



To: Honorable Mayor & City Council

From: Michael Kovacs, City Manager

Date: August 3, 2023

**Agenda Item & Caption:** Discuss, consider, and take any necessary action on a Resolution to the Texas Municipal League on zoning reform.

**Action Requested: Approval of the resolution**

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**Prior Action:** The Council approved a similar resolution at your early September 2022 meeting to submit to the Texas Municipal League (TML) on zoning reform regarding changes to increase the threshold needed to trigger supermajority Council votes on zoning cases brought by nearby owners. City Council approved a UDO change to limit the P&Z's powers to force a Council supermajority vote.

**Overview and Background:** The TML's members approved our resolution referenced above in October, 2022, at their business meeting, and later the TML Board of Directors approved the addition of our ideas on zoning reform, endorsing support for the concept and specific action to help facilitate zoning changes City Councils wanted to implement for the betterment of their community. State Rep. Justin Holland (Republican – Heath) filed HB 1514, but later pulled his support when attacked by fringe Rockwall county area interests. Rep. Carl Sherman (Democrat – Lancaster) filed an identical bill, HB 4637, and the bill was heard by the House Committee on Land & Resource Management. Many groups signed on to the support of the bill from across the political spectrum to include centrist business groups like the North Texas Commission, and think tanks like Texas 2036, right of center groups like the Texas Public Policy Foundation, Texas Builders Association, and left of center groups like housing advocates, TML, and the City of Houston. As the session grew to a close, TML senior staff realized that zoning reform ideas coming from the cities was going to be critical in the off-season and in the next session to prevent further erosions of our municipal powers. Everyone realizes something is broken. Only Austin area HOA group advocates spoke in opposition to the bill. The bill died in committee due to partisan/committee politics. Had the bill be carried by a Republican, it would have likely advanced to the House floor. Senator Hall would not file a companion bill in the Senate.

During the pandemic, and even today, with the amount of growth Fate has seen, our residents are angered by what they see as out of control development in our area with the resulting loss of farmlands and added soul-crushing amounts of traffic. This is partially due to the overall scarcity of housing options in the Metroplex. In serving on the NCTCOG's Land Use and Transportation Task Force, one common theme I have heard of from the major cities and many of the close-in suburbs is large high-rises and mixed-use buildings are often opposed vigorously and successfully by nearby landowners. Laws and legal precedent date back over 100 years in this case to give landowners living within 200 feet of a zoning change the ability to object to the change, and in doing so, create a super-super-majority vote at the Council to pass the zoning change (3/4 vote, or in our case, 6 out of 7). This has the effect of shooting down many good developments that are net-revenue-positive for the cities and which provide affordable, attainable, or even luxury housing close-in to job centers. This then impacts all the suburbs in the area, including Fate, sending hundreds of thousands of new residents "driving until they qualify" further and further away from their jobs. This change would make historical fairness changes to the state law, disempowering NIMBY (Not In My Back Yard) opponents of developments and empowering local City Councils to vote to approve zoning changes more easily, in the best interests of the majority of their people.



**Financial Considerations:**

Zoning reforms will reduce the cost of housing by increasing the overall supply of housing units in the DFW Metroplex area, and in urban areas around the state. This has local Fate applications too if nearby property owners try to oppose developments that are encouraged in our new comp plan, but that a majority of the Council wants to pass. Failing to approve net-revenue-positive developments will ultimately result in higher taxes and fees, and then the eventual decline of Fate as we would not be able to pay for street maintenance and replacements as the City's infrastructure ages and growth slows (remember the Woodcreek front-section case study on taxes/road replacement costs – double your taxes to pay for streets).

**Supporting Documents:** Proposed resolution, Policy Brief by the Mercatus Center at George Mason University – Mostly Invisible: The Cost of Valid Petitions in Texas 2023, Policy Brief by the Mercatus Center at George Mason University - Rezoning Protest Petitions Are Ripe for Reform2022, City of Fate - Zoning Protest Reform Fact Sheet, Texans for Housing - Return to Majority Rule on Zoning Changes

**RESOLUTION NO. R-2023-\_\_\_**

**A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF FATE, TEXAS, REQUESTING THE SUPPORT OF THE TEXAS MUNICIPAL LEAGUE, FINDING A SUBSTANTIAL NEED FOR ZONING REFORMS TO RETURN POWERS TO THE CITIZENS OF THE CITIES OF TEXAS THROUGH THEIR ELECTED MUNICIPAL COUNCILS, AND SUPPORTING THE STATE LEGISLATURE’S ACTION TO AMEND STATE LAW; AND PROVIDING AN EFFECTIVE DATE**

**WHEREAS**, Texas zoning case and state laws have empowered nearby landowners owning only 20% of the local property to oppose zoning changes triggering a “super-super-majority” (3/4) of a city council vote to approve such zoning changes; and

**WHEREAS**, these actions and conduct have resulted in significant financial costs to the cities of Texas, the State of Texas, and our citizens in the form of higher taxes and higher housing prices due to the scarcity and inefficiency of housing choices; and

**WHEREAS**, a small change to the State’s laws on zoning to raise the threshold to 50% for the rigid ¾ majority vote for zoning changes in certain circumstances could have direct impacts to promote better quality developments, raise municipal revenues, reduce urban sprawl, and reduce car traffic; and

**WHEREAS**, Fate’s citizenry would benefit from reduced housing costs, State government costs, and lowered pressure levels for more inefficient development and the resulting traffic in the Fate area, and to our west, east, north, and south.

**NOW, THEREFORE BE IT RESOLVED BY THE CITY COUNCIL OF FATE, TEXAS:**

**SECTION 1.** That the City Council requests the assistance of the Texas Municipal League to assist with supporting fair zoning reforms to raise the threshold for the ¾ super majority requirements triggered by the opposition of landowners close to proposed zoning changes from 20% of property ownership interests within the notification area, to 50%; and

**SECTION 2.** The City finds a substantial need for zoning reforms in the state to return powers to the citizens of the cities of Texas by enabling locally elected Councils to approve zoning changes consistent with the majority will of their citizenry; and

**SECTION 2.** This resolution shall take effect immediately from and after its passage.

**PASSED, APPROVED, AND ADOPTED** by the City Council of the City of Fate, Texas, on this the 7<sup>th</sup> day of August, 2023.

APPROVED:

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David Billings, Mayor

ATTEST:

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Victoria Raduechel, TRMC  
City Secretary



## Mostly Invisible: The Cost of Valid Petitions in Texas

*Salim Furth and C. Whit Ewen*

February 2023

The Texas legislature is currently considering reforms to its valid petition law. Valid petitions are an obscure zoning procedure that have been used to try to obstruct a Dallas hospital expansion,<sup>1</sup> student housing in Bryan,<sup>2</sup> and Habitat for Humanity houses in Austin.<sup>3</sup> The law has come under scrutiny as a potential contributor to the scarcity of housing—and thus its high cost. Legislators ought to either reform the valid petition process to be less onerous and more democratic or do away with it altogether.

Twenty states still have rezoning protest petition laws. Texas' version is relatively strict, but the mechanics are the same as in other states: when a rezoning is proposed, the state must notify the owners of nearby land. In Texas, if owners of 20 percent of the land within 200 feet of a proposed rezoning site protest the rezoning, their protest constitutes a “valid petition.”<sup>4</sup> Figure 1 shows a typical rezoning proposal, with the site and 200-foot buffer highlighted. Once a valid petition is filed, the city council can approve the rezoning only by a three-fourths supermajority. However, because of rounding, the margin is often higher; for example, if a city council is composed of seven members, six members (or 86 percent) must vote in favor. By contrast, Oklahoma's moderate petition law only allows protests once owners of 50 percent of the land within a 300-foot buffer file an objection and allows such rezonings to pass with five yeas from a seven-member council.

Texas' valid petitions have been called “undemocratic”<sup>5</sup> because the 20-percent rule gives an outsize voice to a few unhappy nearby landowners. Indeed, 5 of the 16 petitions in Dallas and Austin we examined could have been triggered by a single protesting neighbor's signature. Furthermore, renters have no say in valid petitions.

Unlike in other states, Texas' petition law now endangers citywide rezonings, thanks to a 2022 court opinion in *City of Austin v. Acuña* that blocked Austin from overhauling its own zoning

### **The Power of One**

The valid petition process is asymmetric: it gives power only to opponents of a rezoning, not to supporters. In a Plano case, four neighboring landowners wrote in favor of rezoning to allow the development of an assisted living retirement home. But one neighbor whose land constituted more than 20 percent of the buffer area wrote in opposition, making it a valid petition. Although Planning and Zoning Commission members could take all responses into consideration in deciding how to vote, Texas' valid petition law automatically gave the single opposing letter the equivalent of two votes. The rezoning proposal was denied.

Source: City of Plano, Planning and Zoning Commission, Zoning Case 2021-031.

(which was done to comply with its comprehensive plan, as paradoxically required under state law). In that case, a mere 1.4 percent of the city's population was enough to force the supermajority at city council per the valid petition law. The court's ruling jeopardizes future zoning overhauls in the Fourteenth Court of Appeals District and casts a shadow over any Texas city's efforts to comprehensively rezone.

The power to alter city council voting thresholds lies with the legislature. Valid petitions implicitly delegate a substantial share of a city council's power to a few private individuals. Their use of that power need not comply with the city's comprehensive plan—and in fact often confounds it. And their use of that power is clearly in service of personal interests, not the public interest.

A bill filed by state Rep. Justin Holland, HB 1514,<sup>6</sup> would increase the proportion of buffer area ownership share required for a valid petition from 20 to 50 percent. In the previous legislative session, HB 2989<sup>7</sup> (not enacted) would have reversed the court's ruling, allowing valid petitions to apply only to limited, contiguous areas.

### **VALID PETITION CAPITAL OF THE WORLD**

There is no Texas-sized data source on the use of valid petitions, but even a cursory evaluation suggests that they are exceptionally frequent in Austin. For this policy brief, we read in detail two years' worth of valid petitions from the city of Austin and 15 months' worth from the city of Dallas.<sup>8</sup> We interviewed seven development professionals from the Austin area.<sup>9</sup> And we received information on the number of valid petitions filed in 2021 and 2022 from 10 other cities in North Texas (listed in table 1).

Twenty valid petitions were filed against Austin rezonings, but only three were filed in Dallas and four in the other 10 North Texas cities combined. Other data showed that rezonings are not exceptionally frequent in Austin, so that does not seem to explain the high incidence. Instead, we hypothesize that the capital's well-organized neighborhood associations and *City of Austin v. Acuña* have raised awareness of valid petitions. Interviewees agreed that Austin is a valid petition hot spot,<sup>10</sup> and two noted that 2020 and 2021 were especially active years for valid petitions. One

Table 1. Valid Petitions by City, 2021–2022		
CITY	POPULATION	2021–2022 VALID PETITIONS
Austin	959,549	20
Dallas	1,304,442	3*
Plano	285,900	2
Grand Prairie	196,272	1
Fate	17,988	1
Frisco	200,675	0
McKinney	195,057	0
Lewisville	111,676	0
Bedford	49,965	0
Little Elm	46,361	0
Forney	23,490	0
Celina	16,771	0

\* Dallas data cover only 15 months.

Notes: Population data are from the 2020 Census. Note that Austin’s quantity in the table here covers 2 years; for the detailed analysis in this policy brief, we used only 2021 cases.

accessory dwelling unit builder told us that a hostile neighborhood association convinced immediate neighbors to create a valid petition against his rezoning request, even though until then they did not personally oppose it.

Valid petitions are mainly used to block multifamily housing. In Austin, 25 percent of rezonings to a multifamily use faced a valid petition, compared to just 5 percent for commercial use. Our interviewees agreed that rezoning for multifamily housing was the likeliest to face a valid petition. In all the cases we read, valid petitions protested the loosening, not tightening, of land use regulations.

### INVISIBLE IMPACT OF VALID PETITIONS

Valid petitions have a mostly invisible impact. Developers told us they have limited capacity, and thus they are less likely to invest time and money on a project that might fail to win city council approval. They tend to stick to sure things.<sup>11</sup> One builder of starter homes shared how he speaks to neighbors before embarking on a project; if neighbors are opposed, he walks away. He estimates that half of his projects end at this stage. Once a project is green lighted, developers variously contact the neighborhood association, knock on doors, send letters, or hire consultants to pitch their plans to neighbors in hopes of heading off a fight.

Rather than risk a valid petition, few developers apply for rezonings in well-organized, affluent neighborhoods. Instead, we found that rezonings for multifamily development were concentrated on main roads;<sup>12</sup> just 4 out of 28 were on local roads. Of the 24 multifamily rezonings on main

roads, only 10 had sidewalks. Multifamily homes should ideally be within an easy walk of a park because they have little outdoor space on-site. But, instead, Austin’s regulatory norms shunt them to locations least appropriate for residences.

Most Austin interviewees agreed that valid petitions were a major barrier to development there. However, the city council’s public records are in apparent tension with this belief. Austin City Council strives for consensus, almost always making its rezoning votes unanimously.<sup>13</sup> Professionals told us that the public consensus masks backroom debates and negotiations. Developers prefer to delay planning commission and city council votes until passage is likely, and the higher threshold required by valid petitions therefore results in more delays in order to reach it. In this opaque forum, a valid petition is one of several factors affecting the outcome.

Another major caveat to the role of valid petitions is that they matter only in places where market demand cannot be met under the preexisting zoning. If the most valuable land uses are already allowed, no developer seeks a rezoning and no valid petition can be filed.

## **VISIBLE IMPACT OF VALID PETITIONS**

To compare zoning changes with and without valid petitions, we gathered data on all 126 rezonings in Austin that commenced in 2021.<sup>14</sup> Although valid petitions’ impact is mostly invisible, the data show that developments facing valid petitions spend several months before the city council and are more likely to get less from the rezoning than originally requested.

For example, owners of 901 and 907 Stobaugh Street (shown in figure 1) requested a rezoning from single-family to MF-4 multifamily zoning.<sup>15</sup> The staff and Austin Planning Commission each recommended approving a less intensive MF-3 designation. Neighbors filed a valid petition, with several of them appending letters in opposition, noting the prospect of increased traffic and its attendant safety risks. The city council unanimously approved a rezoning to MF-2, a multifamily designation even more restrictive than MF-3. As a consequence, fewer housing units will be built on the site.

The majority of rezonings are relatively minor changes, such as a shift from one type of industrial district to another or relief from a “conditional overlay” (a method of customizing zoning commonly used in Austin). Setting these aside, we looked at 27 more complicated rezonings to get closer to understanding the effects of a valid petition.<sup>16</sup>

Table 2 compares the protested to the non-protested cases in this group. Although we cannot know what would have happened to the protested cases in the absence of a protest petition law, the differences in outcomes are consistent with professionals’ belief that petitions can impose months of delays and alter projects’ results—although valid petitions rarely terminate projects potentially due to risk avoidance mentioned by interviewees.

**Figure 1.** The 200-Foot Buffer Around a Proposed Austin Rezoning



Source: Zoning Change Review Sheet, C14-2021-0055, 901 & 907 Stobaugh Street, City of Austin, Texas, August 26, 2021, <https://www.austintexas.gov/edims/document.cfm?id=365728>. We have edited the legend for clarity.

	VALID PETITION	NONE
Cases	10	17
Approved as requested	4	12
Approved with changes	5	4
Time before the city council	204 days	123 days
Unresolved	1	1

Notes: Cases include those that came before the city council for a first reading in 2021 in which the zoning changed category; the requested zoning was multifamily, mixed use, or multiple districts; and the case spent at least one month before the city council. The two unresolved cases are not factored into the calculation of time before the city council; each has been postponed for over a year at the time of writing.

## OPTIONS FOR REFORM

As Texas legislators reconsider the role of valid petitions in shaping the evolution of zoning in their cities, they can consider several models for reform.

*Oklahoma.* To make the valid petition process more democratic and less likely to be captured by one or two neighbors, Texas could increase the validity threshold from 20 to 50 percent (as Texas HB 1514 proposes) and expand the buffer from 200 to 300 feet, or more. Texas could also follow

Montana, Missouri, and many other states by lowering the supermajority threshold from three-fourths to two-thirds.

*Massachusetts.* A recent reform to Massachusetts law makes it more difficult for cities to impose new regulations than to ease old ones. Texas could better defend property rights by adapting this approach—for example, by eliminating the supermajority vote threshold for upzonings and retaining it for downzonings.

*Arizona.* Unlike Texas, Arizona gives condominium owners a distinct voice in its valid petition process. Texas could go further by giving a voice to all residents, including renters. Expanding participation is especially urgent given that Texas' valid petition law now affects citywide zoning overhauls.

*Texas before City of Austin v. Acuña.* The valid petition process is an old wineskin never intended for citywide zoning reforms, which ought to be a broadly inclusive exercise in representative government. The legislature could revive last session's HB 2989 (87th R.), or if lawmakers want to have a citywide protest process, they should tailor a new one for that purpose.

*North Carolina and Wisconsin.* In the past decade, these two states dispensed entirely with their protest petition laws. In Wisconsin, cities were left to decide whether to integrate a protest petition ordinance.

Texas legislators could also make valid petitions less relevant by making zoning less restrictive in areas with high land prices. After all, as more than one interviewee pointed out, projects that do not need rezoning do not have to worry about the vagaries of the valid petition.

## **ABOUT THE AUTHORS**

Salim Furth is a senior research fellow and director of the Urbanity project at the Mercatus Center at George Mason University. His research focuses on housing production and land use regulation. He has published in *Critical Housing Analysis* and the *IZA Journal of Labor Policy* and has testified before several state legislatures as well as the US Senate and House of Representatives. He frequently advises local government officials on zoning reform and housing affordability. Furth earned his PhD in economics from the University of Rochester.

C. Whit Ewen is a businessman who grew up in Austin and Belgium. Community leadership roles led to his service on the Austin Planning Commission, catalyzing his interest in city and regional planning. In the private sector, he founded a customer data analytics startup and angel-funded healthcare tech companies such as ESO Solutions. In the public sector, he has researched subjects such as public-private partnerships in urban parks as well as technical innovations in transportation planning. Prior to his entrepreneurial endeavors, Whit had a distinguished career in international business management in Europe. He earned his BA in psychology from the University of Texas at Austin.

## NOTES

1. Rachel Stone, “Kessler Neighbor Wins Appeal from City of Dallas Over Fitness Center Zoning Vote,” *Advocate Oak Cliff*, April 12, 2022.
2. Bill Oliver, “Bryan City Council Approves Rezoning for Student Housing Across the Street from the Blinn College Bryan Campus, Over Neighborhood Opposition,” *WTAW*, May 18, 2022.
3. Megan Kimble, “Desperate for Housing, Austin Seeks Relief in Rezoning,” *Bloomberg CityLab*, April 29, 2022.
4. The common usage of “valid petition” is specific to Texas. Protest petition laws are less known in other states.
5. Timothy Bray, “Should You Have to Own Property to Vote? Opponents of More Housing in Austin Think So,” *AURA—An Austin for Everyone* (blog), July 16, 2020.
6. Relating to Protesting Changes to Municipal Zoning Regulations and Boundaries, H.B. 1514, 88th Texas Legislature (2023).
7. Relating to Certain Notice and Protest Provisions Applicable to Municipal Zoning Changes, H.B. 2989, 87th Texas Legislature (2021).
8. We thank Arthur Wright for timely and careful research assistance throughout this project. The Austin data includes rezonings that came before the city council for a first reading in 2021. We gathered the Austin data from city records posted online. The Dallas data are from the *City Plan Commission Annual Report FY 2021–2022* and personal communication with staff.
9. Our interviewees included three zoning consultants, a land use attorney, a high-rise developer, an affordable housing developer, and a small-scale builder. Most of the interviewees asked for anonymity. We also corresponded or spoke with officials from three Texas cities and several other people with knowledge of the rezoning process.
10. Professionals working in and around Austin noted that many of the suburbs have zoning that is much more restrictive than the cities’, yet valid petitions are very rare in the suburbs. This is likely because city development is cheek to cheek with older buildings, making disagreements more common. City land prices are also higher, reflecting market demand for denser development, which some people dislike.
11. Our data confirms this: only three rezonings that came before Austin City Council in 2021 have not yet been approved, and two of those are still pending.
12. We categorized local, collector, arterial, and frontage roads. For ease of presentation, we grouped the latter three as “main roads.”
13. We identified only five contested votes out of hundreds on rezonings. Four of those votes concerned projects facing valid petitions.
14. We chose 2021 to ensure that most cases would have been fully resolved by the time of writing; only 2 remain unresolved.
15. Zoning Change Review Sheet, C14-2021-0055, 901 & 907 Stobaugh Street, City of Austin, Texas, August 26, 2021, <https://www.austintexas.gov/edims/document.cfm?id=365728>.
16. For this exercise, we began with our sample of 116 rezonings that came before Austin City Council in 2021 for a first reading. We retained only those that proposed multifamily, mixed use, or multiple zoning districts; changed from one broad category of zoning to another; and took the city council at least a month to decide. This left us with 27 cases, 10 of which involved valid petitions.



## Rezoning Protest Petitions Are Ripe for Reform

*Salim Furth and Kelcie McKinley*

January 2022

In 2021, Veterans Services USA, a nonprofit organization, applied for a rezoning of the Crowne Plaza hotel in Tulsa, Oklahoma. According to Veterans Services USA, the hotel closed after functioning at less than 40 percent capacity in 2019,<sup>1</sup> and the organization saw a new use for it. They sought to renovate the building, operate floors 2 through 6 as a hotel, and rent floors 7 through 11 as housing for low-income veterans. Planning staff agreed that the changes were an upgrade and met an important need, and the planning commission voted six to four in favor of approval.<sup>2</sup> However, unhappy institutional neighbors, including Oral Roberts University and Walmart, were able to block the plan by using an obscure state law.<sup>3</sup> The law allows neighbors to lodge formal objections to a rezoning, which are known as a protest petitions. If a valid protest petition is filed, rezoning cannot proceed without the approval of a three-fourths supermajority on the local governing council.

Oklahoma is among 20 states that allow a small group of neighbors to formally protest a rezoning and raise the threshold for approval from a simple majority to a supermajority.

The protest petition process exists to create a check on city councils, which may listen too little to localized concerns. However, as currently implemented, the process gives too much power to a very small number of neighbors.

As the United States faces a nationwide housing shortage,<sup>4</sup> many cities are gathering the political will to loosen zoning rules and allow greater housing supply in areas that have long been limited by strict zoning.<sup>5</sup> States with protest petition processes that can be activated by a small group of neighbors add an additional hurdle toward these important, city-led efforts to allow more housing. State legislators can support local efforts by reforming protest petition statutes to reflect broad neighborhood consensus and to better protect property rights.



## **REZONING AND THE PROTEST PETITION PROCESS**

Most cities in the United States use zoning to limit which types of buildings and businesses are allowed in each zoning district. Zoning districts are frequently small and intermingled, with neighboring properties subject to very different rules. A property owner or city planning staff can initiate a rezoning, or zoning amendment, to move one or more properties from one district to another. For example, a rezoning is often required to develop homes or businesses on former agricultural land.

When a rezoning is proposed, nearby residents and property owners are generally invited to give feedback. Research shows that only a few neighbors typically engage.<sup>6</sup> Those who do are usually opposed and express concern about potential changes in property values, stormwater runoff, traffic, or community character. Although rezonings can be important for achieving citywide or regional goals, such as providing new homes and creating jobs, few rezonings attract broad community support. There is no way even to know who will eventually buy a home or find a job on a rezoned site, let alone to mobilize them in support of rezoning.

Protest petitions give formal political power to property owners who want to prevent a rezoning. When a rezoning is proposed in a state with a protest petition statute, property owners located within a certain distance of the proposed rezoning may sign a petition protesting the change. If enough neighbors sign, state law dictates that the rezoning can only be approved if a supermajority of the city council, county council, or other legislative body votes in favor.

Although it happens more rarely, property owners can also object to the rezoning of their own property. This is most likely to occur if the city is imposing stricter regulation and thus taking economic value from the affected property owners.

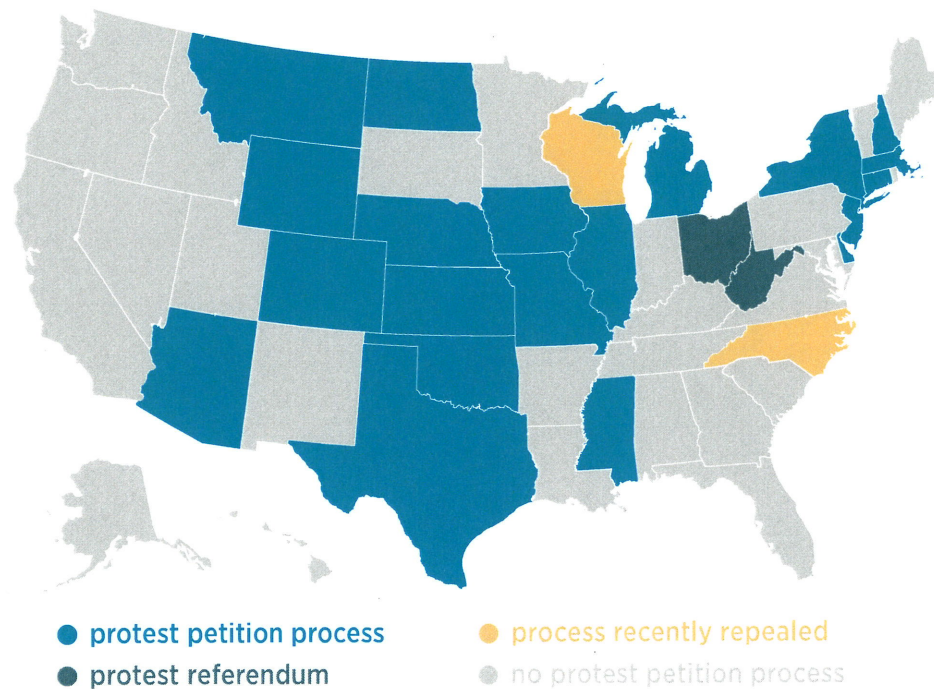
## **THE WHERE AND HOW OF PROTEST PETITIONS**

Twenty states currently have state protest petition laws, as shown in figure 1. Each state sets its own definition of “nearby” property owners and its own threshold for what percentage of nearby private property must be owned by petitioners in order to make the protest petition valid.<sup>7</sup>

Iowa’s statute is typical: if 20 percent of land within 200 feet of a proposed rezoning is owned by signatories of the protest petition, the petition becomes valid and triggers a three-fourths supermajority requirement. Table 1 lists the basic parameters of protest petitions in the 20 states.

The most easily abused protest petition statutes are those, such as Michigan’s, that allow owners of just 20 percent of nearby land to trigger a supermajority requirement. For a small rezoning, it will often be the case that a single property owner has 20 percent of the nearby land and can trigger a supermajority requirement even if the rest of the neighbors favor the rezoning.

Figure 1. Protest Petition Laws by State



Source: See the appendix of this policy brief for a list of protest petition statutes for each state.

But as the Crowne Plaza hotel example shows, even Oklahoma’s relatively broad standards can leave substantial power in few hands. One property owner, Oral Roberts University, owns over half the land within 300 feet of the site and could thus bring a protest petition on its own.

Data indicate that protest petitions occur regularly, but not constantly. A 2006 University of North Carolina survey on petitions found that protest petitions were filed to oppose 8 percent of rezonings in the Tarheel State.<sup>8</sup> The effect of the protest petition was to lower the rezoning approval rate between 5 and 25 percentage points.<sup>9</sup> Informed by the study, North Carolina repealed its protest petition statute in 2015.<sup>10</sup>

Ohio, West Virginia, and—for county zoning only—Michigan, have a unique rezoning protest process: rather than requiring supermajority votes, successful protests result in referendums on the proposed rezoning. This has the virtue of accurately appraising local opinion, but at a high administrative cost. We do not recommend that other states adopt this approach.

**Table 1. Protest Petition Rules by State**

If neighbors bring a valid protest petition, a proposed rezoning requires a supermajority vote of the city council to take effect. This table shows the rules that apply in each state. Rules for county rezonings often differ.

Arizona	Owners of	20%	of land within	150'	trigger a	3/4	majority requirement.
Colorado	Owners of	20%	of land within	100'	trigger a	2/3	majority requirement.
Connecticut	Owners of	20%	of land within	500'	trigger a	2/3	majority requirement.
Delaware	Owners of	20%	of land within	100'	trigger a	3/4	majority requirement.
Illinois	Owners of	20%	of abutting lots		trigger a	3/4	majority requirement.
Iowa	Owners of	20%	of land within	200'	trigger a	3/4	majority requirement.
Kansas	Owners of	20%	of land within	200'	trigger a	3/4	majority requirement.
Massachusetts	Owners of	50%	of land within	300'	trigger a	2/3	majority requirement.
Michigan	Owners of	20%	of land within	100'	trigger a	2/3 to 3/4	majority requirement.
Mississippi	Owners of	20%	of land within	160'	trigger a	3/5	majority requirement.
Missouri	Owners of	30%	of land within	185'	trigger a	2/3	majority requirement.
Montana	Owners of	25%	of land within	150'	trigger a	2/3	majority requirement.
Nebraska	Owners of	20%	of land within	300'	trigger a	3/4	majority requirement.
New Hampshire	Owners of	20%	of land within	100'	trigger a	2/3	majority requirement.
New Jersey	Owners of	20%	of land within	200'	trigger a	2/3	majority requirement.
New York	Owners of	20%	of land within	100'	trigger a	3/4	majority requirement.
North Dakota	Owners of	20%	of land within	150'	trigger a	3/4	majority requirement.
Oklahoma	Owners of	50%	of land within	300'	trigger a	3/5 or 3/4	majority requirement.
Texas	Owners of	20%	of land within	200'	trigger a	3/4	majority requirement.
Wyoming	Owners of	20%	of land within	140'	trigger a	3/4	majority requirement.

Source: See the appendix of this policy brief for a list of protest petition statutes for each state.

## PRIVATE PROPERTY AND THE PRESUMPTION OF LIBERTY

Government policies ought to err on the side of liberty. As John Stuart Mill writes, “the onus of making a case always lies on the defenders of legal prohibitions.”<sup>11</sup> Although the limits of this principle have long been debated, few would argue that government ought to restrict freedoms without offering a plausible reason. F. A. Hayek argues for liberty in the face of limited human knowledge: “we shall not achieve its ends if we confine liberty to the particular instances where we know it will do good.”<sup>12</sup>

In practice, the presumption in favor of liberty relies on the restraint of officials, checks on arbitrary decisions such as judicial review,<sup>13</sup> and structural biases in favor of liberty built into government decision-making.

If implemented well, protest petitions can have a structural bias in favor of liberty. But when implemented poorly—and as written in many states today—protest petitions introduce the opposite bias, favoring restriction over liberty.



The protest petition process is notionally neutral—it can be used by either neighbors or the owners of rezoned property objecting to either tighter or looser zoning. But in practice, neighbors use the petition process almost exclusively to prevent looser zoning. The interests of neighbors should not, of course, be ignored—but neither should a handful of neighbors be granted so much power over others’ property.

In the section that follows, we outline four models for reform that have the potential to tilt the protest petition process away from ever-tighter regulation and toward liberty.

## **OPTIONS FOR REFORM**

Several states have demonstrated possibilities for reforming the protest petition process to ensure that a few neighbors cannot speak for an entire community and to strengthen the presumption of liberty.

### **North Carolina and Wisconsin: Repeal**

States can entirely repeal the protest petition process, as Wisconsin and North Carolina did recently.<sup>14</sup> In Wisconsin, some cities have chosen to keep protest petition ordinances, choosing to limit their own discretion.<sup>15</sup>

An even better option is to repeal the protest petition process only with respect to neighbors, leaving in place the rarely used ability to protest an unwanted rezoning of one’s own land.

However, we are sympathetic to the concerns that originally motivated protest petitions<sup>16</sup>—that city power is sometimes exercised without regard to local concerns. Retaining a mechanism for formal neighborhood resistance is reasonable, but that mechanism ought to be triggered only when a relatively broad and clearly representative group of neighbors protests.

### **Massachusetts: The Baker Majority**

Before 2021, any rezoning in Massachusetts required a two-thirds legislative majority. Governor Charlie Baker championed a reform that lowered the approval threshold to a simple majority, but only for rezonings that loosen regulations against housing.<sup>17</sup> Thus, Massachusetts law has institutionalized the presumption of liberty for housing supply. Municipalities now face a higher threshold for adding than removing regulation.

States can incorporate a Baker Majority by limiting or repealing the protest petition process only for an “upzoning” (that is, a rezoning that restores or expands property rights).<sup>18</sup> For example, a state could alter its statute so that a protest petition against an upzoning triggers a three-fifths

supermajority requirement, whereas a protest petition against any other rezoning triggers a three-fourths supermajority requirement. Or a state could require a larger share of nearby owners' signatures to validate a protest against an upzoning.

New Hampshire House Bill 1179, under consideration in the 2022 session, is one way to enact a Baker Majority. It would repeal the protest petition process for rezonings that intensify land use, although neighbors could still bring protest petitions against rezonings that allow new land uses.<sup>19</sup>

### Oklahoma: 50 Percent Threshold, Broader Neighborhood

Despite the drama at the Crowne Plaza hotel, Oklahoma's protest petition statute is the best in the country in erring on the side of liberty. A valid protest petition must cover fully half of nearby property, guaranteeing that protests cannot be brought when owners of a majority of the neighborhood favor the project. At the same time, property owners enjoy strong protection: 20 percent can bring a petition against a rezoning, as in most other states.

In addition, Oklahoma has a relatively generous definition of "nearby properties": those in the area extending 300 feet from the proposed rezoning. But 300 feet is still quite small. On a typical Tulsa street, house lots are 50 feet wide, so only the six nearest neighbors in each direction along a block are considered nearby. And lots are much larger in nonresidential areas, so a small number of commercial or institutional owners easily constitute the neighborhood, as occurred around the Crowne Plaza.

For other states, adopting Oklahoma's approach would eliminate most abuses of protest petitions while retaining neighbors' collective power in the rezoning process. States could also extend the range of "nearby" to 500 or 1,000 feet, especially in nonurban areas.

Oklahoma's approach could be adjusted in areas with large lots. For instance, a protest petition could require a minimum of 50 or 100 residents within a half mile of the rezoning site in addition to property owners covering 50 percent or more of property within the standard distance.

### Arizona: Count People as Well as Land

The classic protest petition process is designed to protect property values, and each neighbor's signature counts in proportion to the relevant land he owns. Arizona counts people as well as land. It requires that a protest petition be signed by owners of at least 20 percent of the nearby "lots, tracts and condominium units" as well as 20 percent of the nearby land area. Arizona's 20 percent threshold, however, still allows a minority of neighbors to hold up popular changes.

States could go further by requiring signatures from residents, rather than owners, of at least half of occupied housing units in addition to owners of the relevant land. Such a requirement would give renters a voice in protest petitions. However, the potential administrative cost is a reason to be cautious about adopting this approach.

### **CONCLUSION**

States play an important role in the local exercise of zoning powers, setting the rules by which municipalities adopt and amend their zoning ordinances. States with protest petition processes have granted substantial veto power over zoning changes to small groups of neighbors, without any countervailing community power to hasten needed changes. This one-sided veto power makes it harder for cities to adapt their zoning to changing needs and dilutes property rights.

In the midst of a national housing crisis, some cities are building political will for reforms that enable expanded opportunities for housing supply. States should reform or repeal protest petition statutes to ensure that their cities can use the rezoning process without undue difficulty.

## APPENDIX

For ease of reference, we list here the protest petition statutes for each state:

Arizona	ARIZ. REV. STAT. § 9-462.04 (2021); ARIZ. REV. STAT. § 11-814 (2021)
Colorado	COLO. REV. STAT. § 23-305 (2021)
Connecticut	CONN. GEN. STAT. § 124-8-3(b) (2022)
Delaware	DEL. CODE ANN. tit. 22 § 3-305 (2021)
Illinois	65 ILL. COMP. STAT. 5 / 11-13-14 (2022)
Iowa	IOWA CODE § 414.5 (2022); IOWA CODE § 335.7 (2022)
Kansas	KAN. STAT. ANN. § 12-757(f) (2021); KAN. STAT. ANN. § 19-2960(b) (2021)
Massachusetts	MASS. GEN. LAWS ch. 40A, § 5 (2020)
Michigan	MICH. COMP. LAWS § 125.3403 (2022)
Mississippi	MISS. CODE ANN. § 17-1-17 (2021)
Missouri	MO. REV. STAT. § 89.060 (2021)
Montana	MONT. CODE ANN. § 76-2-305 (2021)
Nebraska	NEB. REV. STAT. § 19-905 (2022)
New Hampshire	N.H. REV. STAT. ANN. § 675:5 (2022)
New Jersey	N.J. STAT. ANN. § 40:55D-63 (West 2021)
New York	N.Y. TOWN LAW § 16-265 (McKinney 2022)
North Dakota	N.D. CENT. CODE § 40-47-05 (2022)
Oklahoma	OKLA. STAT. tit. 11 § 43-105 (2021)
Texas	TEX. LOC. GOV'T. CODE ANN. §§ 211.006(d)-(f) (West 2021)
Wyoming	WYO. STAT. ANN. § 15-1-603 (2021)

## ABOUT THE AUTHORS

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Kelcie McKinley has an MA in economics from George Mason University. McKinley graduated from Texas Tech University with a BS in biology. She worked as a development associate at the Fund for American Studies and as an assistant at the Texas House of Representatives. Her research interests include urban policy and environmental policy. She currently lives in Houston, Texas.



## NOTES

1. Rick Maranon, "Group Halts Plans for Rezoning South Tulsa Building into Mixed Affordable Housing," *FOX23 News*, June 23, 2021.
2. Tulsa Metropolitan Area Planning Commission, *Minutes of Meeting No. 2841*, May 5, 2021, <http://tulsaplanning.org/tmapc/minutes/2021-05-05-TMAPC-Minutes.pdf>.
3. Rick Maranon, "Group Halts Plans for Rezoning."
4. Madeline Baron et al., *Housing Underproduction in the U.S.: Economic, Fiscal and Environmental Impacts of Enabling Transit-Oriented Smart Growth to Address America's Housing Affordability Challenge* (Washington, DC: Up for Growth, 2018).
5. Many cities, such as Bozeman, Montana, have eased requirements for accessory dwelling units. Others, like New Rochelle, New York, have rezoned downtowns to allow new housing. Salim Furth and Philip Wharton, *Zoning and Permitting Innovations Unlock Opportunity* (Las Vegas, NV: Better Cities Project, 2021). Hannah Kears, "Bozeman Commission Relaxes ADU Regulations," *NBC Montana*, November 16, 2021.
6. Katherine Levine Einstein, David M. Glick, and Maxwell Palmer, *Neighborhood Defenders: Participatory Politics and America's Housing Crisis* (Cambridge, UK: Cambridge University Press, 2019).
7. We are grateful to the Tennessee Advisory Commission on Intergovernmental Relations for earlier research on state protest petition laws, which we verified and updated. Bill Terry et al., *Community-Based Land-Use Decisions: Public Participation in the Rezoning Process* (Nashville, TN: Tennessee Advisory Commission on Intergovernmental Relations, 2015).
8. David W. Owens, *Zoning Amendments in North Carolina* (Special Series no. 24, School of Government, University of North Carolina at Chapel Hill, Chapel Hill, NC, February 2008).
9. Protested rezonings were 24 percentage points less likely to be approved than other rezonings (52 percent versus 76 percent). But that was mostly because protested rezonings received fewer votes, not because of the supermajority threshold. Only 5 percent of protested rezonings received a majority of votes but failed to receive a supermajority. Three interacting forces may explain the gap: (a) protested rezonings may generally be "worse" and would thus receive fewer affirmative votes in the absence of a formal process, (b) the protest itself may influence council votes, and (c) council members may strategically change their vote when they know a rezoning is doomed. Without quantifying these channels, one cannot precisely identify the impact of the supermajority requirement.
10. John Moritz, "NC Legislature Approves Bill to End Protest Petitions," *Asheville Citizen-Times*, July 15, 2015.
11. John Stuart Mill, *The Principles of Political Economy*, vol. 3 of *The Collected Works of John Stuart Mill*, ed. John M. Robson (Toronto: University of Toronto Press, 1977), 938.
12. F. A. Hayek, *The Constitution of Liberty*, vol. xvii of *The Collected Works of F. A. Hayek*, ed. Ronald Hamowy (Abingdon, UK: Routledge, 2011), 83.
13. Randy E. Barnett, "Judicial Engagement through the Lens of Lee Optical," *George Mason Law Review* 19, no. 4 (2012): 845–60.
14. "Zoning FAQ 5," League of Wisconsin Municipalities, last updated November 2019, <https://www.lwm-info.org/1135/Zoning-FAQ-5>; Moritz, "NC Legislature Approves Bill."
15. For example, suburban Wauwatosa, Wisconsin. Evan Casey, "Wauwatosa Is Considering Taking Away 'Protest Petitions' for Residents Who Want to Block Rezoning for Certain Properties," *Milwaukee Journal-Sentinel*, November 15, 2021.
16. Protest petitions were a feature of the first comprehensive US zoning ordinance, which Edward Bassett designed for New York City in 1916. David W. Owens, "Protest Petitions," School of Government, University of North Carolina at Chapel Hill, April 2020, <https://www.sog.unc.edu/resources/legal-summaries/protest-petitions>.
17. The reform also adjusted the protest petition process, bringing it in line with Oklahoma's.



18. It is relatively easy to define an upzoning as a rezoning that restores or expands property rights. If all uses and intensities of the property that were allowed under the original zoning are allowed with no new restrictions or conditions after the rezoning, then the rezoning is an upzoning. For example, if a city wants to rezone an office district to allow multifamily housing, and if the city adds multifamily housing as a permitted use without removing other permitted uses, then the rezoning qualifies as an upzoning. If instead the city adds multifamily housing as a permitted use but in the same action lowers the building height limit, then the effect is mixed, and the rezoning would not qualify as an upzoning under this formal definition.
19. H.B. 1179, 167th Gen. Ct., 2022 Sess. (N.H. 2022).



## Proposed Zoning Protest Reform

### Briefing

**January 16, 2023**

**Goal:** Amend the law so that only a majority, 50%, of land ownership, instead of the small 20% currently required, may trigger a supermajority vote at city council, as illustrated in Table 1.

#### **Historical View**

Protest petition power was contained in the original model act that most states adopted to enable municipal zoning in the 1920s. This tool, which only twenty states still have, was conceived in the pre-information age era and helped to inform the public of pending land use changes. Planning laws and practices have changed radically since.

Modern zoning practice now require notice of rezonings to neighbors and the public, including signs on the property, mailings to neighbors within a certain distance, electronic notification and publication in common news outlets. Most developers meet with neighbors (often because they are either required or strongly encouraged to by the city or town).

Concerns are addressed, compromises made and some applications are withdrawn. Most cities have Conditional Use zonings or development agreements which allow neighboring property owners to have more involvement in the rezoning process and/or zoning to be tailored to the site. Most rezonings occur only after significant concessions are made to address concerns of neighbors.

So, whatever the reason was for this statute in the 1920s, it doesn't apply now.



## National View

- In 20 states, a small group of neighbors can use an obscure state law, the protest petition, to block rezonings. As practiced, protest petitions are unrepresentative and impinge on property rights. North Carolina, Wisconsin, and Massachusetts have recently repealed or sharply reformed their protest petition statutes.
- Other states can repeal protest petition statutes or reform them to be more representative and to better protect property rights. (1)

## Texas View

- The Zoning Protest statute has been in-effect since 1927 (recodified 1987).
- Section 211.006(d), Local Government Code states:
  - The protest must be written and signed by the owners of at least 20 percent of either:
    - The area of the lots or land covered by the proposed change; or
    - The area of the lots or land immediately adjoining the area covered by the proposed change and extending 200 feet from that area.
- If the protest petition gathers the requisite signatures, it requires a super-majority vote by the city council to approve the development, as illustrated in Table 1.
- The Texas Supreme Court, in its case *Tex. Boll Weevil Eradication Foundation v. Lewellen*, stated that delegating legislative authority to private entities, such as in this law, where they may force the city council to a higher voting threshold, must be subject to “stringent analysis” and receive less judicial deference, writing that those private entities that are lacking in legislative guidance, deciding without special qualifications, possessing pecuniary interests which may conflict with public interests and whose decisions are not subject to review are factors that weigh against its constitutionality.



## Proposed Change

- Update Section 211.006(d), Local Government Code The protest must be written and signed by the owners of at least 50 percent of either:
  - The area of the lots or land covered by the proposed change;
  - or
  - The area of the lots or land immediately adjoining the area covered by the proposed change and extending 200 feet from that area.

## Rationale for proposed change

- “The voice of the majority decides, for the *lex majoris partis* is the law of all councils, elections, etc. when not otherwise expressly provided.” Thomas Jefferson 1801
- Today, City councils may decide on special and conditional uses with a simple majority vote. This is not true in the case of a zoning protest case where a super-majority may be forced and required for approval of a development plan, as illustrated in Table 1.



City Council Size	50% Majority		75% Super Majority	
	Votes Needed	Percent	Votes Needed	Percent
5	3	60%	4	80%
6	3	50%	5	83%
7	4	57%	6	86%
8	4	50%	6	75%
9	5	56%	7	78%
10	5	50%	8	80%
11	6	54%	9	82%
12	6	50%	9	75%
13	7	54%	10	77%
14	7	50%	11	79%
15	8	53%	12	80%

Table 1: Actual votes necessary for different thresholds on City Council

- In a case in the City of Fate, we had a zoning protest petition for a viable commercial development project. Our city council voted 5-2 to approve the project, but since a super-majority vote was required (6 of our 7-member council were needed for approval), the development was denied.
- In Texas, we need to find a better balance between personal property rights and the power of the neighbors to trigger a supermajority in zoning changes.

### Objections and Response

- Some objectors to this change claim that this law protects minority rights: that this protects the citizen “David” against the developer “Goliath.”
- We do protect minority rights in a republic, but even changing the Bill of Rights in the U.S. Constitution requires substantially less threshold than one *unelected* person, even a foreign one, can trigger in this statute.
- People want to control other people’s property: it’s a universal tendency. There are many ways people can control other people’s property, e.g. restrictive covenants or deeds, not to mentioning buying the property.



But in many cases, people don't have that right, and thus they resort to this statute. But that doesn't mean it's in the best interest of the community or is right.

- *People have the right to use their property; their neighbors do not.*
- *The public has the right to have the majority of their elected officials make decisions.*
- *The ability to trigger a supermajority is a power, not a right.* A right or freedom usually either prevents government control or prohibition of a person's actions or abilities to participate in democratic process. Whereas, here is a power that the legislature delegates, to as few as one person, to manipulate a city council voting threshold.

### **In Summary**

The proposed change is simple, allows the majority of the governing body to make the decision in more cases, maintains the power granted to citizens for protest petitions, clears a hurdle for affordability housing, and will create economic development opportunities for cities. The question is: who decides? The majority or a minority?

In service,

A handwritten signature in black ink, appearing to read "David Billings", written in a cursive style.

David Billings  
Mayor

1. The Mercatus Center at George Mason University. Housing Reform in the States: A Menu of Options for 2023, July 25, 2022

# Return to Majority Rule on Zoning Changes

**Problem:** An old law empowers a few property owners to block housing and constrain property rights, hurting the Texas miracle economy.

**31%**  
**Needed  
just 1  
opponent**

**A single property owner can overturn the democratically-elected majority.**

- In two cities the Mercatus Center studied, Dallas and Austin, in 31% of their valid petitions, only one nearby owner's signature was necessary to manipulate the City Council's voting threshold. *That's more powerful than most Texas mayors.*

**2/3**  
**Supported  
& it still  
failed**

**A major Dallas hospital's expansion was obstructed.**

- In 2019, nearby owners collected signatures opposing the hospital's expansion on its own property.
- Despite 300 support letters & support from 2/3rds City Council, this zoning change failed to pass due to supermajority requirements

**Solution: restore democracy by establishing a reasonable supermajority threshold. Support Rep. Carl Sherman Sr.'s HB 4637 / Seeking Joint Authors**

- Doesn't remove protest rights
- Doesn't impact required public hearings
- Does keep all existing required notices
- Does follow sound planning and governance rules that respect property rights and the will of the People

**Texans For Housing advocates for changes in law to make it easier to build more housing in Texas in proximity to daily needs, resulting in greater affordability, lower tax burdens for homeowners, and lower environmental costs.**

[www.TexansforHousing.com](http://www.TexansforHousing.com)

## Background information

A rule dating back to 1927 says if 20% of land ownership within 200 feet object to a zoning change, then the city council must approve this change with a 75% supermajority (with rounding 86% of a 7-member council).

\* This law is mostly used to block housing, constraining supply and inflating prices.

\* Thanks to modern planning tools allowing for more tailored zoning and better communication such as online participation and notice, the stringent supermajority rules are no longer necessary.

\* To protest is to complain in public about an act; such rights won't be curtailed.

\* People have the right to have their elected officials decide by majority rule.

\* The power to trigger a supermajority isn't reviewable and may have illegal reasons.

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