instance, contains almost 900 square miles.) Their size, however, is not a reliable measure of counties' powers to carry out the wishes of county residents. As the states' basic administrative subdivisions, counties are charged with executing many state-mandated duties, such as the assessment of property for taxation, the recording of deeds and subdivision of land, criminal law enforcement (through sheriffs and district attorneys), maintenance of basic vital statistics, and administration of election

and judicial functions. Despite these mandates, counties have locally elected legislatures (variously denominated "boards," "commissions," etc.) that can respond to local demands for regulation and services to the extent that state statutes delegate to them the power to do so. As state legislatures delegate more powers for autonomous action to counties, counties begin to resemble "municipal corporations" from which they were traditionally distinguished — that is, as agents of their local population rather than simply as "subdivisions of the state."[2] In particular, most states have now enacted zoning-enabling acts conferring on counties the power to enact zoning ordinances governing the use, height, density, and bulk of structures in "zones" within the county's territory.

In 20 states (basically, New England and Mid-Atlantic states and those Midwestern states settled by New Englanders), counties are further subdivided into townships (called "towns" in Minnesota, Wisconsin, New York, and six New England states).[3] Like counties, townships have elected boards possessing powers that are defined by detailed state statutes. Also like counties, townships typically have zoning power pursuant to a state-enabling act. Generally, townships' power to zone displaces county power for privately owned land. (Sometimes county-owned structures possess some form of immunity from other local governments' zoning, an issue discussed in Chapter 9.) Unlike counties, townships are generally small in size: Based on the surveys authorized by the Land Ordinance of 1785, townships in the Midwest are generally neat six-by-six-mile squares. In eastern states like New York, towns can follow more irregular metes-and-bounds survey measures, but they are still fairly small; Westchester County, for instance, contains 14 towns or town-villages.

b. "Municipal Corporations": Cities, Villages, and the Power to Change Local Governments' Boundaries

According to traditional usage, cities and villages were regarded as the only true "municipal corporations" because their function was to provide services and regulations for persons residing within their territory (according to the terms of a corporate charter granted to their incorporators) rather than serve as administrative units of the state government. Although the distinction is now largely obsolete, cities and villages differ from counties and townships in one salient aspect: The boundaries of the former are generally set by local residents seeking to create a municipal corporation through a petition for incorporation. In most states, local residents can create a municipality by submitting to a statutorily designated decision-maker — frequently the county commission, a state judge, or a special state boundary commission — a map with the borders of the proposed municipality along with a petition signed by a sufficient number of persons residing within those borders. If the proposed municipality meets the state statutory criteria for incorporation (typically a certain minimum population, density, need for urban services, physical contiguity, urban character, and absence of harm to neighboring areas), then a new city is born. The result is that municipalities typically have squiggly boundaries that frequently spill over the borders of counties and townships.

The ease with which local residents can create new cities varies by state. In 2002, Iowa had 948 municipalities, while Arizona, with about twice Iowa's area and population, had 87. When a new municipality is formed, it typically displaces the power of counties and

2. John Martinez, Michael Libonati, 1 Local Government Law §2:13 (2011).

3. These 20 states are Connecticut, Illinois, Indiana, Kansas, Maine, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Hampshire, New Jersey, New York, North Dakota, Ohio, Pennsylvania, Rhode Island, South Dakota, Vermont, and Wisconsin.

townships to regulate territory within the municipality and often takes over part of the county's taxing jurisdiction. The county and townships are left to divide power over so-called unincorporated territory outside the boundaries of any city or village. (The town of Ossining in Westchester County, New York, for instance, has been largely eaten away by villages of Ossining, Briarville Manor, and Croton-on-Hudson). If a city expands to encompass substantially the entire territory of the county, then the two governments may be merged into a single entity (e.g., the city and county of San Francisco).

Once formed, incorporated municipalities, unlike counties and townships, have the power to enlarge their boundaries through annexation of adjacent "unincorporated" territory — that is, land within the county or township and not already contained within an "incorporated" municipality. Again, such annexation typically involves a petition by the annexing city or the residents of the area proposed for annexation, accompanied by a map showing the area to be annexed. Most states require some sort of election to approve the annexation, but state law varies on whether the annexees have the right to veto the proposal. In some states, a majority of annexees must approve the petition, allowing suburbanites to block efforts by cities to include them in enlarged city boundaries (with often enlarged city tax burdens). But some states allow at least certain types of cities to unilaterally annex adjacent territory without the consent of the outlying residents.[4]

Thus, incorporation transfers power over land use regulation from the much larger county to a much smaller municipality. Because state law generally does not allow cities to annex other cities, municipal incorporation can be conducted defensively to stop annexation by a neighboring municipality and thereby avoid those expanding cities' land use restrictions or taxation. Under the so-called Lakewood Plan of the 1950s, developers would form new cities that employed no personnel but instead purchased all of their services from the county, solely for the purpose of blocking annexation by larger and older cities.[5] But "defensive incorporation" can also be used to intensify regulation by giving the immediate neighbors within a proposed municipality the power to impose zoning to exclude locally undesirable land uses — homeless shelters, jails, landfill, etc. — that the county or annexing cities might otherwise locate in the neighborhood. Thus, through defensive incorporation, large central cities can be walled off from controlling land in the suburbs.

The capacity of suburbanites to fend off central cities' annexation varies by state law. Texas, for instance, allows "home-rule cities" to annex outlying areas unilaterally, with the consequence that 82 percent of the population of metropolitan El Paso lives in the central city. Massachusetts, by contrast, does not allow unilateral annexation, with the result that Boston controls only 13 percent of the population in the metro area. Likewise, the District of Columbia, with constitutionally fixed borders, is considerably less populous than *each* of three of its suburban counties — Fairfax, Montgomery, and Prince George's.

The technicalities of annexation and incorporation have this major effect on land use politics: In jurisdictions where incorporation is easy and annexation is hard, land use decisions tend to be decentralized to small — often tiny — local governments controlled by the immediate neighbors to proposed controversial land uses (e.g., low-income housing, homeless shelters, landfill, etc.). This and subsequent chapters discuss how the scale of government can affect local politics.

4. See, e.g., Texas Local Government Code, Section 43.021(2), permitting "[a] home-rule municipality" to "extend the boundaries of the municipality and annex area adjacent to the municipality."

5. Gary J. Miller, Cities by Contract: The Politics of Municipal Incorporation (1982).

c. *Powers of Local Governments: Statutory Delegations Versus "Home Rule" Powers*

For the most part, local governments' powers are the product of state law, with federal statutes playing an unimportant role. Traditionally, a municipality (or other local governmental unit) had only the powers its state had delegated to it through enabling legislation. Thus the enactment of the Standard State Zoning Enabling Act (SZEA) in many states during the 1920s was a necessary forerunner to the widespread local exercise of zoning power that soon followed. Moreover, state courts traditionally construed these enabling acts very narrowly, invoking "Dillon's Rule" (named for the author of a turn-of-the-century treatise) requiring that state grants of powers to local governments be construed to imply only those powers absolutely essential for carrying out the expressly enumerated powers. This narrow view of local government powers has, however, eroded as a result of two developments. First, states have amended their constitutions or statutes to contain grants of "home rule" powers for "chartered" local governments. Second, state courts have been abandoning the very narrow construction of local government powers suggested by Dillon's Rule.

The language of state constitutional and statutory grants of home-rule power varies by state, but they tend to fall into one of two patterns, either conferring power on local governments to enact legislation over a limited domain vaguely described as "municipal" or "local" affairs,[6] or to enact legislation over an unlimited domain just so long as the local regulation is not prohibited by state law.[7] In the former case, state courts would theoretically have the power to review local land use regulations to ensure that they did not exceed the scope of local or municipal affairs. In the latter case, state courts could limit local home-rule powers only by finding that some state statute preempted the challenged local law. In either case, the willingness of state courts to uphold the local law might be bolstered by state statutes or constitutions reversing Dillon's Rule by calling for the liberal construction of local governments' statutory powers.[8] In any case, state courts have a lot of discretion to determine the scope of even the first constrained type of home-rule grant, because the limits on the grant are extremely vague, often amounting to nothing more than the fuzzy admonition that the local law "relat[e] to . . . government, protection, order, conduct, safety, health and well-being of persons or property therein."[9] For an overview of home-rule provisions, see Lynn Baker & Daniel Rodriguez, *Constitutional Home Rule and Judicial Scrutiny*, 86 Denv. U. L. Rev. 1337 (2009).

6. Arkansas Code Annotated §14-42-307 (a)(1) (2008) ("Each municipality operating under a charter shall have the authority to exercise all powers relating to municipal affairs"); California Const, Art. XI §5(a) (2008) ("It shall be competent in any city charter to provide that the city governed thereunder may make and enforce all ordinances and regulations in respect to municipal affairs, subject only to restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general laws"); Colorado Const. Art. XX, §6 (2008) ("The people of each city or town of this state, having a population of two thousand inhabitants . . . are hereby vested with . . . power to make, amend, add to or replace the charter of said city or town, which shall be its organic law and extend to all its local and municipal matters").

7. Alaska Const. art. X, §11 (2009) ("A home rule borough or city may exercise all legislative powers not prohibited by law or by charter"); Delaware Laws, Chapter 22, §802 (2008) ("Every municipal corporation in this State . . . may . . . amend its charter so as to have and assume all powers which, under the Constitution of this State, it would be competent for the General Assembly to grant by specific enumeration and which are not denied by statute").

8. See, e.g., N.Y. Const. Article IX, 2(c)(c) ("Rights, powers, privileges and immunities granted to local governments by this article shall be liberally construed"); Iowa Const., Art. III §38A (2008) Sec. 38A ("The rule or proposition of law that a municipal corporation possesses and can exercise only those powers granted in express words is not a part of the law of this state").

9. New York Const. Article IX, §2(c)(10).

The power to regulate local land might seem to fit comfortably within such capacious boundaries. There are limits on home-rule powers, however, that could prevent local governments from relying on general home-rule grants and instead being forced to rely on specific state enabling acts.

First, state law does not typically confer home-rule powers on every type of local government. Instead, many states require that the local voters first approve a charter defining the powers and decisionmaking structure of the local government.[10] The charter serves as a local constitution, trumping local ordinances that are inconsistent with the charter's terms. Nonchartered governments that rely entirely on state legislation to define their powers — for instance, the typical county or township — frequently cannot, therefore, exercise home-rule powers and must instead depend on the various enabling acts enacted by the state legislature.

Second, state home-rule provisions may impose special procedural requirements in order for local governments to invoke their home-rule powers. In Kamhi v. Town of Yorktown, 74 N.Y.2d 423, 547 N.E.2d 346 (N.Y. App. Div. 1989), for instance, the court held that a township could not require a developer of a 43-acre parcel to donate a "recreation fee" of $47,550 as a condition for approval of a site plan. The court noted that the fee was not authorized by the relevant provisions of the state zoning-enabling act defining permissible conditions for the approval of site plans. New York's Municipal Home Rule Law provided that local governments could supersede state statutes when enacting "local" legislation relating to the township's "government, protection, order, conduct, safety, health, and well-being of persons or property therein."[11] *Kamhi* held, however, that township could not take advantage of this power because the township did not invoke its supersession powers "with definiteness and explicitness" by expressly citing the supersession power and stating which precise provisions of the enabling act the township intended to supersede.

Third, the court may hold that the specific grant of power to zone under the state enabling act preempts any general grant of power to regulate more generally under the home-rule statute. Courts' willingness to infer such preemption may be increased by a judicial sense — sometimes unspoken — that local governments cannot be trusted with broad powers to control land use without close state supervision. This same suspicion of local governments could induce the court to apply Dillon's Rule selectively to the issue of land use regulation, narrowly construing the local governments' powers under the enabling act because the court is suspicious that local policymakers cannot be trusted to safeguard the interests of landowners or nonresidents. In Naylor v. Township of Hellam, 565 Pa. 397, 773 A.2d 770 (Pa. 2001), for instance, the court narrowly construed the state planning law to bar a township from imposing a moratorium on subdivision approvals pending revision of the township plan. There was no dispute that the township had a statutory delegation of power to review subdivision applications. The *Naylor* court, however, read the delegation with persnickety rigidity, finding that the absence of an express mention of moratoria meant that the township lacked the power to slow down its processing of applications for better planning. In reaching this decision, the court emphasized its lack of trust in the local government, noting that "[t]he General Assembly is better suited to examine the significant policy issues at stake and to determine the appropriate legal standards to govern the application of such a powerful planning tool."

10. See, e.g,. Charter of the City of Cincinnati, *at* http://www.cincinnati-oh.gov/council/downloads/council_pdf35437.pdf.

11. Municipal Home Rule Law §10(1)(ii)(a)(12).

Why would the General Assembly be "better suited" to examine the advisability of a moratorium on land use development? And why does such a moratorium raise such "significant issues"? The discussion below considers how the scale and heterogeneity of a jurisdictions' population might affect how they deliberate about a neighbor's decision to develop their land.

d. Immunities of Local Government from State Law: "Imperio" Home Rule and Land Use

In addition to authorizing local governmental legislation, home-rule provisions in state constitutions can also immunize such legislation from being overruled by the state. Such immunity is sometimes called "imperio" home rule, because it creates an "imperio in imperium" — a "state within a state" — by allowing subdivisions of a state to resist the state legislature.

No state constitution confers general imperio home rule on local governments. Instead, such immunity is generally limited to municipal or local affairs. Moreover, the scope of such immunity is generally construed very narrowly by courts for fear of creating an unreachable enclave of local powers with substantial effects on nonresidents. There have, however, been decisions holding that the state legislature is barred from interfering with certain aspects of local governments' land use policies. In Town of Telluride v. San Miguel Valley Corp., 185 P.3d 161, 170–71 (Colo. 2008), for instance, the court invalidated, as inconsistent with the constitution's home-rule provision, a state statute that would prohibit extraterritorial condemnations of property by home-rule municipalities. In reaching this decision, the court relied on the Colorado Constitution's home-rule provision expressly granting to chartered municipalities the power "within or without its territorial limits" to exercise eminent domain. The court refused to find any implied limit on this textually explicit power despite the suburbanites' interest in not having their land condemned by a government for which they could not vote, asserting categorically that the "[state] legislature cannot prohibit the exercise of constitutional home rule powers, regardless of the state interest which may be implicated by the exercise of those powers." See Richard Briffault, Town of Telluride v. San Miguel Valley Corp.: Extraterritoriality and Local Autonomy, 86 Den. U.L. Rev. 1311 (2009).

Town of Telluride, however, is an outlier: It is more typical for state courts to limit imperio home rule by defining municipal affairs to exclude any policy having substantial effects on nonresidents.

2. The Market for Local Governments: Can Local Politicians Be Trusted to Represent Their Constituents?

As the description above indicates, the system of U.S. local government can and often does confer a lot of policymaking discretion on thousands of often tiny jurisdictions to set land use policy. Moreover, the state laws defining this system are vague enough to give courts latitude to be either suspicious of or deferential toward this highly decentralized system of decisionmaking. How should courts view local politics? Is there a judicially usable model

of local democracy that might channel judicial suspicion and deference? Consider the following account of local governments' incentives.

William A. Fischel, The Homevoter Hypothesis

4–6, 12 (2001)

. . . The homevoter hypothesis holds that homeowners, who are the most numerous and politically influential group within most localities, are guided by their concern for the value of their homes to make political decisions that are more efficient than those that would be made at a higher level of government. Homeowners are acutely aware that local amenities, public services, and taxes affect ("are capitalized in") the value of the largest single asset they own. As a result, they pay much closer attention to such policies at the local level than they would at the state or national level. They balance the benefits of local policies against the costs when the policies affect the value of their home, and they will tend to choose those policies that preserve or increase the value of their homes.

The importance of a home for the typical owner can hardly be overstated. Two-thirds of all homes are owner-occupied. For the great majority of these homeowners, the equity in their home is the most important savings they have. . . .

I am arguing both positive and normative positions [here]. I think that, subject to some important qualifications, local governments perform localized services more efficiently than the state or national government would. But readers do not have to accept my normative contentions to find something useful here. The approach that yields the best understanding of local government behavior, and hence the best predictions about what happens when institutional arrangements are changed, is to see that behavior through the eyes of a homeowner. . . .

. . . An increase in local property taxes to add teachers for schools may make the community more attractive to homebuyers. This will, if the program is cost effective, add to the value of all homes in the community, not just of homes currently containing school-age children. The prospect of a capital gain (or the anxiety about a loss if the schools are left to deteriorate) makes the policy more palatable to the majority of voters, even those who do not have children in school. . . .

Attention to home prices will also guide regulatory policies. A town that is asked to rezone property for a low-level nuclear waste dump in exchange for $2 million a year in cash and benefits has to consider not just the value of the cash (which could be used to cut property taxes or to augment local services), but also the effect that harboring the dump will have on the community's reputation and health and hence the value of the voters' homes. This probably accounts for why the actual proffer of such a deal in New Jersey found no takers among that state's 567 municipalities. . . .

. . . Concern about the vulnerability of their largest asset also explains why homeowners are more likely to participate in school board meetings, vote in local elections, and otherwise participate in community affairs. There is hard evidence that they do so. Denise DiPasquale and Edward Glaeser analyzed a national survey of citizen participation in local affairs. Even after controlling for other economic and demographic differences between homeowners and renters, they found that homeowners were more conscientious citizens and more effective in providing community amenities.

The importance and vulnerability of their asset are not the only reasons that homeowners are more likely to be the major local political actors. Living in a home for a long time creates a personal attachment for which changes in the neighborhood and

community are upsetting. Surveys indicate that long-term residence by both renters and homeowners is an important factor in community participation. But length of residence does not always mean more protectiveness. Kent Portney found that long-time residents were *less* opposed than newcomers to the establishment of proposed waste-disposal sites in Massachusetts. Less systematically, I have observed that people who have just moved into the neighborhood are often most concerned about proposed land-use changes. Maybe noneconomic attachments to neighborhoods and community are formed that quickly, but I suspect that the size of the down payment and the newly acquired mortgage make new homeowners especially watchful of local activity. The uninsurable-asset aspect of homeownership still seems like the key factor. . . .

Note on the Tiebout Hypothesis, Capitalization, and Local Democracy

1. *Capitalization and voter ignorance*. It is a familiar point among garden-variety cynics and public choice theorists that voters do not know much about what politicians do in their name. As Ilya Somin notes in summarizing the literature:

> The consensus of decades of public opinion research is that most voters are ignorant of even the most basic political information, including knowledge of which branches of government control which policies, and the meaning of "conservative" and "liberal" ideologies. Seventy percent of voters cannot name both of their state's senators. More than a third can be categorized as "know-nothings" almost completely ignorant of relevant political information, and perhaps no more than five percent are knowledgeable to any substantial extent.

Ilya Somin, Resolving the Democratic Dilemma, 16 Yale J. reg. 401 (1999). Since Anthony Downs' classic book, An Economic Theory of Democracy (1957), economists have explained voter ignorance by noting that it is economically rational for voters to be uninformed because the probability of their ballot being decisive is minuscule and, political action being a public good, their capacity to enjoy the benefits of a desired outcome will be undiminished by their failure to cast an informed ballot. Put another way, government does not solve the collective action problems that impede a voluntary resolution of land use conflicts, but instead merely relocates these problems. In the governmental context, the difficulty is producing the public good of political activism — showing up at hearings, putting up yard signs, writing letters, attending rallies, voting, and collecting information sufficient to perform these tasks intelligently. Just as neighbors can shirk in bearing their share of bribing Komesar's "citizen E" (see page 000) to build only a single-family houses, so too can neighbors shirk in keeping abreast of local politics to the extent necessary to prevent a developer from building an undesirable use nearby.

Given the depths of this political ignorance, why should Fischel believe that local voters are capable of monitoring local officials to insure that they regulate land to maximize its value? The key to Fischel's theory is the idea of capitalization: Because *homebuyers* are well-informed about their purchases of real estate, local governments' policies also will affect — that is, be "capitalized into" — real estate values. If local governments provide better schools, more honest and effective police, and lower taxes, then the value of real estate will go up, because homebuyers are well-informed about these characteristics and bid accordingly. To avoid driving away potential buyers from the local market, local *homeowners* — "homevoters" in Fischel's phrase — carefully monitor local governments. Unlike rationally ignorant voters hypothesized by Anthony Downs, homevoters have a very

large stake in local decisions sufficient to focus their attention — namely, their immobile down payment, the value of which is at risk from local governments' stupidity or corruption.

Is this account of local democracy convincing? The idea that local governments would behave like efficiency-minded firms under these circumstances was first proposed by Charles Tiebout, A Pure Theory of Local Expenditures, 64 J. Pol. Econ. 416–424 (1956), an article proposing an abstract model of "citizen-consumers" shopping for their ideal package of services and taxes among competing local governments. Tiebout's theory was a purely theoretical response to Paul Samuelson's claim that no decentralized pricing mechanism could determine the optimal consumption of public goods. The Tiebout model, therefore, had the same abstract flavor. It rested on seven assumptions that practical observers might regard as implausible, including four that (properly modified) inform Fischel's homevoter hypothesis: (a) Homebuyers are well-informed shoppers for packages of taxes and services provided by local governments; (b) local governments are sufficiently numerous that homebuyers can choose between them based on those governments' policy choices; (c) local governments' choices do not determine the prices of housing located in neighboring jurisdictions; and (d) homevoters dominate the local political process to demand that local governments choose those policies that maximize real estate values. For a general overview of the Tiebout model and its application to several different models, see Wallace E. Oates, The Many Faces of the Tiebout Model, in The Tiebout Model at Fifty, 21 (William A. Fischel ed., 2006).

No one believes Tiebout's model is an empirically exact portrayal of how local governments actually work any more than the lines on a subway map are an accurate picture of train tracks and tunnels. But is there sufficient reason to believe that Tiebout's theory is close enough to reality to provide some basis for greater judicial trust of local governments, at least under certain conditions? Consider below those four assumptions described above in more detail.

2. *How well informed are homebuyers?* Consider first the idea that homebuyers are well informed about the policy choices of different local governments. What's the evidence supporting this claim? There is survey evidence suggesting that homebuyers actually know very little about competing local governments' specific political decisions. Nick Gill & Andrés Rodríguez-Pose, Do Citizens Really Shop Between Decentralised Jurisdictions?: Tiebout and Internal Migration Revisited, 16 Space & Polity, 175 (2012) (finding only a weak link between internal migration and decentralization in other nations); Keith Dowding et al., Tiebout: A Survey of the Empirical Literature, 31 Urban Studies 767 797 (1994). On the other hand, since Wallace Oates' 1969 study of property taxes and expenditures' effects on home values in northern New Jersey,[12] there have been numerous capitalization studies indicating that those decisions actually do affect price of real estate, suggesting that homebuyers might adjust their bids based on, say, the reputation of schools or rumors about crime, without really knowing the policy bases for these adjustments. (Note that real estate brokers often prominently advertise a house's school district and political subdivision when trying to sell it.) See, e.g., H. Spencer Banzhaf & Randall P. Walsh, Do People Vote with Their Feet?: An Empirical Test of Tiebout's Mechanism, 98 Am. Econ. Rev. 843 (2008) (finding that migration correlated strongly with factory emissions, indicating that households "vote with their feet" to find the best environmental quality). As Ilya Somin makes the point, "[M]ost citizens put far more effort into deciding where to live than into acquiring political information." Political

12. Wallace E. Oates, Effects of Property Taxes and Local Spending on Property Values: An Empirical Study of Tax Capitalization and the Tiebout Hypothesis, 77 J. Pol. Econ. 957, 71 (1969).

Ignorance and the Countermajoritarian Difficulty: A New Perspective on the Central Obsession of Constitutional Theory, 89 Iowa L. Rev. 1287, 1346 (2002).

Capitalization studies, however, are simply a specific instance of studies about externalities, and they can be controversial for similar reasons offered by Fischel earlier. For a vigorous debate about the extent of capitalization of tax rates, see John Yinger, Capitalization and the Median Voter, 71 Am. Econ. Rev. 99 (1981). John Yinger, Howard S. Bloom, Axel Boersch-Supan & Helen F. Ladd, Property Taxes and House Values: The Theory of Estimation of Intrajurisdictional Property Tax Capitalization (1988) (finding evidence that only 50 percent of property taxes are capitalized into home values); William Fischel, Home Voter Hypothesis at 48–49 (responding to Yinger et al. by noting that tax advantages from underassessment were likely not fully capitalized because they were "blatantly unfair and illegal" and, therefore, likely to be reversed by courts).

3. *How elastic is the supply of local governments?* Of course, one cannot shop for one's ideal package of taxes and regulations unless a sufficient number of sellers are ready to meet the demand. Are there a sufficient number of local governments to satisfy the Tiebout model? Not perfectly: The supply of land itself, after all, is inelastic, such that locations nearer to the jurisdiction with the most jobs would have a certain irreducible advantage over others. (Scarsdale, on this theory, should have higher real estate values than, say, the town of Yorktown simply because it is closer to New York City, not because it is particularly efficient in providing services.) But note that, at least in certain states, the law of easy municipal incorporation allows the supply of local governments to become quite large. There are, for instance, between 107 and 324 local governments in *each* of the counties of Los Angeles, San Bernardino, and San Diego. The Governments Division of the U.S. Census Bureau, Exploring the Intricate Layers of State and Local Governments: California (March 2011), *at* http://www2.census.gov/govs/pubs/state_snapshot/gov07-ca.pdf. Note also that this supply seems to respond elastically to demand. The high density of villages and cities clustered near the border of Westchester County abutting New York City would seem to be a function of developers and local residents pressing for more urban services where real estate values are higher. But see Kenneth Bickers & Richard N. Engstrom, Tiebout Sorting in Metropolitan Areas, 23 Rev. Pol'y Res. 1181 (2006) (finding roughly random levels of sorting in Houston and Atlanta MSAs).

Does the Tiebout hypothesis provide a good reason to favor easy incorporation? Or to exercise more deferential judicial review when there is a high-density of small local governments with zoning and taxing power? Note that local Goliaths like New York City or the Salt River Project in Phoenix Arizona (a special district controlling water and power in the Phoenix metro area) have effective control over an entire commutershed. Should the Tiebout-Fischel model suggest greater distrust of such monopolies than of small local governments embedded in more governmentally fragmented counties?

4. *Do local governments internalize their costs and benefits?* The critical assumption underlying capitalization is that the choices of each local government affect only the value of real estate within that government's borders. Absent this assumption, there would be less reason for a homebuyer to pay more for a structure within a better-governed jurisdiction. But the requirement of internalization of costs and benefits poses a dilemma: There is a tension between creating jurisdictions large enough to internalize the costs generated by their regulatory decisions (or lack thereof) and numerous enough to provide a home for the different preferences of mobile citizen-consumers. The citizen who does not mind a noisy and smelly factory if it will reduce his tax burden could, in theory, form a tiny municipality like the City of Industry, which has a population of 219 but a commercial-industrial tax base of 2,500 businesses employing more than 80,000 people. City of Industry website, *at* http://www.cityofindustry.org/page.php?20). But such a

jurisdiction will likely cause spillover effects in neighboring jurisdictions. One could assign the regulation of activities with major spillover effects — airports, landfills, large shopping malls, etc. — to counties only by having leviathan counties take over important chunks of zoning responsibility, thereby limiting the choices of mobile homebuyers.

Is there any way out of this dilemma? Suppose that local governments could negotiate with each other over nuisance costs. Could such bargaining between governments perform the same function that bargaining between neighbors performs in Komesar's schematic nuisance case? Would high transaction costs inevitably doom such bargains? Chapter 9 discusses how local government law provides a framework for dealing with interlocal externalities.

5. *Do stakeholders comprising a majority of voters really dominate the local political process?* In the Fischel-Tiebout model, the politicians who run local governments seek to maximize land values, because homevoters are breathing down their necks. According to Fischel's definition, homevoters are any people with an immobile and noninsurable asset sunk in the ground. Such residents prefer fight to flight, because they cannot flee: Any bad local government policy will be capitalized into their asset, causing them to suffer a loss if they try to sell in response to poor governance.

Note that it is neither necessary nor sufficient to be a homevoter that one happens to be an owner and occupant of a residential building. It is not sufficient to the extent that homeowners could theoretically purchase an insurance policy that would compensate them for unforeseen losses in their house's value relative to the regional housing prices, diminishing their stake in maintaining the neighborhood's value. See Lee Fennell, The Unbounded Home: Property Values Beyond Property Lines 196–201 (2009). It is not necessary because there are ways other than owning a down payment in owner-occupied residential real estate by which one might have uninsurable and immobile stakes in land. Tenants leasing rent-controlled housing units, for instance, have such stakes to the extent that they lose the value of the rental subsidy if they move. See Richard Arnott, Tenancy Rent Control, 10 Swed. Econ. Pol. Rev. 89, 111–112 (2003). In short, a homevoter is simply anyone with a large, immobile, and uninsurable stake in a local government's territory that motivates political participation.

Homevoters, thus defined, do not always dominate a local government's population. In New York City, for instance, the large majority (66 percent) of housing units are occupied by renters, not owners. See Chapter 1, pp. 000. In Fischel's theory, such footloose renters would not have the homevoter's incentives to monitor city politics. Moreover, the composition of a local government's population is not exogenous to politicians' choice of policies. An enterprising politician might drive out, say, middle-class homeowners to the extent that they believe such residents are vocal opponents to the politician's coalition of renters. See Edward L. Glaeser & Andrei Schleifer, The Curley Effect: The Economics of Shaping the Electorate, 21 J. L. & Econ. 1–19 (2005) (describing Mayor Curley's efforts to consolidate an ethnic Irish coalition by driving out middle-class voters from Boston with policies that redistributed wealth from homeowners). Local voters also might be more interested in intra-governmental redistribution than maximization of local property values. One study found that because low-income households pay less in property taxes, they are more likely to free-ride, demanding services as homevoters without having to pay for them. Stephen E. Calabrese et al., Inefficiencies from Metropolitan and Fiscal Decentralization: Failures of Tiebout Competition, 79 Rev. Econ. Stud. 1081 (2012).

Even where homevoters are numerically dominant, it does not follow that they run the government. The homevoter hypothesis assumes that homevoters' incentives are sufficient to overcome the usual collective action difficulties that plague any form of politics — the costs of acquiring and distributing information, holding together a coalition of

residents with different interests, avoidance of free-riding when it comes time to show up at rallies and hearings, etc. As Fischel notes, there is some evidence that it is easier to engage in political participation in jurisdictions with smaller populations. J. Eric Oliver, Democracy in Suburbia (2005) (showing data that local governments with smaller populations have higher rates of various forms of participation than larger governments, controlling for an array of variables). But note also that partisan or other forms of heterogeneity might be necessary to generate the sort of conflict necessary to mobilize voters to pay attention to politics: Oliver finds that the participation-increasing effects of small size can be counteracted by the participation-dampening effects of demographic homogeneity. Likewise, David Schleicher finds that turnout and meaningful policy debates are much reduced by a city's being dominated by a single political party. David Schleicher, Why Is There No Partisan Competition in City Council Elections: The Role of Election Law, 14 J. L. & Pol. 419 (2007).

Should courts assess the competitiveness of local politics and levels of political participation (affected by size, heterogeneity, etc.) to determine whether to defer to a local government's regulatory decisions? Note that such assessment would require some normative criteria for what constitutes a "good" political process. Is the local process working well, for instance, in a medium-size suburb overwhelmingly composed of homeowners if there is never internal dissension about the goal of maximizing home values, even if this means exclusion of low-income housing that could permit renters from entering and voting in the community? Should courts regard this unanimity as evidence of democratic accountability, or of democratic failure because outsiders' interests are ignored? If it looks like privileged insiders had excessive influence over a regulatory decision because voters were not really minding the store, then should the courts treat the decision to some form of strict scrutiny? One might regard the targets of such scrutiny as instances of what Komesar calls the "influence model" of zoning. Note that there are judicially crafted doctrines — for instance, the public use doctrine discussed in Chapter 10 with respect to eminent domain or the anti-spot-zoning doctrine discussed in Chapter 4 — that seem designed to ferret out excessive influence of private interests on public decisionmaking. Should courts play a role in counteracting Komesar's influence model?

6. *What about majoritarian "tyranny"*? Suppose one agreed that a unified majority of committed stakeholders — call them homevoters — dominated the local government's political process. Is this necessarily a good thing? Note that such a system of government might resemble what Komesar calls the majoritarian model, in which eight voters inefficiently (and perhaps unjustly) ignore the ninth voter's pain.

Where is such a majoritarian model likely to be dominant? Fischel himself has argued that homevoters are most likely to impose costs on individual property owners in smaller, homogenous jurisdictions where the majority all share an interest in maximizing their own property values at the expense of the owners of underdeveloped land. He argues, therefore, for stricter judicial scrutiny of land use regulation in such contexts. William Fischel, Regulatory Takings: Law, Economics, and Politics (Harvard Press 1995). But recall from the account offered above that local governments are pervasively under the control of the state legislature, with minimal limits imposed by imperio home rule. Is the heterogeneity and special influence that aggrieved property owners might enjoy at the state level sufficient to counteract local majoritarianism? See Carol Rose, Carol M. Rose, Takings, Federalism, Norms, 105 Yale L. J. 1121, 1140–41 (1996) (state legislature can correct local majoritarian abuses).

Note that it is not necessarily inefficient for a majority of homevoters to impose costly regulations on an isolated landowner so long as the former leave the latter some mechanism — fee, assessment, exaction, etc. — by which to buy her way out of the inefficient

regulatory scheme. Lee Anne Fennell, Hard Bargains and Real Steals: Land Use Exactions Revisited, 86 Iowa L. Rev. 1 (2000). Komesar's simple model of majoritarianism lacks such a Coasean payoff mechanism. One might nevertheless object on fairness grounds to the singling out of a politically vulnerable landowner for regulatory burdens, even if they could buy their way out from under the ones that were not cost justified. Chapter 7 discusses the various assessment, fee, and exaction mechanisms used by local governments to charge landowners for the right to build within the charging jurisdiction.

Note also that local governments seeking to attract homebuyers might themselves have incentives to provide protections to at-risk minorities prospectively, in the form of insurance against risk of confiscatory or discriminatory regulation. Christopher Serkin, Local Property Law: Adjusting the Scale of Property Protection, 107 Colum. L. Rev. 883 (2007). Serkin's theory assumes some enforcement of these insurance contracts by some independent adjudicator. Chapters 3 and 4 focus on how individual landowners and developers might protect themselves from neighbors through similar insurance provided by federal courts.

C. An Introduction to Zoning

The single most important mechanism by which local governments control land use is the zoning ordinance. (There are other important mechanisms as well, including subdivision regulation and building codes (discussed in Chapter 5), fees and assessments (discussed in Chapter 7), municipal services like water and sewer and land assembly through eminent domain (discussed in Chapter 10)). What follows are a brief history of zoning and an account of how zoning ordinances can be construed. The central question raised but not answered by this overview is whether planning, planners, and plans should control zoning. It is a question to which the book returns in Chapter 4.

1. A Brief History of Zoning

U.S. zoning has two main roots: (1) early single-purpose public land use controls, and (2) the coalescence of the urban reform and architecture movements into the city planning movement.

Prior to the advent of zoning, landowners were hardly free to do whatever they chose. The nuisance law and express contractual agreements (covenants) discussed in Chapter 6 were, and still are, potentially important constraints. Moreover, prior to the New York City zoning ordinance of 1916, some cities had adopted limited-purpose controls on building bulks. For example, in 1898 Massachusetts limited the height of buildings around the statehouse in Boston, and in 1899 Washington, D.C., restricted the height of buildings to preserve the prominence of the Capitol building's dome. In 1906, Boston sought to minimize fire hazards by imposing height limitations that varied between residential and commercial or business areas.

Many cities adopted controls on specific land uses. Mich. Rev. Stat. 171 (1838) authorized local government officials to "assign certain places for the exercising of any trade or employment offensive to the inhabitants." Courts routinely enforced ordinances

that barred specific noxious uses from neighborhoods designated for protection. See, e.g., In re Hang Kie, 10 P. 327 (Cal. 1886) (laundries); Shea v. City of Muncie, 46 N.E. 138 (Ind. 1897) (taverns and liquor stores); Cronin v. People, 82 N.Y 318 (1880) (slaughtering of cattle).

However, the technique of comprehensively dividing a city into districts and varying building and use regulations from district to district was not pioneered until 1891, in the German city of Frankfurt-on-the-Main. For descriptions of the Frankfurt plan, see Anthony Sutcliffe, Towards the Planned City: Germany, Britain, the United States, and France, 1780–1914, at 32 (1981); Thomas H. Logan, The Americanization of German Zoning, 42 J. Am. Inst. Planners 377, 379–80 (1976). In 1909, Los Angeles adopted a comprehensive zoning scheme demarcating one residential and seven industrial districts. See Ex parte QuongWo, 118 P. 714 (Cal. 1911).

The 1916 New York City ordinance did the most to trigger interest in zoning. The ordinance was designed to cure two specific problems — the invasion of loft factories employing Eastern European garment workers into the prestigious Fifth Avenue commercial district, and the traffic congestion and blockage of light and air caused by proliferating skyscrapers. The ordinance was pushed through by a coalition of three interest groups: Fifth Avenue merchants, real estate owners concerned about keeping skyscrapers from depressing property values, and reformers interested in broader concepts of city planning. In his informative history, Seymour Toll concludes it was "a tiny interest group in the city to which a much larger community acquiesced when the law was eventually passed in 1916." Seymour I. Toll, Zoned American 164 (1969); see also Gregory F. Gilmartin, Shaping the City: New York and the Municipal Arts Society 188–202 (1995); Raphaël Fischler, The Metropolitan Dimension of Early Zoning, 64 J. Am. Plan. Ass'n 170 (1998).

New York City's ordinance helped inspire Herbert Hoover to promulgate the Standard State Zoning Enabling Act (SZEA) to assist states in authorizing their cities to zone. The first three sections of the SZEA concisely describe the method and theory of zoning. Section 1 empowers local governments to

> regulate and restrict the height, number of stories, and size of buildings and other structures, the percentage of a lot that may be occupied, the size of yards, courts, and other open spaces, the density of population, and the location and use of buildings, structures, and land for trade, industry, residence, or other purposes.

U.S. Department of Commerce, Standard State Zoning Enabling Act (1926), reprinted in 5 Kenneth H. Young, Anderson's American Law of Zoning §32.01 (4th ed. & Supp. 2004).

Section 2 contemplates the particular method by which such powers are to be implemented:

> For any or all of said purposes the local legislative body may divide the municipality into districts of such number, shape, and area as may be deemed best suited to carry out the purposes of this act; and within such districts it may regulate and restrict the erection, construction, reconstruction, alteration, repair or use of buildings, structures, or land. All such regulations shall be uniform for each class or kind of building throughout each district, but the regulations in one district may differ from those in other districts.

Id. Although section 1 empowered local government to adopt land use regulations only "for the purpose of promoting health, safety, morals, or the general welfare of the community," section 3 elaborated further on the permissible goals of regulation:

> Such regulations shall be made in accordance with a comprehensive plan and designed to lessen congestion in the streets; to secure safety from fire, panic, and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; and to facilitate the adequate provision of transportation, water, sewerage, schools, parks, and other public requirements. Such regulations shall be made with reasonable consideration, among other things, to the character of the district and its peculiar suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout such municipality.

Id. The idea of districting land uses had great political appeal. Reformers thought it would promote the general welfare. Landowners, especially owners of single-family houses, saw zoning as a way of protecting their investments from inferior uses that might locate close by. Even industrialists could see some virtues in zoning; if a manufacturing plant were located in a district designated for industry, it probably would be less likely to be enjoined as a nuisance.

In any event, the practice of zoning spread rapidly. By 1930, 35 states had passed zoning enabling acts patterned after the SZEA. Between 1915 and 1925, the number of cities with zoning rose from a handful to 500. *Developments in the Law — Zoning*, 91 Harv. L. Rev. 1427, 1434–35 (1978). Today, Houston is the only large city without comprehensive zoning. (For a glimpse of the way things work in Houston, see pp. 000.) Most small cities also have zoning schemes.

Why did zoning spread so rapidly in the 1920s after centuries of land use being regulated almost exclusively by covenants and nuisance law? William Fischel argues that the spread of cheap working-class transportation — the automobile — untethered to streetcars and railroads was the key impetus: The motor bus made it possible for working-class housing to be located anywhere in a city or suburb, creating an incentive for middle-class homeowners to use law rather than distance from railroad tracks to exclude apartments. William Fischel, An Economic History of Zoning and a Cure for Its Exclusionary Effects, 41 Urb. Stud. 317 (2004).

The state courts split on the constitutionality of the first comprehensive zoning ordinances: Ten or so upheld comprehensive zoning ordinances, but several others held that the technique violated due process by not being sufficiently related to traditional police power concerns. See id. at 1435; Alfred Bettman, Constitutionality of Zoning, 37 Harv. L. Rev. 834 (1924). The U.S. Supreme Court finally ruled that zoning was consistent with the Fourteenth Amendment's due process clause in Village of Euclid v. Ambler Realty, a landmark opinion discussed in more detail in Chapter 3.

Note on the Evolution of Zoning from a Static to a Dynamic System

A zoning ordinance has two parts: a map and a text. The map classifies the city's land into zoning districts; the text spells out the uses permitted in each zone and details restrictions on lot size, building placement, building height, and similar issues. Apart from the constant of this simple "map plus text" model, zoning has changed significantly since it was introduced in the 1920s.

The first generation of zoning ordinances was based on the idea that the chief problem solved by zoning was high-intensity uses' imposition of nuisance-like costs on the quiet enjoyment of land by residential users. On this assumption, all land uses could be arranged along a single dimension of noxiousness, from least noxious to most noxious.

The point of zoning was simply to exclude more noxious uses — i.e., noisier, dirtier, taller, more crowded, or bulkier uses — from proximity to less noxious uses (paradigmatically, the single-family home), protecting the latter from the former. Ira Michael Heyman, Legal Assaults on Municipal Land Use Regulation, 5 Urb. Law. 2 (1973), reprinted in The Land Use Awakening: Zoning in the Seventies 51 (Robert H. Freilich & Eric O. Stuhler eds., 1980). It followed that there was no need to exclude less noxious uses from proximity to a more noxious use. Under the early zoning ordinances, residential structures could be, and often were, located in industrial or commercial zones, but not vice versa.

Zoning authorities also initially assumed that they could specify in advance where residential, industrial, and commercial uses ought to be located. But experience quickly revealed that it is not practicably possible to predict future market demand, and zoning provisions that run counter to the market create great political pressure for change and are apt to be amended. Accordingly, as early as the 1930s, planners began to turn away from static end-state plans and to shift the focus of zoning away from fixed advance allocations and toward case-by-case review of landowners' or developers' proposed development plans. Fred P. Bosselman & A. Dan Tarlock, The Influence of Ecological Science on American Law: An Introduction, 69 Chi.-Kent L. Rev. 847, 858 (1994) (describing early goal of zoning as "identifying and perpetuating the climax condition of human communities").

This changed the function of zoning maps. Early maps actually attempted to project desired development patterns. When it became clear that this was impossible (or at least very difficult), zoning maps essentially became "first offers," which described minimum uses that cities would allow; the "final offers" (the real controls) emerged from ad hoc bargaining between landowner and city. To discern a municipality's zoning intentions today, therefore, one must focus not only on the current map, but also on the pattern of amendments the municipality has recently approved.

Modern zoning maps have some general characteristics, described below, that distinguish them from their ancestors.

1. *Holding zones, zoning map amendments, and administrative flexibility devices.* The SZEA provided three basic avenues for change. Two of these were administrative procedures conducted by local agencies. *Variances* essentially waive the application of specific provisions of the zoning ordinance to a particular plot. The SZEA envisioned that variances would be granted by a quasijudicial board of zoning appeals to relieve landowners of unnecessary hardship and would be sufficiently limited to avoid compromising the overall zoning scheme. The *special exception* (also known as the *conditional use*) is an unusual use identified in advance by the zoning ordinance that is apt to impose special costs on nearby users — noise, smell, traffic, etc. Such uses can include service stations, houses of worship, schools, homeless shelters, or any other use designated by the local legislative body. Such uses are permitted in designated zones so long as they meet certain site-specific criteria, some of which are extremely vague — for instance, having no "detrimental effect" on neighboring properties. Typically, some local administrative body (often the planning commission) first hears applications for these permits. The commission's decision often may be appealed to the local legislative body.

Rezonings (also called *zoning amendments* or *map amendments*) are revisions of the applicable text or map. The local legislative body enacts them through the normal legislative process. Unlike variances and conditional uses, map amendments actually change the underlying local law and, therefore, are less constrained by the limits contained in that law.

Modern zoning laws do not assume that the existing zoning should remain fixed but instead encourage parcel-by-parcel change in response to specific petitioners from developers. Cities now offer a wide variety of procedures by which the zoning rules applicable to

a particular piece of land can be changed. Although these change mechanisms are treated in detail in Chapter 4, the balance of this chapter will be less mysterious if we define some of them at this juncture.

Since the 1960s, local legislatures have often done so with the device of a "*planned unit development*" (PUD) or "floating" zone. Such zones are essentially zones that are defined in the zoning law's text but not placed on the map until an individual petitioner seeks out the PUD designation for a specific parcel with an application showing the layout and use of specific buildings. The legislature, usually after a hearing before the planning commission and that commission's recommendation, then enacts a custom-tailored zone based on the petitioner's application, uniquely restricting the uses on the land to the petitioner's site plan. PUD ordinances generally provide a specific procedure of hearings and submissions by which the public can have a chance to challenge such map amendment requests.

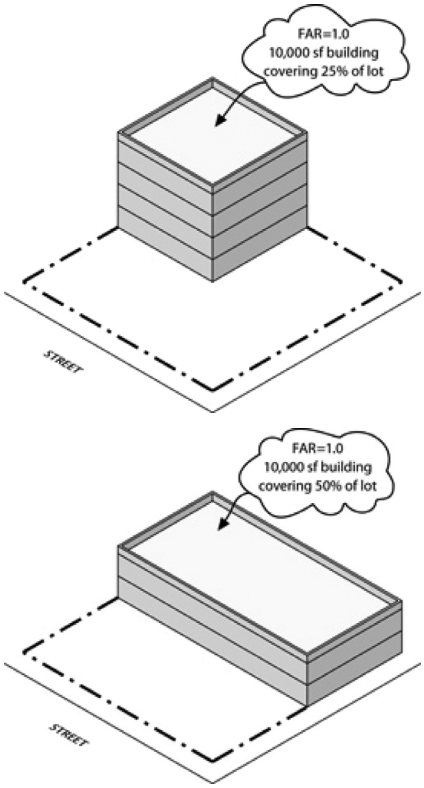
To increase the opportunity for the local legislature to provide custom-tailored map amendments for interested developers, the zoning ordinance may place much or all undeveloped land into a "*holding zone*" — that is, a zoning designation of such low density or unprofitable uses that that the local government expects owners to apply for a map amendment rather than develop the land according to the existing zoning. Popular holding zones include agricultural zones requiring very large lot sizes per dwelling unit or industrial zones that forbid nonmanufacturing uses in communities unprofitable for manufacturing enterprises.

2. *Ratio-based zoning for flexibility.* Modern ordinances, especially in big cities, often use ratios rather than fixed numbers to define height and lot coverage. Such ratios are designed to give developers more flexibility in designing buildings to avoid the "cookie cutter" fixed heights and setbacks of the original ordinance. For instance, New York City amended its zoning ordinance in 1961 to include the use of "*floor-area ratios*" (FAR) and "*open-space ratios*" ("OSR") to define height and bulk. OSR defines open space on a lot not by specific setbacks, but rather a ratio of open space to total lot area. FAR defines height as a ratio between the total floor area of a building and the area of the lot on which the building sits, giving the builder the option of a short building covering all of the lot or a taller but narrower building. A FAR of 1, for instance, would allow construction of a two-story building covering 50 percent of the lot or a four-story building covering 25 percent of the lot.

New York City also defines an overall height limit with a second ratio — a "sky exposure plane" — consisting of an imaginary line extending upwards from a base height at an angle defined by a ratio of vertical to horizontal distance, which allows the developer to build higher by using a deeper setback on each story above the base height.

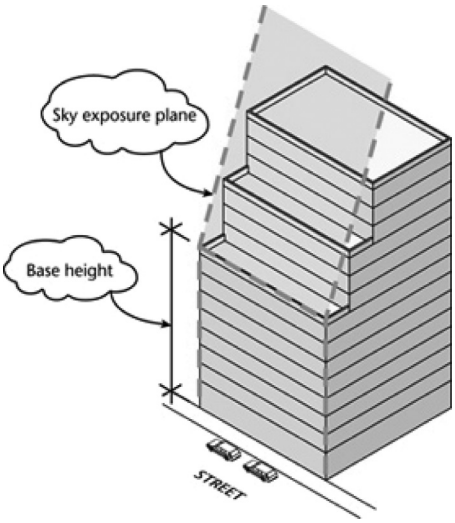
The result of these ratios is that figuring out the buildable "envelope" on a particular lot can be complex — a function of lot size, setback depths, and so forth. Test your math skills: Try to draw a few sample buildings using an FAR of 6.02, OSR of 5.9, and sky plane ratio defined by a base height of 85 feet and a vertical-horizontal ratio of 2.7 to 1 on a lot with an area of 20,000 square feet.

3. *The proliferation of zoning categories.* The zoning classifications of modern maps are both more narrowly defined and more numerous than those of first-generation maps. The 1916 New York City ordinance had only three types of use districts: residence, business, and unrestricted. Lincoln Trust Co. v. Williams Bldg. Corp., 128 N.E. 209, 210 (N.Y. 1920). Today, the New York City ordinance has 172 different use districts, including 57 separate "special districts" unique to particular neighborhoods. New York, N.Y., Zoning Resolution, art. I, ch. 1, H11–12 (May 13, 2004). When the U.S. Supreme Court upheld the village of Euclid's zoning law in 1926, the village had six use districts; today the city of Euclid has 12. The reasons behind this expansion already have been alluded to: The more use districts a city has, the more easily it can pick a narrowly tailored use district out of the



Source: New York City Zoning Resolution.

FIGURE 2-2
Schematic Diagram Illustrating Floor-Area Ratio



Source: New York City Zoning Resolution, Section 23–632(a)).

FIGURE 2-3
Schematic Diagram Illustrating the Sky Exposure Plane

zoning law to allow existing uses to continue while restricting their expansion to a broad array of uses covered by the same designation. Similarly, creating new zones improves a city's bargaining position because more types of ad hoc deals become possible.

4. *Favoring mixed uses of land.* The original wisdom that commercial, residential, and industrial uses ought to be separated from each other has gradually yielded to the idea that a fine-grained intermixture of uses can be more efficient, socially beneficial, and aesthetically pleasing. That earlier view rested on the idea that the "highest" use of land was seen as a neighborhood of single-family houses, unsullied by inconsistent uses. Once this vision was accepted, the notion of a hierarchy of uses and the need for their rigid segregation followed. The notion that residential areas should be sharply differentiated from nonresidential areas owes much to the landscape architects of the late nineteenth and early twentieth centuries who sought to reconcile the city with the country. For a brief survey of that tradition, see Roy Lubove, The Urban Community: Housing and Planning in the Progressive Era 1–22 (1967).

This rigid separation of uses that marks early zoning was sharply criticized by Jane Jacobs in her classic 1961 book, The Death and Life of Great American Cities. Jacobs argued that a mixture of uses is crucial to a city's vitality, in part because mixed-use districts attract different kinds of people whose activities occur over more of the day, thereby making the area safer and more vibrant around the clock, and in part because a mixture of uses promotes "the cross-fertilization of ideas and experiences that is so important to a city's economic and social health." Jay Wickersham, Jane Jacobs's Critique of Zoning: From Euclid to Portland and Beyond, 28 B.C. Envtl. Aff. L. Rev. 547, 550–51 (2001); see also pp. 000 for a discussion of Jane Jacobs. Today, criticism of the separation of uses is pressed most strongly by the New Urbanists, who urge that a mix that allows people to work and shop within walking distance of their homes promotes a greater sense of community and reduces dependence on environmentally unfriendly automobiles. See, e.g., Andres Duany et al., Suburban Nation: The Rise of Sprawl and the Decline of the American Dream 24–25 (2000). Chapters 5A and 9D explore those themes. The movement in favor of form-based zoning likewise deemphasizes segregation of uses in favor of specifying urban forms or physical layouts that might encompass mixed uses like retailers in close proximity to residences. See Daniel Partolek et al., Form-Based Codes: A Guide for Planners, Urban Designers, Municipalities, and Developers (2008).

5. *The loss of agglomeration economies from zoning?* In effect, the modern zoning ordinance uses increasingly fine-grained and individually negotiated zoning categories (whether predefined in the ordinance's text or custom-tailored PUD zones) to micromanage the specific uses of land on a particular parcel. What have been the effects of this trend?

According to Edward Glaeser, "a web of regulation" has made New York City "shorter" throughout the 1980s and 1990s. The effect of this loss of height was a massive increase in housing prices driven by limits on supply. With only an average of 3,120 new units permitted per year in the 1980s and 1990s (compared to more than 11,000 per year in the 1950s and early 1960s), the cost of New York City housing increased by 284 percent in constant dollars. Edward Glaeser, Triumph of the City: How Our Greatest Invention Makes Us Richer, Smarter, Greener, Healthier, and Happier 150–51 (2011). In effect, homevoters, seeking more control over their neighborhoods, cut back on potential housing that could have been purchased by prospective buyers. Glaeser has pointed to evidence of a similar increase in restrictiveness in other big cities. Edward L. Glaeser & Joseph Gyourko, The Impact of Zoning on Housing Affordability, Harvard Institute of Economic Research Paper No. 1948 (Mar. 2002).

By reducing the supply of housing, zoning could erode one of the chief advantages of big cities — their agglomeration of highly educated workers who increase their human capital by interacting in close physical proximity with each other. Substantial evidence suggests that urban density increases the returns from investment in education through such agglomeration, because people learn from each other. Edward L. Glaeser, Agglomeration Economics (2010). By driving people out of cities where they are most productive, high housing prices produced by restricted supply can reduce these agglomeration economies. Ryan Avent, The Gated City (2011).

Does the Fischel-Tiebout model of politics ensure that the value of lost agglomeration is less than the value produced by zoning ordinances for homebuyers — say, lower congestion costs of traffic, lost air and light, and fiscally productive land uses? The city as a whole could promote such agglomeration benefits only by foregoing some of the income stratification that Tiebout and Bruce Hamilton say is necessary to ensure that homebuyers make efficient decisions about whether to migrate to a jurisdiction in search of local public goods. See David Schleicher, The City as Law and Economics Subject, 2010 U. Illinois L Rev 1507 (2010). Moreover, homevoting neighbors may exclude new residents even when these newcomers add agglomeration benefits in excess of their congestion costs, because such benefits likely transcend the neighborhood in which the newcomers settle and are, therefore, external to the neighbors' calculations. See Roderick M. Hills, Jr. & David Schleicher, Balancing the "Zoning Budget," 62 Case Western L. Rev. 81 (2012). Does the rising cost of housing in big cities suggest that neighbors have too much clout? Chapter 8 explores this question in examining legal doctrines limiting exclusionary zoning, but the issue arises in Chapter 3 as well when the efficiency of zoning becomes the subject of constitutional litigation, and in Chapter 4, when the proper design of zoning procedures for the protection of the public interest from private interests is a focus.

2. *Interpreting Ambiguities in Zoning Ordinances: The Meaning of "Single-Family Residential" Use*

The detail and complexity of modern zoning ordinances provide many opportunities for clever lawyering and judicial interpretation, because the terms contained in those ordinances are often vague and conflicting. One critical question in construing these complex rules is whether a local government's administrative or political decisionmakers will receive deference from courts when construing ambiguous zoning terms.

Consider, for instance, the meaning of the term "single-family residential use." This designation permits what the original zoning law treated as the most favored land use — the detached house occupied by one household. But litigation over the meaning of "single family" and "residential" is a commonplace occurrence in land use law.

One recurrent issue is whether unrelated adults, living together in a single-family residential zone, constitute a family within the meaning of the zoning law. See, e.g., Bayram v. City of Binghamton, 27 Misc. 3d 1032, 899 N.Y.S.2d 56 (N.Y. Sup. 2010) (seven college students living together in a house did not constitute a "family" within meaning of single-family zone because they did not maintain a common household with common meals); Scott County Area Plan Comm'n v. Townes Half-Way House, Inc., 909 N.E.2d 515 (Ind. App. 2009) (halfway house for substance abusers seeking to overcome addiction was a "single-family" use because group lived together in a dwelling unit as single housekeeping unit under common management plan based on an intentionally structured relationship).

Another common interpretative issue is whether the owners of a house renting it to different short-term lessees constitutes a "residential" use of a house by a "single family." In Siwinski v. Town of Ogden Dunes, 922 N.E.2d 751 (Ind. App. 2009), for instance, the intermediate appellate court overruled the trial judge's determination that the Siwinskis renting their house to other families for periods of less than 30 days on five separate occasions constituted a commercial use. Citing the canon of statutory construction that courts "interpret an ordinance to favor the free use of land and will not extend restrictions by implication," the appellate court reasoned that the Siwinskis' use was residential because the "[o]rdinance does not expressly prohibit short-term rentals" and "the renters of the Siwinskis' property used the house for eating, sleeping, and other activities typically associated with a residence or dwelling place." "Under the trial court's overly broad construction of the Ordinance," the court concluded, "the Siwinskis would be prohibited from . . . such things as having weekend guests or allowing family members to use the property while they were away as the property would then not be occupied exclusively as a residence by one family." Id. at 754.

The Indiana Supreme Court, however, reversed the intermediate appellate court's decision, holding that the Siwinskis renting the property for short periods was not residential, because "[t]he rental activity undertaken by the Siwinskis was conducted for profit or gain." The court also reasoned that, because the Siwinskis rented to different families, "the dwelling was not occupied exclusively by one family" and, therefore, could not be a single-family use. 949 N.E.2d 825, 829–30 (Ind. 2011). In reaching this conclusion, the court noted that "[i]t makes sense that Ogden Dunes, a small, quiet, lakeshore town on Lake Michigan, would not want renters overwhelming its residential district during the summer lake season." Noting that the town "is unique in Indiana in that it is a beachfront community and is completely surrounded by the Indiana Dunes National Lakeshore," the court concluded that "[t]he residents are able to determine the use of their town's land through the zoning ordinances, and they intended to keep the unique nature of a small residential beach community intact by not allowing for rental property in their residential district." Id. at 830.

Other jurisdictions have rejected the Indiana Supreme Court's conclusion that short-term rentals constitute a commercial rather than a residential use. In re Toor, 59 A.3d 722 2012 WL 3641550, 2012 VT 63 (2012), concerned a California couple renting out their five-bedroom, four-and-a-half-bath vacation home in Vermont 11 times in one year. The rental terms' durations lasted from as little as two nights to as long as two weeks, and the couple charged rent, including a 9 percent state room tax, to help defray tax and maintenance costs. The couple also lent the house to friends and frequently entertained guests without payment, as well as living in it themselves. The town's zoning administrator, the Development Review Board (DRB, essentially a local land use agency), and the trial judge all concluded that the charging of rent to short-term lessees constituted a commercial use for more than a single family in violation of the zoning, which specified that the zone permitted "[l]iving quarters with cooking, sleeping and sanitary facilities provided within a dwelling unit for the use of a single family maintaining a household" and defined a family to mean "one or more persons living as a household (dwelling) unit, but not including individuals or groups occupying rooming and boarding houses, clubs, motels or hotels."

In rejecting the interpretation of family offered by the agencies and courts below, the Vermont Supreme Court noted that "having non-paying overnight guests, whether family or friends, is a normal incident of use of a single-family home" that did not depend on either "the presence of the homeowner" nor "on the length of the guest's stay." According to the court, "when the wording is used to define a permitted use, it must regulate the use." That is, if the occupants do everything that the ordinance specifies — "living, cooking,

sleeping" by a "household" — then the fact that the occupants' identity changed periodically was irrelevant to the scope of the prohibition. Rejecting the view of the agencies and court below that renting the property changed "the use . . . from a personal use to a commercial use or to a mixture of both," the court noted that "[t]he [zoning] bylaws allow commercial uses in this zone: bed and breakfast, rooming and boarding house, and home offices" and that the definition of a family specifically excluded "individuals or groups occupying rooming and boarding houses, clubs, motels or hotels." "The specific exclusion implies that 'one or more persons living as a household' could, absent the exclusion, encompass transient and commercial living arrangements," the court concluded, even as it acknowledged that "use of the term 'including' or 'not including' does not always mean that the general element — here, the household (dwelling) unit — encompasses the specific inclusion or exclusion." Id. at 728. The court noted that the definition said nothing about the duration of a single family's occupancy: "If the renters are not the family for purposes of the definition, it does not matter whether the renters are present for a day or for a year. Their occupancy would be illegal." That "the aggregate occupancy of the rental groups did not constitute occupancy by a single household" was also textually irrelevant to the court, because "[a]t any given time, the occupancy of the house was by a single household. If the Town meant to require more than this, it could easily have included something to that effect in the bylaws." Any "concern about impermanence of composition of each group . . . would apply whether appellants were renting the property or using it themselves together with guests or for guests without them." Id. at 729.

In reaching the conclusion that short-term rentals were a permitted "single-family residential use," *In re Toor* was "particularly affected by the requirement of narrow construction and the need for landowners to be able to ascertain the line between proper use of their property and illegal use." Finding "no ascertainable rules in its decision" except the "itemize[ation of] a number of factors" without any "bright lines" or "specification of the chemistry among [the factors]," *In re Toor* stated that the trial judge below "created no usable rule to apply in the future." Id. at 729. *In re Toor* also rejected the idea that the neighbors' need to control the number and identity of renters next door could justify a broader reading of the zoning prohibition, stating that "these arguments are for the municipal governing body rather than the judiciary," because "[w]e are not the body to resolve the conflicting interests of the landowner, the neighbors of the landowner, and the Town and all its citizens except under ascertainable standards adopted by the Town. In this case, we cannot find that there are such standards that prohibit this use of appellants' property. . . . Interpreting the existing bylaw to properly weigh the interests and fashion a balanced solution is well beyond our role." Id. at 729–30.

In re Toor is not unique in construing zoning limits on residential uses to favor the landowner. In Atkinson v. Wilt, 941 N.Y.S.2d 798 (NY App. 2012), the court held that a couple renting out a six-bedroom house for seven weeks during the summer on a weekly basis as a vacation rental did not prevent their use of the house from being single-family use, given that the couple intended to use the property primarily as a second home, living there on weekends for the balance of the year. Like *In re Toor*, *Atkinson* relies on an inference based on negative implication from the zoning law definition of a tourist accommodation as "any hotel, motel, resort, tourist cabin or similar transient facility used to house the general public, including an accessory restaurant." Unlike *In re Toor*, *Atkinson* specifically relied on "petitioners' representations that they carefully screened potential renters, thereby belying any assertion that the property was open to the general public." *Atkinson* relied on a canon favoring landowners: "[T]o the extent that it may be argued that the Town's Land Use Ordinance is unclear in this regard, we need note only that any such

ambiguity must be construed in favor of petitioners." Id. at 800. Consider the following questions about zoning interpretation.

a. Did the Text of the Zoning Laws Provide Any Correct Answer?

In re Toor relied on various textual arguments, such as the inference that the express exclusion of certain types of commercial uses implied permission for nonexcluded ones. But *In re Toor* acknowledges that such negative implication is not always appropriate. Do any straightforward textual arguments show that either *Siwinski* or *In re Toor* was wrongly or rightly decided? Or is the text simply indeterminate? How can that be, given the detail of the zoning codes' language?

b. The Antiderogation Canon and the Protection of Market Ordering

It is extremely common for state courts to assert that ambiguities in zoning ordinances should be construed to favor rights in private property, because "zoning laws are in derogation of the common law." *Ohrenstein v. Zoning Bd. of Appeals of Town of Canaan*, 833 N.Y.S.2d 763 (2007) (upholding glassblowing as a home occupation permissible in a residential zone). See also Van Camp v. Riley, 476 N.E.2d 1078 (12th Dist. Clermont County 1984) ("It is well-settled that as zoning regulations deprive the owners or real property of certain uses thereof, and are in derogation of the common law, they must be strictly construed and not extended by implication"). *Atkinson*, for instance, relied on this antiderogation canon. *See also* Daniel A. Himbaugh, Tie Goes to the Landowner: Ambiguous Zoning Ordinances and the Strict Construction Rule," 43 Urb. Law. 1061 (2011). What's the point of the antiderogation canon? To protect common law property rights? Should the canon be limited to cases where the common law unequivocally protects the landowner because the challenged use is not a nuisance? To cases where market failure seems unlikely?

c. The Deference Canon and the Judicial Protection of Democratic and/or Expert Decisionmaking

Federal courts generally defer to federal agencies' interpretations of ambiguous terms. Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). State courts rarely take such a deferential stance toward local agencies' interpretations of zoning laws, instead holding that courts should defer to agencies' resolutions of mixed questions of law and fact but not their resolutions of pure questions of law. See, e.g., New York Botanical Garden v. Board of Standards and Appeals of City of New York, 694 N.E.2d 424 (1998) (Because the BSA is composed of land use experts, its interpretation of the city's zoning resolution, unless irrational, is entitled to deference except in cases of "pure legal interpretation," such that the BSA's "fact-based determination" that regardless of the size of the tower, the university's radio operations "are of a type and character customarily found in connection with an educational institution" deserves deference as construction of how term "educational" ought to be applied in zoning law). Some state courts reject *Chevron* altogether. See, e.g., In re Complaint of Rovas Against SBC Mich., 754 N.W.2d 259, 265–72 (Mich. 2008) (expressly rejecting *Chevron*). Does it make sense for state courts to defer less to local administrative agencies than for federal courts to defer to federal

agencies? Note that in smaller local governments, boards of zoning appeals typically are staffed by laypersons without legal training who serve part-time. In New York City and similarly very large municipalities, the board will be composed of real estate professionals — engineers, architects, planners, etc. — serving six-year terms in a full-time capacity. See, e.g., New York City Charter §659. Should the level of deference vary based on the professionalism and independence of the board? Or on the political responsiveness of the board? The next section of this chapter explores the role of planning and planners. Planning staff are the paradigmatic land use experts; as you read the next session, ask whether the deference canon should give their views or the plans that they create special deference in construing ambiguous terms in a zoning law.

D. Planning, Planners, Plans

Planning can be regarded as a third alternative to either allocation of land uses by private markets defined through common law rules or allocation through local politics. Referring once more to Komesar's typology, planning allocates land uses according to an objective notion of the public good not defined by private preferences aggregated either by the market or political deals. Plans have taken on considerable legal importance in many states. This section introduces planning theory and the planning profession, presents illustrative plans and illustrative statutes that require a local government to plan, and concludes with materials that probe the question of when land use planning is worth the candle. (The issue of the legal significance of a local plan is deferred to pp. 000).

1. An Overview of the Planning Process

a. History of Urban Planning in the United States

The idea of providing an alternative to both market and politics was part of the original idea behind progressive advocates' call for urban planning in the early twentieth century. Inspired by the idea of expert control over the layout of public and private buildings in Imperial Germany's *Städtebau* ("city building"), American architects such as Daniel Burnham and journalists such as Frederic Howe pressed for giving experts similar power to arrange plazas, parks, streets, and public buildings to produce large-scale aesthetic and civic benefits in the United States. These early planning advocates, often Protestant evangelicals like Howe, were equally disgusted by urban political machines that were often organized along ethnic lines to deliver the spoils of office to their followers and real estate speculators who built tenements for the very poor and mansions for the very rich without regard to any unifying vision of urban society. They were also disturbed by what they took to be the social disorder of cities wracked by wildcat strikes and flooded with a wave of immigrants without citywide social ties. Against what they took to be tendencies toward social disintegration, they called for inspiration of civic unity using monumental architecture and public spaces — triumphal arches, broad diagonal avenues from Haussmann's Paris, parks like Daniel Burnham's Central Park in New York City. The idea of unifying urban society through public architecture got a big boost from the success of Daniel Burnham's monumental plaster-cast buildings created for Chicago's Columbia

Exposition of 1893, a spectacle that helped launch the City Beautiful movement. See generally Daniel Rodgers, Atlantic Crossings: Social Politics in a Progressive Age 54–60, 112–59 160–72 (1998) (describing how European models of expert city planning, monumental architecture, and desire for civic unity transcending labor and ethnic strife motivated planning advocates). As Frederic Howe described the early city planning movement:

> [C]ity planning is the first conscious recognition of the unity of society. It involves a socializing of art and beauty and the control of the unrestrained license of the individual. It enlarges the power of the State to include the things men own as well as the men themselves, and widens the idea of sovereignty so as to protect the community from him who abuses the rights of property, as it now protects the community from him who abuses his personal freedom. City planning involves a new vision of the city. It means a city built by experts, by experts in architecture, in landscape gardening, in engineering, and housing, by students of health, sanitation, transportation, water, gas, and electricity supply; by a new type of municipal officials who visualize the complex life of a million people as the builders of an earlier age visualized an individual home. It involves new terms, a wider outlook, and the co-ordination of urban life in all its relationships.

Frederic C. Howe, The Remaking of the American City, Harper's Monthly, 127:186–87 (July 1913). Or, as Daniel Burnham put the matter more succinctly, "Make no little plans. They have no magic to stir men's blood. . . ."

The federal government gave city planning its imprimatur in 1928 when the U.S. Department of the Treasury, under then Secretary Herbert Hoover's leadership, issued its Standard City Planning Enabling Act (SCPEA) as a complement to the Standard Zoning Enabling Act model for state legislation.

The general idea of city planning under the SCPEA was for the city's legislature to approve a plan as a guide for future city development that is drafted by the city's planning experts and recommended by the planning commission. Although local land use plans appear in many varieties, a typical one includes a statement of goals; a prediction of demographic, economic, and social trends in the city; and a map that indicates desired land uses (usually less precisely than a zoning map does). The document is variously denoted a master plan, official plan, or comprehensive plan. Sabo v. Township of Monroe, 232 N.W.2d 584, 594 n. 14 (Mich. 1975) (quoting Arthur Abba Goldberg, Zoning and Land Use 17 (1972)). Local governments turned out to be much less enthusiastic about planning than zoning, to the early disgust of architects who had hoped that legal emphasis on planning would elevate architectural expertise and design as a factor in building approvals. Charles H. Cheney, Architectural Control in Relation to Zoning, *in* 155 Annals of the American Academy of Political and Social Science, Part 2: Zoning in the United States, 159–65 (May 1931). Planning came under heavy attack after World War II by critics like Jane Jacobs, who announces in the first sentence of The Death and Life of Great American Cities 3 (1961), "This book is an attack on current city planning and building." Jacobs's basic criticism is that planners have tended to segregate differing public and private land uses, while a city thrives only when it allows land uses to be intricately diverse and close-grained. Similarly skeptical is Kenneth L. Kolson, Big Plans: The Allure and Folly of Urban Design (2002).

Land use planning is sometimes associated with the now-repudiated practice of dreaming about how a community might appear on a specific date far in the future. Planners who followed this practice usually chose a round number as their target (the year 2000 was extremely popular during the mid-twentieth century) and prepared futuristic maps and pictures portraying life at that time. Plans of this sort have almost never had any significant effect. Meyerson and Banfield describe these as "utopian schemes"; others

who have been less charitable have called them "letters to Santa Claus." Influential critiques of these long-range, end-state plans include Melville C. Branch, Continuous City Planning (1981); and Martin Meyerson, Building the Middle-Range Bridge for Comprehensive Planning, 22 J. Am. Inst. Planners 58 (1956).

In the 1950s, the federal government swung its weight behind comprehensive land use planning. In 1954, Congress required that a local government have a "workable program for community improvement" to be eligible for urban renewal funding and other federal grants-in-aid; a workable program was defined to include progress toward adoption of a comprehensive plan. The Section 701 program, also begun in 1954, provided federal financial support for plan preparation. The first generation of plans produced in response to this federal impetus did little to add to the prestige of the planning profession. The plans that were adopted usually had little legal effect and tended to be ignored by policymakers. See Alan A. Altshuler, The City Planning Process 84–143 (1965) (devastating critique of how a plan was prepared and adopted in the late 1950s in St. Paul, Minnesota). Moreover, many plans prepared during this period were formally aborted. Even as late as 1970, the planning departments of Los Angeles and New York were producing massive drafts of general plans that ultimately were not adopted by their cities.

By around 1980, virtually all planning professionals had come to recognize both the limits of rationality and the unpredictability of modern civilization. Planners thus have tended to become less ambitious in the dimensions of space and time. Specific plans applicable to particular subcity areas have come into vogue. See note 3, p. 000. Many planners also have come to believe that the planning period should not stretch beyond 25 years (at the very most) and that detailed planning should concentrate on the next five years or so. There also is agreement that plans have to be continually revised to take account of new information and events. In sum, flexible, middle-range planning has come to replace long-range, end-state planning. We shall soon see, however, that some critics doubt the wisdom of even these more modest planning efforts, particularly insofar as they apply to use of private lands. On the history of U.S. ideas and efforts, see Alexander Garvin, The American City: What Works, What Doesn't (2d ed. 2002); Jon A. Peterson, The Birth of City Planning in the United States, 1840–1917 (2003); John W. Reps, The Making of Urban America: A History of City Planning in the United States (1965).

Especially after 1991, the federal government has conditioned portions of federal transportation funding on progress in metropolitan-wide transportation planning. See, e.g., 23 U.S.C. §1, 34 (2004). Would Jacobs object to comprehensive planning of this part of the public grid?

b. Modern Planning Theory

Modern planning theory is a great deal less ambitious than Frederic Howe's euphoric 1913 call for "the co-ordination of urban life in all its relationships." The following excerpt provides a summary of modern justifications for city planning:

American Planning Association, Growing Smart Legislative Guidebook: Model Statutes

for Planning and the Management of Change (Stuart Meck ed. 2002), Introduction to Chapter 7

This Chapter provides the authorizing legislation for planning at the local level of government — how local governments organize to plan, what plans should contain, and

the processes for adopting them. It is noteworthy that, throughout the United States, even where state statutes do not require planning, local governments of all sizes continue to plan on their own. This underscores how widespread the recognition of the benefits derived from such planning has become. While each local government may have a special set of reasons in undertaking the preparation of plans, several of the most frequently-mentioned include:

— Local planning draws the attention of the local legislative body, appointed boards, and citizens to the community's major development problems and opportunities — whether they be physical, environmental, social, or economic. A plan gives elected and appointed officials in particular an opportunity to back off from their preoccupation with pressing, day-to-day issues and to clarify their ideas on the kind of community they are trying to create by their many specific decisions. The local planning process provides a chance to look broadly at programs a local government may initiate regarding housing, economic development, provision of public infrastructure and services, environmental protection, and natural and manmade hazards and how they relate to one another. A local comprehensive plan represents a "big picture" of the community, one that can be related to the trends and interests of the broader region as well as the state in which the local government is located.

— Local planning is often the most direct and efficient way to involve the members of the general public in describing the community they want. The process of plan preparation, with its attendant workshops, questionnaires, meetings, and public hearings, permits two-way communications between citizens and local government officials as to a vision of the community and the details of how that vision is to be achieved. In this respect, the plan is "a blueprint of values" that evolves over time.

— Local planning results in the adoption of a series of goals and policies that, ideally, should guide the local government in administering regulations like zoning and subdivision controls, in the location, financing, and sequencing of public improvements in the community, and in guiding redevelopment efforts. In so doing, it may also provide a means of coordinating the actions of many different agencies within the local government itself.

Apart from these reasons from the local government perspective, local planning also has direct benefits to the private sector.

— Because planning results in a statement of how the local government intends to act over time with respect to its physical development and redevelopment in terms of public investment and execution of land development controls, the "private land owner may shape his own plans in the plastic stage when they have not yet crystallized" in the words of one writer. A plan sends signals by providing a "prophecy of public reaction" to specific development proposals, which ultimately influences complimentary private investments.

— The predictability that a plan offers by its requirement of information-gathering and analysis ensures (hopefully) that what a local government does is based on facts, not "haphazard surmises." It thus provides a measure of consistency to governmental action, a "guard against the arbitrary" that "diminishes the problems of discrimination, the granting of special privileges, and the denial of equal protection of the laws."

Finally, from the standpoint of the state itself, it is desirable that local governments plan. State facilities like freeway interchanges and parks are affected by what local governments authorize to occur around them. A local government can allow development that is either compatible or incompatible with such state investments. Typical state interests — like protection of wetlands, preservation of coastal areas and farmland, and provision of affordable housing — are directly influenced by what local governments do. While states do not, in all instances, attempt to directly influence the substantive content of plans or their implementation, the preparation of such plans does provide an opportunity for such

interests to be raised so that local governments can address them in a positive and proactive manner. The mere fact that a local government might consult with the state transportation or natural resources department in a plan's preparation is a way in which state interests may be articulated and accommodated.

c. *The Planning Profession*

Anthony J. Catanese & W. Paul Farmer, Personality, Politics, and Planning
180–81, 183–84, 186–90 (1978)

[The authors report on their lengthy conversations with the chief planners of seven large central cities.]

. . . We suspected that there might be a gap between theory and practice — we found instead a chasm. There appears to be little congruence between the theoretical works in the field of city planning and the practice that we have been examining. Most of the planners we talked with had little interest in the detail and intricacies of city planning theory, although they were aware of the major writers and overall themes. . . .

This brings us to the clearly discernible characteristic common to all of these planners — politicization. All of the planners in this series made it known that they were working for political leaders and within a political setting and, hence, had to rely upon successful performance in the political arena. It was quite fascinating to hear so many chief planners from such diverse cities explain how they tried to make the nontechnical skills of the politician useful to planners. For example, there was much talk about compromises, forming coalitions, and predicting the political feasibility of plans. While this may seem eminently reasonable, there is very little such discussion in the literature of planning (and what exists is very recent in origin). . . .

One further point should be made concerning this characteristic of politicization — that is, the demise in significance of the "independent planning commission.". . . . Some of the planners expressed an arrogance toward the independent planning commission, but most viewed it as a curious relic from the past. One wonders why we bother to have such commissions at all given this low assessment of their efficacy and the shaky foundation of their raison d'etre. All of the planners in this discussion have been oriented toward city planning as an arm of the executive branch of local government. They see the chief executive, not the city planning commission, as the representative of the people. This is certainly the mainstream of contemporary thought in city planning, and it shows that these planners have emerged from the isolation and aloofness sometimes forced by reporting to such an independent planning commission. . . .

. . . We asked the planners to describe the overriding goal for planning in their respective cities. All of them did it without hesitation or protest. We were frankly surprised by this and had expected some protest. . . .

The statements on the overriding goal for planning in each city by the respective planners are arrayed in Table [2-1]. . . . .

Note on the Planning Profession

1. *Planners' values.* According to one study, most planners tend to be committed to environmental protection and mass transit, but are mildly negative about development.

TABLE 2-1
Overriding Goal Comparison

Eplan-Atlanta	"to make the city tolerable to live in . . . the basic common denominator there is to design a city where you can raise a child . . . and to help guide the decisions . . . toward a common goal . . ."
Krumholz-Cleveland	"promoting a wider range of choice for those Cleveland residents who have few if any choices."
Carroll-Indianapolis	"input into the goals-setting process . . . [and] budget-making process . . ."
Vitt-Kansas City	"The overriding goal of the department is to help the city as a whole and each subarea . . . work toward performing closer to the potential that exists . . ."
Drew-Milwaukee	"We decided that fiscal balance would be our overall goal and the cornerstone of our comprehensive planning and programming efforts."
Bonner-Portland	"Less is enough is really where it is at."
Spaid-St. Paul	"The overriding goal . . . has two perspectives: neighborhood stability and economic viability."

Elizabeth Howe & Jerome Kaufman, The Values of Contemporary American Planners, 47 J. Am. Plan. Ass'n 266 (1981). See also Jerome L. Kaufman, Thinking Alike, 66 J. Am. Plan. Ass'n 34 (2000) (finding that planners of several surveyed nations share these same attitudes). A study of San Diego planners, however, revealed that they had more favorable attitudes toward growth than did members of the general population. Nico Calavita & Roger Caves, Planners' Attitudes Toward Growth, 60 J. Am. Plan. Ass'n 483 (1994). A survey of planners from 180 cities in Southern California suggested that senior planners favored denser and more walkable urban developments over traditional low-density and auto-oriented suburban developments. Ajay Garde, City Sense and Suburban Design: Planners' Perceptions of the Emerging Suburban Form, 74 J. Am. Pln. Ass'n 325 (2008). There is some evidence that a "common planning culture or ideology" transcends nationality. A survey of Spanish, Dutch, and American planners suggested that all three groups "tended to have 'public-oriented' values," favorable attitudes toward the environment and mass transit, and "only lukewarm [feelings] towards private developers." Jerome L. Kaufman and Marta Escuin, Thinking Alike: Similarities in Attitudes of Dutch, Spanish, and American Planners, 66 J. Am. Plan. Ass'n 34, 37 (2000).

See generally The Profession of City Planning: Changes, Images, and Challenges 1950–2000 (Lloyd Rodwin & Bishwapriya Sanyal eds., 2000).

2. *The evolution of planning education.* The Federal Housing Act of 1954 provided major inducements to municipalities to prepare comprehensive plans. Partly as a result, the yearly number of professional degrees awarded by U.S. planning schools increased from about 100 in 1954 to nearly 1,500 in 1975. Enrollment in planning schools began to decline after 1975, however, as federal and other financial support fell, schools of public policy began to compete with planning schools for students, and young people generally became less idealistic. See William Alonso, The Unplanned Paths of Planning Schools, Pub. Int., No. 82, at 58 (Winter 1986). Planning schools at MIT, University of Southern

California, and elsewhere adapted to the falloff in student demand by offering degrees in real estate development. Many graduates of these programs end up working for developers and lending institutions. See Gayle Berens, Changing with the Times at MIT, Urb. Land, Apr. 1991, at 34.

2. *Legal Enforcement of Comprehensive Planning*

a. *State Statutes That Require a Local Government to Adopt a Plan*

Variations. Some observers assert that about half of the states compel their localities to prepare a comprehensive plan. See, e.g., James Lawlor, State of the Statutes, Planning, Dec. 1992, at 10. See also Patricia E. Salkin, From *Euclid* to Growing Smart, 20 Pace Envtl. L. Rev. 109 (2002) (reviewing legislative activity on this and other fronts). The pertinent state statutes, however, are not easy to classify.

A number of states flatly command each general-purpose local government to adopt and update a comprehensive plan. These include California (Cal. Gov't Code §§65300 (West 2012), first enacted in 1965) ("[T]he legislative body of each county and city shall adopt a comprehensive, long-term general plan for the physical development of the county or city. . . ."); Florida (Fla. Stat. ch. 163.3167(2) (2013), first enacted in 1975) ("Each local government shall maintain a comprehensive plan. . . ."); and Maine (Me. Rev. Stat. Ann. tit. 30A, §§4312(2)(A) (West 2012), first enacted in 1989) ("The Legislature declares that it is the purpose of this Act to: A. Establish, in each municipality of the State, local comprehensive planning and land use management").

Many states, however, limit their mandates in one fashion or another. For example, Mass. Gen. Laws ch. 41, §§81A, 81D (2004), specifies that a town with a population over 10,000 must establish a planning board, which "shall make a master plan" whenever it "may deem advisable." In Missouri, a municipality has the option of creating a planning commission; if it does, the commission "shall make and adopt a city plan." Mo. Rev. Stat. §§89.310–340 (2013). A city or county in Nebraska must prepare a comprehensive plan in order to have authority to adopt zoning regulations. Neb. Rev. Stat. §§19–901(2), 23–114.03 (2012).

Merits. The wisdom of mandatory planning statutes is debated by law professor Daniel Mandelker and planning professor Lawrence Susskind in an exchange published in Planning 14–22 (July 1978). Ironically, it is Susskind who contends that state governments should not insist on local comprehensive planning. He argues that local compliance will be grudging at best, especially if the state declines to fund planning costs. Mandelker asserts that planning is necessary to ensure that zoning regulations are not invalidated for violating judicial norms of fundamental fairness.

After conducting an empirical study, a team of professors at planning schools concluded that local plans tend to be of higher quality in states that mandate planning. Raymond J. Burby et al., Is State-Mandated Planning Effective?, Land Use L., Oct. 1993, at 3. See also Charles M. Haar, In Accordance with a Comprehensive Plan, 68 Harv. L. Rev. 1154 (1955) (supporting mandatory planning). But see Model Land Dev. Code §3–101 note 2 (1976) (stating that local planning should be optional); Robert E. Deyle & Richard A. Smith, Local Government Compliance with State Planning Mandates, 64 J. Am. Plan. Ass'n 457 (1998) (suggesting that Florida's planning mandates

were "of little consequence without local commitment to the policies contained in the plan"). What statewide interests, if any, are promoted by local comprehensive planning?

b. State Regulation of the Elements of a Municipality's Plan

Several states specify the elements that local governments must include in their comprehensive plans. See, e.g., Fla. Stat. §163.3177 (2013); R.I. Gen. Laws §§42-11-10, 45-22.2-4 (2012); Miss. Code Ann. §17-1-1(c) (2012); Minn. M.S.A. §473.859(1) (2013). These mandates can be very detailed. Florida's statute, for instance, mandates that local plans include (among other elements) a capital improvements plan, a transportation element, a future land use element, a conservation element, a sewer and solid waste element, and a housing element. Moreover, Florida's specifications for each element are spelled in excruciating detail, mandating, for instance, that the future land use plan element meet eight criteria ranging from "encourag[ing] the location of schools proximate to urban residential areas to the extent possible" to "[e]nsur[ing] the protection of natural and historic resources." §163.3177(6)(a)(3)(a)–(h). On top of these criteria, the statute also mandates that the land use element "discourage sprawl," helpfully defining such discouragement with 13 "primary indicators" of not discouraging sprawl such as "[p]romot[ing], allow[ing], or designat[ing] for development substantial areas of the jurisdiction to develop as low-intensity, low-density, or single-use development or uses." §163.3177(6)(a)(9)(I)–(XIII).

Is it likely that state courts will carefully enforce these mandates against local governments? Note that the elements can be in tension with each other: While requiring plans to "discourage sprawl," Florida also mandates that they "[p]rovide for the compatibility of adjacent land uses." State courts occasionally strike down a plan for lacking one of the required elements. Miami Sierra Club v. State Admin. Com'n, 721 So.2d 829 (Fla. App. 3 Dist., 1998) (holding invalid state commission's approval of county plan for reuse of former Homestead military base for lacking plans for stormwater, wildlife and its habitats, and noise). But such judicial invalidation is rare, perhaps because, despite the prolixity of the state mandates, the actual criteria tend to be vague and conflicting. For a review of scholarship on the effectiveness of actual comprehensive plans, see Emily Talen, Do Plans Get Implemented? A Review of Evaluation in Planning, 10 J. Plan. Liter. 248 (1996).

What is the point of the state's attempt to micromanage local plans? Is there reason to distrust local incentives to take into account extra-local costs and benefits of their land use decisions? If so, then would it be prudent for state statutes to focus on those external costs and benefits, specifying more precise requirements that courts might actually enforce?

3. Criticisms of Comprehensive Planning

When a private entity, such as a land development firm, attempts to plan comprehensively, its executives may have difficulty amassing and integrating the pertinent information. As the domain of the firm's plan increases — whether in territory affected, functions included, or time span covered — these difficulties multiply. When a government plans, its agents must surmount these same hurdles and additional ones as well. Even more than private planners, public planners may lack incentives to consider all of the costs

and benefits of their efforts and, in a democratic society, may lack the legitimacy to make long-term governmental commitments.

a. Can Planners Gather and Process the Pertinent Information?

Lon L. Fuller, Freedom — A Suggested Analysis
68 Harv. L. Rev. 1305, 1325 (1955)

Imagine a newly settled rural community in which it is apparent that sooner or later a path will be worn through a particular woodland. Suppose the community decides to plan the path in advance. There would be definite advantages in this course. Experts could be brought in. A general view of the whole situation could be obtained that would not be available to any individual wayfarer. What would be lacking would be the contribution of countless small decisions by people actually using the path — the decision, for example, of those whose footprints pulled the path slightly to the east so that they might look at a field of daisies, or of those who detoured around a spot generally dry, but unaccountably wet in August.

I hope the figure of the path will not be taken with more seriousness than it is offered. Lest I be accused of romanticizing the problem, I should like to [relate] an actual incident that seems in point.

Through the foresight of the city fathers the Cambridge Common is provided with an elaborate network of paved sidewalks, carefully planned to serve the convenience of any person wishing to traverse the Common from any angle. It was found, however, that at certain points people perversely insisted on walking across the grass. The usual countermeasures were tried, but failed. Now the city is taking down its barriers and its "keep-off-the-grass" signs and is busily engaged in paving the paths cut by trespassing feet. Those who have had experience with the problem of designing forms for the life of the human animal will see here, I believe, a pattern of events that has repeated itself many, many times.

John Rahenkamp, Land Use Management: An Alternative to Controls
in Future Land Use 191–92 (Robert W. Burchell & David Listokin eds., 1975)

My experience would suggest that any fixed plan is inevitably wrong. In fact, fixed plans have no logical or legal basis and no sensitivity over time to the fundamental changes which can occur. I think it is extraordinarily clear — as a matter of fact, I am amazed that we have to keep talking about it — that our attempts to project social need or technological change have been historically inaccurate. Our long-term projections are grossly out of line every time. The best we can work with is something approximating three to five years. At best, we can simulate within brackets. But even so, the brackets are so broad that if we are asking society to believe we are operating a system strictly within those brackets, I think we are grossly misleading them.

We should also remember that we are a pluralistic society, and somehow, the reflection of that pluralism ought to be different from the patterns we have seen in the past, different from the patterns in Europe. Let me provide two examples of the way master plans haven't worked. I had dinner the other night with an English new town planner, who had been involved in some of the old "new towns," and pointed out the extraordinary problems of having a fixed master plan. He told me about the 1950 projection of one car for ten units, which now represents about one-quarter of the total, and described having

to put blacktop and tarmac on everything to try to get enough parking. Similarly, we are working in Columbia [Maryland] where good planners laid down master plans ten years ago and said the neighborhoods will produce 600 children. Actually, the neighborhoods are producing only two-thirds of that — perhaps because the residents ride bicycles so much.

The best master planners we have in the country inevitably are failures when it comes to prognosticating over a long period of time. The new system of new town planning is simply laying down the infrastructure and letting it happen. That sounds like managed sprawl to me, which is perhaps the logical way to go.

Charles E. Lindblom, The Science of "Muddling Through"

19 Pub. Admin. Rev. 79 (1959)

[In this article, Lindblom compares two methods of policymaking: (1) the rational comprehensive approach, and (2) the successive limited comparisons approach. The former approach generally corresponds to comprehensive planning, and the latter to muddling through — that is, the practice of confronting problems piecemeal as they arise. The following table, which appears in the article, succinctly presents the differences between the two methods. Lindblom claims that the muddling-through approach is the one that agencies actually practice. He asserts that the rational comprehensive approach is impossible (except for relatively simple problems) because it "assumes intellectual capacities and sources of information that men simply do not possess, and it is even more absurd as an approach to policy when the time and money that can be allocated to a policy problem are limited, as is always the case."]

Rational Comprehensive	*Successive Limited Comparisons*
1a. Clarification of values or objectives distinct from and usually prerequisite to empirical analysis of alternative policies.	1b. Selection of value goals and empirical analysis of the needed action are not distinct from one another but are closely intertwined.
2a. Policy formulation is therefore approached through means-end analysis: First the ends are isolated, then the means to achieve them are sought.	2b. Since means and ends are not distinct, means-end analysis is often inappropriate or limited.
3a. The test of a "good" policy is that it can be shown to be the most appropriate means to desired ends.	3b. The test of a "goods" policy is typically that various analysts find themselves directly agreeing on a policy (without their agreeing that it is the most appropriate means to an agreed objective).
4a. Analysis is comprehensive; every important relevant factor is taken into account.	4b. Analysis is drastically limited: (1) Important possible outcomes are neglected. (2) Important alternative potential policies are neglected. (3) Important affected values are neglected.
5a. Theory is often heavily relied upon.	5b. A succession of comparisons greatly reduces or eliminates reliance on theory.

For a critique of the generality of Lindblom's arguments on behalf of using successive limited comparisons, see Jonathan Bendor, A Model of Muddling Through, 89 Am. Pol. Sci. Rev. 819 (1995).

Friedrich A. Hayek, The Road to Serfdom

36, 48–50 (1944)

Economic liberalism is opposed . . . to competition's being supplanted by inferior methods of co-ordinating individual efforts. And it regards competition as superior not only because it is in most circumstances the most efficient method known but even more because it is the only method by which our activities can be adjusted to each other without coercive or arbitrary intervention of authority. . . .

The assertion that modern technological progress makes planning inevitable can also be interpreted in a different manner. It may mean that the complexity of our modern industrial civilization creates new problems with which we cannot hope to deal effectively except by central planning. In a sense this is true — yet not in the wide sense in which it is claimed. It is, for example, a commonplace that many of the problems created by a modern town, like many other problems caused by close contiguity in space, are not adequately solved by competition.[2] But it is not these problems, like those of the "public utilities," etc., which are uppermost in the minds of those who invoke the complexity of modern civilization as an argument for central planning. What they generally suggest is that the increasing difficulty of obtaining a coherent picture of the complete economic process makes it indispensable that things should be coordinated by some central agency if social life is not to dissolve in chaos.

This argument is based on a complete misapprehension of the working of competition. Far from being appropriate only to comparatively simple conditions, it is the very complexity of the division of labor under modern conditions which makes competition the only method by which such coordination can be adequately brought about. There would be no difficulty about efficient control or planning were conditions so simple that a single person or board could effectively survey all the relevant facts. It is only as the factors which have to be taken into account become so numerous that it is impossible to gain a synoptic view of them that decentralization becomes imperative. . . .

. . . The more complicated the whole, the more dependent we become on that division of knowledge between individuals whose separate efforts are coordinated by the impersonal mechanism for transmitting the relevant information known by us as the price system.

Note on Planners' Weighty Informational Requirements and Limited Cognitive Capacities

1. *Introspection.* Do you engage in much medium- and long-range planning in your personal life? For example, are you a person who adopts and adheres to New Year's resolutions? If not, why not? How detailed are your plans for your career? For the time remaining in the current academic year? To what extent would you chalk up your failures

2. EDS: Hayek was writing in opposition to central economic planning. Can one construe this sentence to mean that he would favor comprehensive land use planning?

to plan to inadequate information and bounded cognitive capacity, as opposed, say, to inadequate self-control?

2. *Gallows humor.* Notes on Planning Objectives, *in* Richard Hedman & Frederick Haigh Bair, And On the Eighth Day (2d ed. 1967), offers a wry perspective on planners' difficulties in obtaining and weighing information. The authors outline the basic principles of four different 20-year master plans that a city might have adopted in 1905, 1935, 1960, and 1980. The 1905 plan states in part, "Streetcar lines are a major determinant in shaping the frame of the city of tomorrow. . . . Make ample provision for livery stables in the Plan." The 1935 plan notes, "Population approaches its ultimate peak. . . . [T]here will be an oversupply of schools. This is obvious from the drop in the birth rate." The 1960 plan contemplates rapid population growth and calls for massive expenditures on superhighways and parking structures. The 1980 plan states, "It is functionally pointless to attempt reconstruction of the large-target metropolis," but adds optimistically, "Population of the U.S. will soon be back up to 100 million, barring resumption of hostilities or unforeseen results of radiation exposure."

3. *Theory and practice.* To what extent has mainstream planning theory recognized and adapted to planners' difficulties in acquiring and processing information?

b. Do Planners Have Appropriate Incentives?

Suppose that a tract of land would be most profitably improved with townhouses, but a homebuilding company made a business error and developed detached single-family houses on it instead. The investors and other participants in the firm would bear most if not all of the losses from this mistake. To avoid losses of this sort, the managers of a profit-oriented developer have incentives to gather reliable information about consumer tastes and the production costs of alternative development schemes.

Now suppose a government planner was deciding whether to allocate the same tract to townhouse or single-family use. Would the planner bear any of the losses resulting from an allocative error? (How might the law of takings, discussed at pp. 000, bear on the answer?) Would a planner have adequate nonmonetary incentives to assemble accurate information about market conditions?

One of the arguments for planning is that a government official is more likely than a developer to take into account the external costs that a townhouse (or single-family) development would impose on neighboring landowners. Is this advantage likely to outweigh the disadvantages arising from the relative weakness of a planner's incentives? How great is the risk that planners will not selflessly pursue the public interest, but instead be captured by one interest group or another, as envisioned in both Komesar's majoritarian and influence models, presented at p. 000?

c. Can Planning Be Reconciled with Democracy?

American Law Institute, Model Land Development Code
111–12 (1976) (Commentary on Article 3)

William Wheaton, Director of the Institute of Urban and Regional Development at Berkeley, analyzed the metropolitan plans for Denver and Washington and concluded

that the patterns of physical development stated were based on five biases of planners, probably not shared by the community at large. The biases were (1) that scattered development is inherently evil; (2) that open space should be preserved; (3) that a city should have a strong, high density core; (4) that the journey to work should be reduced; and (5) that central urban residential locations are preferable to suburbs of single-family homes. Wheaton asks whether objectives like full employment and maximization of opportunities for underprivileged groups are not more important. He admits the present difficulty of designing plans for these objectives, but he argues that physical plans must at least attempt to forecast economic and social consequences which will flow from the stated development pattern. (Wheaton, Operations Research for Metropolitan Planning, 29 J. Am. Inst. Planners 250 (1963).)

James C. Scott, Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed

142–43 (1998)

[Scott's chapter on the "high-modernist city" describes the influential ideas of Le Corbusier, a Swiss-born French architect and planner who was active mainly between 1920 and 1960. Le Corbusier favored highly ordered and comprehensive city plans that strictly separated different land uses. The city that most closely accords with Le Corbusier's ideals is Brasilia, the capital of Brazil. Designed in the 1950s by the architects Oscar Niemeyer and Lucio Costa, Brasilia features monumental traffic arteries, huge squares, dramatic public buildings, and large, uniform apartment blocks. In criticizing the sterility of Brasilia and its lack of pedestrian traffic, Scott echoes Jane Jacobs's reservations about comprehensive planning (see p. 000).]

The historic diversity of the city — the source of its value and magnetism — is an unplanned creation of many hands and long historical practice. Most cities are the outcome, the vector sum, of innumerable small acts bearing no discernible overall intention. Despite the best efforts of monarchs, planning bodies, and capitalist speculators, "most city diversity is the creation of incredible numbers of different people and different private organizations, with vastly different ideas and purposes, planning and contriving outside the formal framework of public action."[103] Le Corbusier would have agreed with this description of the existing city, and it was precisely what appalled him. It was just this cacophony of intentions that was responsible for the clutter, ugliness, disorder, and inefficiencies of the unplanned city. Looking at the same social and historical facts, Jacobs sees reason to praise them: "Cities have the capability of providing something for everybody, only because, and only when, they are created by everybody."[104] She is no free-market libertarian, however; she understands clearly that capitalists and speculators are, willy-nilly, transforming the city with their commercial muscle and political influence. But when it comes to urban public policy, she thinks planning ought not to usurp this unplanned city: "The main responsibility of city planning and design should be to develop, insofar as public policy and action can do so, cities that are congenial places for this great range of unofficial plans, ideas, and opportunities to flourish."[105] Whereas Le Corbusier's

103. Jane Jacobs, The Death and Life of Great American Cities (New York, Vintage Books, 1961), p. 241.

104. Ibid., p. 238. The caveat, "and only when," may be a rare recognition by Jacobs that, in the absence of extensive planning in a liberal economy, the asymmetrical market forces which shape the city are hardly democratic.

105. Ibid., p. 241.

planner is concerned with the overall form of the cityscape and its efficiency in moving people from point to point, Jacobs's planner consciously makes room for the unexpected, small, informal, and even nonproductive human activities that constitute the vitality of the "lived city."

Note on Planning and Democracy

The articulation of goals seldom is a simple task. Presumably most adults have some ability to set personal goals. Similarly, private organizations often are able to establish goals that attain wide support among members. For example, a corporation may strive to maximize the value of the firm, a religious organization to keep and spread the faith, and a university to climb in academic stature. Public planning efforts, however, usually pose more intractable problems in goal setting. The constituents of political systems often sharply disagree on goals. (This may be ameliorated in part to the extent that like-minded people cluster together in distinct political units.) If voters disagree on goals, governmental policy can be expected to fluctuate from election to election (if not more frequently). One of the purposes of a new election, in fact, is to permit the electorate to have a new say on governmental goals. In short, there is an inherent tension between democratic government and long-range planning beyond the span of a single term of office. In addition, the American tradition of separation of powers among relatively independent governmental branches inhibits planning efforts by any single branch.

Given that markets and other decentralized systems of coordination are hardly perfect either, how telling are the arguments that public decisionmakers may lack the information, cognitive capacity, incentives, and legitimacy conducive to successful comprehensive planning?