



## Rezoning Protest Petitions Are Ripe for Reform

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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.

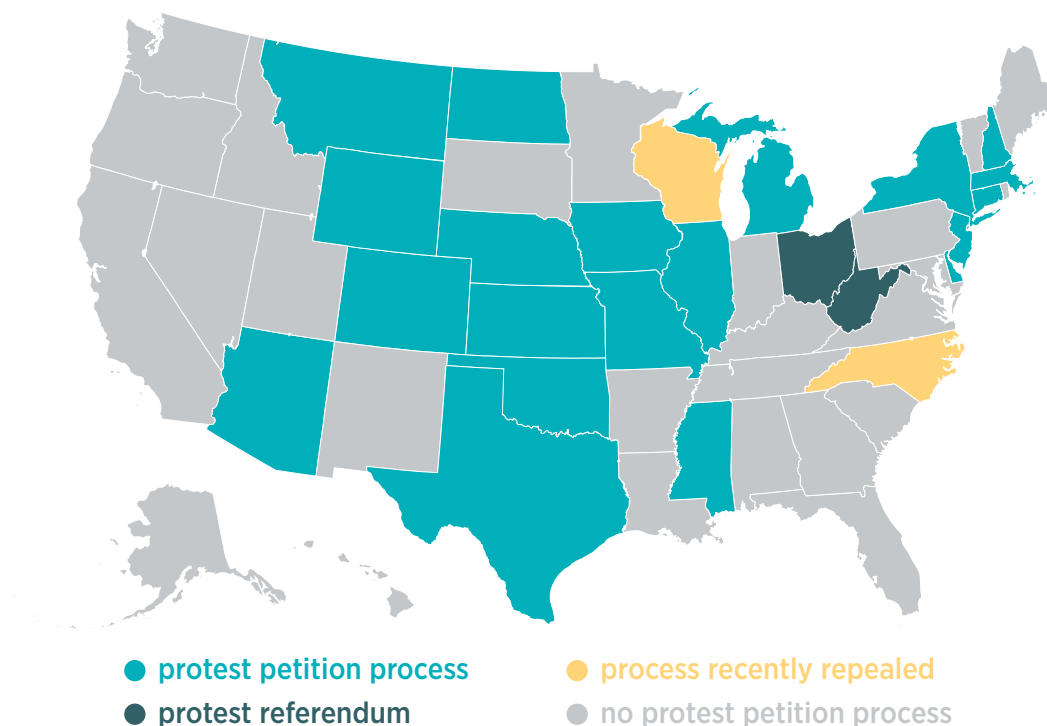
## **THE WHERE AND HOW OF PROTEST PETITIONS**

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

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 and has been published in *Critical Housing Analysis* and the *IZA Journal of Labor Policy*. He 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's writing has appeared in *National Affairs*, *American Affairs*, *The City*, *Public Discourse*, and numerous newspapers. He previously worked at the Heritage Foundation, at Amherst College, and as a contractor to the US Department of Housing and Urban Development. He earned his PhD in economics from the University of Rochester.

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## 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 Kearse, “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).