EQUITABLE HOUSING INSTITUTE

Promoting housing stability, fairness and affordability by combating exclusionary practices

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Supermajority vote requirements and related barriers to adding needed housing

In order to reverse the crisis-level shortage of housing across the United States, it will be necessary to correct the widespread pattern of low-density residential development in the limited portions of urbanized areas where residential development is allowed. Opposition by local residents is probably the chief obstacle to adding needed housing in American communities.

Many states, however, do not allow local governments to approve rezonings by a mere majority vote of the local governing body, if the owners of a few nearby parcels file a formal "protest petition" challenging the rezoning application. Usually, a formal protest by the owners of 20% or more of the real estate within a few hundred feet of the land in question is sufficient to defeat the rezoning, unless a supermajority of the local governing body approves it. The most common supermajority requirement is three-quarters of the members of that body.

Even in states that do not have such a statute, some local governments have adopted similar "protest petition" provisions in their zoning ordinances, including supermajority approval requirements. All those state and local supermajority requirements are contrary to the general American principle of majority rule, and such requirements have been shown to reduce the approval rate of rezoning applications.

In addition, some zoning ordinances that do not have such "protest petitions" require the applicant for rezoning to get the consent of some nearby neighbors in order to have the rezoning approved. All the foregoing requirements are unnecessary to the achievement of any valid governmental interest. Those approval barriers should be prohibited as to rezonings that would allow needed, new housing. The Economic Fair Housing Act (EFHA) is a means of doing so.

Two states that have no supermajority requirement nevertheless require a local referendum, where a formal protest petition is filed to a rezoning application. Also, the establishment of zoning rules, and of substantial changes to them, in a locality is often subject to a local plebiscite.

Such "direct democracy" initiatives are strongly protected in the American system. However, regardless whether such an initiative is used, the local governing body would not be permitted under the EFHA to allow regulatory barriers to housing opportunity to exist in the jurisdiction. Nor would a local vote for a proposition that would violate federal law be valid. The EFHA could be such a law.

1. Housing shortages and residents' opposition to new housing nearby

Increasing land-use restrictions on housing development are the likely cause of housing production lagging increasingly behind job creation in wealthy, urban areas over the last 40 to 50 years, according to various major studies.[1] The natural result has been chronic escalation of housing costs and a major increase in the proportion of American households who are considered "housing cost-burdened."[2]

For example, between the 1960s and 2016, the proportion of American rental households that are considered "housing cost burdened" roughly doubled, from 23.8 percent to 47.5 percent. [3] (That is, those households paid more than 30 percent of their household income for housing costs.) About half of those households (11.0 million) were considered "severely housing cost burdened" by 2016 (they paid at least 50 percent of their household income for housing costs).[4]

Furthermore, there is a "powerful connection between homelessness and access to housing people can afford," according to the U.S. Inter-Agency Council on Homelessness ("USICH").[5] And American homeowners experienced housing price increases far greater than typical income increases too, between 1960 and 2016. The median home value in the United States increased 112 percent during that period, while median income for owners rose only 50 percent.[6]

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[1] *See generally, e.g.*, Equitable Housing Institute (EHI), *Toward a comprehensive ban on exclusionary housing practices*, pp. 8-9 (2019) (discussing Ganong-Shoag and Hsieh-Moretti studies), posted at: https://www.equitablehousing.org/images/PDFs/PDFs--2018-/EHI-Toward-comprehensive-ban-tech_edits-10-2020.pdf.

Freddie Mac recently estimated that housing production nationwide has fallen 3.8 million units behind household formation. *See, e.g.*, Emily Badger and Eve Washington, *The Housing Shortage Isn't Just a Coastal Crisis Anymore*, NY Times (July 14, 2022), posted at: https://www.nytimes.com/2022/07/14/upshot/housing-shortage-us.html. "Up For Growth, a Washington-based policy and research group focused on the housing shortage, says that the deficit doubled from 2012 to 2019." *Id.*

[2] *See, e.g., id.*, pp. 3-6.

[3] JOINT CTR. FOR HOUSING STUD. OF HARV. U., *The State of the Nation's Housing 2018* ("SONH 2018"), 5 (2018).

[4] *See* SONH 2018, *supra* note 3, at 5, 30. Most low- and moderate-income American households rent their housing, and more than one-third of U.S. households are renters. *See*, e.g., Pew Research Center, *More U.S. households are renting than at any point in 50 years*, (Jul. 19, 2017) (as of 2016, there were about 43.3 million rental households and 75 million owner-occupied households).

[5] *The Importance of Housing Affordability and Stability for Preventing and Ending Homelessness*, UNITED STATES INTERAGENCY COUNCIL ON HOMELESSNESS 1 (May 2019). ("When housing costs are more affordable and housing opportunities are more readily available, there is a lower likelihood of households becoming homeless, and households who do become homeless can exit homelessness more quickly and with greater likelihood of sustaining that housing long-term.")

[6] SONH 2018, *supra* note 3, at 5 (the divergence of housing costs and household incomes was fairly steady during that period, for both renters and homeowners, with the most dramatic changes occurring in the 2000s.) "Cost-burdened shares continue much higher among Black (45 percent) and Hispanic households (43 percent) than among Asian and other minority households (36 percent) or White households (27 percent)." *Id*. at 31 Even among households within the same income groups, larger shares of minorities than Whites are cost burdened. *Id.*

Opposition by neighbors and other local residents is probably the chief obstacle to adding needed housing in American communities.[7] Residents' resistance to new housing—sometimes termed NIMBYism ("Not In My Back Yard" sentiment)—is quite powerful, because the local officials responsible for decisions on housing issues are either elected by those residents, or appointed by elected officials.[8]

2. Supermajority vote requirements and related restrictions on the approval of needed, new housing

Twenty states permit "a small group of neighbors to formally protest a rezoning and raise the threshold for approval from a simple majority to a supermajority."[9] As mentioned, in most of those states, the owners of 20% or more of the real estate within a few hundred feet of the land in question can force the supermajority requirement,[10] and the most common supermajority requirement is three-quarters of the local governing body.[11]

Empirical research confirms the common-sense conclusion that a supermajority approval requirement makes it more difficult for a rezoning application to be approved. In a detailed study of the effects of North Carolina's "protest petition" statute and its supermajority approval requirement, the statute was found to lower the rezoning approval rate as much as 25%.[12] Informed by that study, the North Carolina legislature repealed its protest petition statute in 2015."[13]

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[7] *See generally, e.g.,* EHI, *Developing a better "carrot," to induce residents to support needed, new housing in their communities* (June 2018), posted at https://equitablehousing.org/images/PDFs/PDFs--2018-/Pursuing_win-win_solutions_with_local_residents.EHI-6-2018.pdf.

[8] *See generally, e.g., id.*

[9] *See, e.g.,* Mercatus Center, *Rezoning Protest Petitions Are Ripe for Reform* ("Meratus"), pp. 1, 4 & Table 1 (2022), posted at: https://www.mercatus.org/research/policy-briefs/rezoning-protest-petitions-are-ripe-reform. Mercatus lists 20 states in which city councils generally must approve a proposed rezoning by a supermajority vote, in order for it to take effect, where neighbors bring a valid protest petition. "Rules for county rezonings often differ." *Id.,* p. 4 Table 1.

[10] *Id.* at 1.

[11] *Id.,* pp. 2, 4 & Table 1.

[12] David W. Owens, *Zoning Amendments in North Carolina* ("Owens"), p. 11 (2008) (explaining that a "valid protest petition can . . . affect the zoning process in an indirect but significant manner. The approval rate for projects subject to a protest petition is 52 percent, compared to a 76 percent approval rate for rezoning petitions overall.") *Id.* That 25% difference was found even though only "5 percent of the rezonings subject to a valid protest petition received a majority favorable vote but less than a three-fourths majority, thus failing to be adopted as a direct result of the protest petition." *Id.*

[13] Mercatus, *supra* note 9, p. 3, citing John Moritz, *NC Legislature Approves Bill to End Protest Petitions*, Asheville Citizen-Times (July 15, 2015). Most states that still have such a supermajority provision are Midwestern and Mountain states, but numerous Northeastern states also have those provisions—including the very populous, high-housing-cost states of New York, Connecticut, New Jersey, Massachusetts and Ohio.

Under the North Carolina statute (General Statute § 160A-385(a)), the persons who could file a "protest petition" included the owners of "5 percent of a 100-foot-wide buffer extending along the entire boundary of each discrete or separate area proposed to be rezoned." Owens, *supra* note 12, p. 11. If a valid protest

As to local "protest petition" provisions in states that do not explicitly permit them, Wisconsin is an example. There, the statewide "protest petition" supermajority voting requirement for rezonings was repealed in 2019, as to cities, villages, and towns.[14] (The state retained that requirement for zoning by counties.) However, the state did not explicitly prohibit cities, villages, and towns that exercise zoning powers from retaining comparable "protest petition" provisions in their municipal ordinances.[15]

The League of Wisconsin Municipalities has advised its members that, as a result, a Wisconsin "municipality may rely on its broad legislative home rule powers . . . and broad zoning powers . . . to adopt its own version of a protest petition process."[16] Such requirements are in effect in places such as Wisconsin's capital, Madison,[17] and some cities within the Milwaukee metropolitan area.[18]

Wisconsin is not unique in that regard. For example, in Virginia, which has no statewide protest petition supermajority provision, we are aware that the Town of Vienna (near EHI's headquarters) has such a provision.[19]

We discuss other issues regarding supermajority approval requirements for housing rezonings below, in Parts 3, 4 and 5.

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petition was filed, "adoption of the proposed amendment requires the favorable vote 'of three-fourths of 'all the members of the city council.'" *Id.* at 10.

North Carolina's protest petition statute had been mandatory for cities, but counties were not permitted to use it, according to the study. *Id.*. Thus, North Carolina's legislature had a basis for comparing the experience in localities that had protest petition provisions versus that in localities that did not.

[14] *See, e.g.*, Brian J. Ohm, *A Quarter Century of Changes to Wisconsin's Local Land Use Enabling Laws* ("Ohm"), p. 27 (2018), posted at https://dpla.wisc.edu/wp-content/uploads/sites/1021/2017/06/2018OhmKeepingUpWithChangesin-WisPZLaws.pdf.

> Section 8 of 2017 Wisconsin Act 243 repealed Section 62.23(7)(d)2m.a. of the Wisconsin Statutes effective January 1, 2019 (applicable to cities, villages, and towns exercising zoning under village powers). This is the section of the Statutes that required a three-fourths approval vote of the governing body in the case of neighboring property owners who filed a petition protesting a rezoning.

[15] *See, e.g., id.* (Wisconsin "did not repeal the protest petition requirements for county zoning found in section 59.69(5)(e)5g of the Wisconsin Statutes.")

[16] League of Wisconsin Municipalities, *Zoning FAQ 5*, posted at: https://www.lwm-info.org/1135/Zoning-FAQ-5 (accessed May 9, 2023). *See also* Ohm, *supra* n. 14, at 27 (repeal in Wisconsin did not "prohibit cities, villages, and towns from enacting an ordinance establishing procedures for a super majority vote for a rezoning if the local community wants to include it as an option as a matter of local law.')

[17] See, e.g., Dean Mosiman, *Amid development boom, Madison may change rules to approve rezoning property*, Wisconsin State Journal (May 23, 2022).

[18] *See, e.g.*, Evan Casey, *Wauwatosa is considering taking away 'protest petitions' for residents who want to block rezoning for certain properties*, Milwaukee Journal Sentinel (Nov. 15, 2021).

[19] *See, e.g.*, Brian Trompeter, *Vienna Council approves tweaks to process for zoning-change protests*, InsideNoVa.com (July 14, 2017), posted at https://www.insidenova.com/news/fairfax/vienna-council-approves-tweaks-to-process-for-zoning-change-protests/article_72ccd070-665d-11e7-9cad-73474a557850.html.

Consent requirements

Some local ordinances in a number of states provide that a zoning amendment may not be approved until the consent of a certain number or percentage of affected landowners is obtained.[20] By contrast to "protest petition" provisions, consent provisions actually "empower affected landowners to conclusively block a zoning amendment."[21]

The United States Supreme Court overturned certain rezoning consent provisions early on, as violations of due process, but some similar provisions still exist.[22] Given the persistent tendency of local residents to oppose even reasonable rezonings to add needed housing, consent requirements seem just as problematic as supermajority approval requirements, regarding such rezonings.

Referendums and plebiscites

Ohio and West Virginia, which have no supermajority requirement, require a local referendum where a formal protest petition is filed to a rezoning application.[23] Also, the establishment of zoning rules and substantial changes to them by the local governing body often is subject to a possible local plebiscite.[24]

Because of the special status of such "direct democracy" initiatives in the American system, they deserve an extended analysis that is beyond the scope of this memorandum. We note, however, that regardless of whether such an election is held, the local governing body would not be permitted under the EFHA to allow regulatory barriers to housing opportunity to exist in its jurisdiction. Nor would a local vote for a proposition that would violate federal law be valid.

As the U.S. Supreme Court has pointed out, "a property owner can challenge a zoning restriction," including denial of the owner's rezoning proposal, if the restriction "is 'clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.'"[25]

> *If the substantive result of the referendum is arbitrary and capricious*, bearing no relation to the police power, then the fact that the voters of Eastlake wish it so would not save the restriction. As this Court held in invalidating a charter amendment enacted by referendum: *"The*

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[20] DAMIEN KELLY, *ET. AL.*, 1 A PRACTICAL GUIDE TO WINNING LAND USE APPROVALS AND PERMITS § 2. 04[3](f) (2022).

[21] *Id.*

[22] *Id.*, citing *Seattle Title Ins. Co. v. Roberge*, 278 U.S. 116 (1928); *Eubank v. City of Richmond*, 226 U.S. 137 (1912). The Court invalidated those provisions on the grounds that they delegated too much power to the landowners, with no standards to control that power and no provision for local government review of the landowners' decision.

[23] *See, e.g.*, Mercatus, *supra* n. 9, pp. 3, 4 Table 1.

[24] *See, e.g.*, WILLIAM A. FISCHEL, ZONING RULES!, p. 38 (2015).

[25] *Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 676 (1976), citing *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926).

> *sovereignty of the people is itself subject to those constitutional limitations which have been duly adopted and remain unrepealed."*[26]

Therefore, local referendums and similar "direct democracy" initiatives are not permitted to nullify federal laws.

3. Supermajority vote requirements generally contravene the fundamental American principle of majority rule

"The Framers of the Constitution generally favored decision making by simple majority vote."[27] In the seminal Federalist Papers, Alexander Hamilton declared: "To give a minority a negative upon the majority (which is always the case where more than a majority is requisite to a decision), is, in its tendency, to subject the sense of the greater number to that of the lesser."[28]

James Madison, the "Father of the Constitution," made clear in another Federalist Paper that no more than a simple majority should be required for a quorum, and no more than a majority of the quorum should be required for a decision, in the U.S. House of Representatives. Otherwise:

> In all cases where justice or the general good might require new laws to be passed, or active measures to be pursued, the fundamental principle of free government would be reversed. It would be no longer the majority that would rule; the power would be transferred to the minority.[29]

The majority rule principle also applies generally in the Senate, as illustrated "by the grant of a vote to the Vice President (Article I, Section 3) in those cases where the Senators are 'equally divided.'"[30]

In certain limited circumstances, the Constitution and the rules of the United States Senate and House of Representatives require a supermajority vote to approve an action. However, the Constitutional supermajority requirements have no bearing on ordinary legislation such as local zoning matters.

The rules of the House and Senate traditionally and generally have not required a supermajority vote to pass any actual legislation. Congressional rules, including

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[26] *Eastlake*, *supra* n. 25, at 676, quoting *Hunter v. Erickson*, 393 U.S. 385, 392 (1969). (some emphasis added).

[27] U. S. Congress, Congressional Research Service (CRS), *Supermajority Votes in the House*, p. 1 (Updated February 3, 2023).

[28] CRS, *Supermajority Votes in the House*, *supra* n. 24, at 1, quoting THE FEDERALIST No. 22 (Alexander Hamilton).

[29] THE FEDERALIST No. 58 (James Madison), posted at https://avalon.law.yale.edu/18th_century/fed58.asp. Madison thus answered the argument that "more than a majority ought to have been required for a quorum; and in particular cases, if not in all, more than a majority of a quorum for a decision." *Id.*

[30] CRS, *Super-Majority Votes in the Senate*, p. 1 (Updated April 12, 2010).

supermajority rules, go to the "method," the determination by each House as to "how and when to conduct its business."[31]

Supermajority rules can have important impacts on the fate of a piece of legislation. However, all those rules—including the Senate's rules regarding the filibuster—can be changed by a simple majority vote. (See discussion of supermajority voting requirements in Congress, below (Section 5).)

4. Arguments in favor of supermajority requirements are unsupportable regarding rezonings to allow needed housing

Protest petition provisions are designed to protect the interests of property owners in the "stability and continuity of zoning regulations."[32] That rationale may have had practical importance to the initial acceptance of zoning by American communities in the 1920's, which is when a protest petition provision was included in the first Standard State Zoning Enabling Act (SZEA). [33]

However, in recent times, the overwhelming problem has been that rezoning applications to provide needed housing are being denied far too often—or not even being made—because of unmeritorious local resistance. In fact, a virtual consensus has emerged among

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[31] *NLRB v. Canning*, 573 U.S. 513, 550 (2014) (addressing Senate rules). *See also id.* at 550-551, quoting *United States v. Ballin*, 144 U.S. 1, 5 (1892):

> The Constitution explicitly empowers the Senate to 'determine the Rules of its Proceedings.' And we have held that 'all matters of method are open to the determination' of the Senate, as long as there is 'a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained' and the rule does not 'ignore constitutional restraints or violate fundamental rights.'

[32] *Levin v. Parsippany-Troy Hills*, 82 N.J. 174, 411 A.2d 704, 707 (1980), citing 1 ANDERSON, AMERICAN LAW OF ZONING (2 ED. 1976), § 4.33 at 251.

[33] *See, e.g.,* Advisory Committee on Zoning, U.S. Dept. of Commerce, *A Standard State Zoning Enabling Act*, Sec. 5 (rev. 1926). That provision stated that zoning "regulations, restrictions, and boundaries may from time to time be amended, supplemented, changed, modified, or repealed. *In case, however, of a protest against such change, signed by the owners of 20 per cent or more* either of the area of the lots included in such proposed change, or of those immediately adjacent in the rear thereof extending --- feet therefrom, or of those directly opposite thereto extending --- feet from the street frontage of such opposite lots, such amendment shall not become effective except by the favorable vote of *three-fourths of all the members of the legislative body of such municipality*."); posted at: https://www.govinfo.gov/content/pkg/GOVPUB-C13-18b3b6e632119b6d94779f558b9d3873/pdf/GOVPUB-C13-18b3b6e632119b6d94779f558b9d3873.pdf (emphasis added).

The "stability and continuity of zoning regulations." rationale was contained in note 31 of the SZEA, as follows: "For this reason the practice has been rather generally adopted of permitting ordinary routine changes to be adopted by a majority vote of the local legislative body but requiring a three-fourths vote in the event of a protest from a substantial proportion of property owners whose interests are affected. This has proved in practice to be a sound procedure and has tended to stabilize the ordinance." *Id.*

housing policymakers, that major reform of land use regulations is needed to combat exclusionary zoning and other exclusionary housing practices. [34]

"Local residents' resistance to permitting new housing in their area is probably the chief obstacle to creating enough housing in the right places, suitable for the low- and moderate-income people who need it." [35] Residents' resistance—often called NIMBYism ("Not In My Back Yard" sentiment)—is quite powerful, because the local officials responsible for decisions on housing issues are either elected by those residents, or appointed by elected officials.[36]

That a supermajority voting requirement is not necessary to the protection of any valid governmental interest is strongly indicated by the fact that, as mentioned, less than half the States of the Union now have such a requirement. Historically, the SZEA and its protest petition supermajority provisions "became a standard model in zoning codes adopted in the 1920s and 1930s across the United States." Protest petition provisions were still in effect in most States of the Union in 1980.[37]

Thus, there has been some erosion of supermajority approval requirements for rezonings—notably at the state level—especially for rezonings that would allow more housing. For example (as mentioned), North Carolina repealed its statewide protest petition supermajority provisions in 2015, and Wisconsin repealed its similar provision in 2019. Then in 2021, Massachusetts made its protest petition supermajority requirements inapplicable to rezonings that loosen regulations against housing.[38] A supermajority voting requirement clearly appears to be unnecessary to the protection of any valid governmental interest—at least as to rezonings that would allow needed housing.

Another reason why the supermajority vote requirement for a contested rezoning is inappropriate is that rezonings arguably are quasi-judicial in nature, as 14 states now consider them to be. [39] As explained in one state Supreme Court decision:

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[34] *See, e.g.*, EHI, *Emerging Consensus on Regulatory Barriers to Housing Affordability* (Dec. 12, 2017), https://www.equitablehousing.org/images/PDFs/Emerging-consensus-on-RBHAs.EHI-memo-final-2.pdf.

[35] EHI, *Developing a better "carrot," to induce residents to support needed, new housing in their communities*, p. 1 (June 2018), posted at: https://equitablehousing.org/images/PDFs/PDFs--2018-/Pursuing_win-win_solutions_with_local_residents.EHI-6-2018.pdf. *See also, e.g.*, John Infranca, *Differentiating Exclusionary Tendencies*, 72 Fla. L. Rev. 1271, 1273 (2020) ("While an increase in the supply of housing should lead to lower housing prices, at least at the municipal or regional level, such restrictions--and local opposition to new development--remain prevalent, even during a period of rising housing costs throughout much of the country.")

[36] *See, e.g.*, EHI, *Developing a better "carrot," . . ., supra* n. 33, at 1.

[37] *Levin v. Parsippany-Troy Hills*, 82 N.J. 174, 411 A.2d 704, 707 (1980), citing authorities.

[38] Mercatus, p. 5. A similar bill was introduced in the New Hampshire House in 2022. *Id.* p. 6. It did not pass, however. *See* Legiscan, New Hampshire House Bill 1179 (2022 Session), posted at: https://legiscan.com/NH/text/HB1179/id/2461491.

[39] *See, e.g.*, DAMIEN KELLY, *ET. AL.*, 1 A PRACTICAL GUIDE TO WINNING LAND USE APPROVALS AND PERMITS, § 2.04[2] (2023) (the 14 states that "appear to have adopted and retained the quasi-judicial rule in zoning cases," as of mid-2015, "principally western states, although Florida, Maryland, Kentucky, and Vermont have joined the group").

> Generally, when a municipal legislative body enacts a comprehensive plan and zoning code it acts in a policy-making capacity. But in amending a zoning code, or in re-classifying land thereunder, the same body, in effect, makes an adjudication between the rights sought by the proponents and those claimed by the opponents of the zoning change.[40]

It also has been argued that protest petition supermajority vote requirements "afford landowners protection from hastily conceived and ill-advised amendments to zoning ordinances."[41] But as mentioned, the overwhelming problem these days is that rezonings to add needed housing are being denied far too often (or not even being made) because of unmeritorious local resistance.

There are substantial legal protections for landowners from ill-advised zoning amendments.[42] Those protections have less discriminatory effects on people in need of suitable housing in the community than supermajority vote requirements and other regulatory barriers to approval of rezoning proposals to add needed housing.

5. Supermajority vote provisions in Congress

As mentioned, the federal Constitution and the rules of the United States Senate and House of Representatives require a supermajority vote to approve an action in certain limited circumstances, as follows:

Constitutional requirements

> The original Constitution requires a two-thirds vote of either the House, the Senate, or both in five situations. They include (1) overriding presidential vetoes, Article I, Section 7, clause 2; (2) removing Federal officers through impeachment proceedings with conviction by two-thirds vote of the Senate, Article I, Section 3, clause 6; (3) ratifying treaties by

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[40] *Fasano in Fleming v. City of Tacoma*, 81 Wash. 2d 292, 502 P.2d 327, 331 (Washington 1972).

[41] DAMIEN KELLY, *ET. AL.*, 1 A PRACTICAL GUIDE TO WINNING LAND USE APPROVALS AND PERMITS § 2.04 (2023), quoting *Bourgeois v. Town of Bedford*, 120 N.H. 145, 412 A.2d 1021, 1023 (1980)).

[42] For example, no level of American government is permitted to deprive a person of life, liberty or property without due process of law. *E.g.*, U.S. Const., amend. XIV. The essence of due process regarding proposed land use changes is to give reasonable notice to all those who may be affected, and to provide them the opportunity to be heard on the issues at a meaningful time and in a meaningful manner. *See, e.g.*, *Petersen v. Chicago Plan Comm'n*, 302 Ill. App. 3d 461, 707 N.E.2d 150, 154 (Ill. App. 1998).

Those basic requirements apply even in jurisdictions that consider rezonings to be legislative decisions by the local governing body, rather than quasi-judicial proceedings with heightened due process safeguards. And those requirements apply even where concerned residents have no actual property right that would be affected by the rezoning. *See, e.g., id.* American zoning proceedings generally involve an administrative agency (such as a zoning or planning commission). *See, e.g.,* DAMIEN KELLY, *ET. AL.*, 8 ZONING AND LAND USE CONTROLS § 49.01 (2023). Administrative proceedings are governed by the fundamental requirements of due process of law. *Petersen*, 707 N.E.2d at 154.

If a rezoning decision is arbitrary and capricious (bearing no substantial relation to the public health, safety, morals, or general welfare), it can be invalidated on judicial review. *See, e.g., Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 676 (1976) (quoted *supra*, n. ___).

> two-thirds vote of the Senate, Article II, Section 2, clause 2; (4) expelling members from the House or Senate, Article I, Section 5, clause 2; and (5) proposing constitutional amendments, Article V.[43]

Two other supermajority provisions were added to the Constitution after its enactment.

> [T]he Fourteenth Amendment to the Constitution, ratified in 1868, disallowed anyone who engaged in "insurrection or rebellion" from holding any civil or military office unless each house removed this disability by a two-thirds vote. The 25th Amendment, ratified in 1967, addresses the issues of presidential succession and inability. In the case of an Acting President, the House and Senate, by a two-thirds vote of each chamber, may determine that "the President is unable to discharge the powers and duties of his office."

None of the supermajority requirements in the Constitution deal with ordinary legislation, including the kind of legislation involved here, regarding permissible, local land uses. All the situations addressed by Constitutional supermajority requirements are extraordinary: such as removing federal officers, overriding a Presidential veto, ratifying treaties with foreign governments.

Senate Rules—filibusters, etc.

"[T]he Senate has often changed its Standing Rules with the support of less than a supermajority (and even by voice vote)."[44] Probably the most famous Senate Rule involves the filibuster—non-stop speeches against a bill, supported by at least a 40% minority of the Senators, in order to block or delay the bill's passage.[45]

Under Senate Standing Rule XXII, a three-fifths vote of all Senators is necessary in order to close the debate on most bills and other issues ("invoke cloture").[46] Another paragraph of that same rule states that, in order to end debate on any proposal "to amend the Senate rules . . . the necessary affirmative vote shall be *two-thirds* of the Senators present and voting."[47]

Nevertheless, a parliamentary procedure dubbed the "nuclear option" has been used by both major parties to make the supermajority vote requirement of the cloture rule inapplicable to certain subjects.[48] In 2013, the majority Democratic Party amended the

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[43] U. S. Congress, Congressional Research Service (CRS), *Super-Majority Votes in the Senate*, p. 1 (Updated April 12, 2010).

[44] CRS, *Procedures for Considering Changes in Senate Rules*, p. 3 (2013) (""On December 14, 1982 (97th Congress), for example, the Senate adopted S.Res. 512, repealing Senate Rule XXXVI, relating to limitations on outside earned income and honoraria, by a vote of 54 to 38." *Id.*

[45] *See, e.g.*, CRS, *Procedures for Considering Changes in Senate Rules*, p. 4 (2013).

[46] *See, e.g., id.*

[47] *Id.*

[48] The "nuclear option" has been explained as follows:

cloture rule to allow confirmation of federal judges other than U.S. Supreme Court nominees by a simple majority vote.[49] Then, in 2017, the majority Republican Party further amended that rule to allow confirmation of U.S. Supreme Court nominees by a simple majority vote.[50] The other Senate rules also are subject to amendment by a simple majority vote, using parliamentary procedures. [51]

House Rules

The House does not have the filibuster. Its rules allow for the end of debate at any time, by a simple majority vote. Also, rules adopted by the House, like those of the Senate, can

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> The nuclear option can be invoked by a senator raising a point of order that contravenes a standing rule. The presiding officer would then overrule the point of order based on Senate rules and precedents; this ruling would then be appealed and overturned by a simple majority vote (or a tie vote), establishing a new precedent.

Wikipedia, *Nuclear Option*, posted at: https://en.wikipedia.org/wiki/Nuclear_option. The key to use of the "nuclear option" is that cloture and the other Standing Rules are "nondebatable questions."

> The nuclear option is made possible by the principle in Senate procedure that appeals from rulings of the chair on points of order relating to nondebatable questions are themselves nondebatable. Since cloture is a nondebatable question, the appeal is decided without debate. This obviates the usual requirement for a two-thirds majority to invoke cloture on a resolution amending the standing rules.

Id.

[49] *Id.*

[50] *Id.*

[51] Those other supermajority voting requirements are for motions to:

- Suspend the rules
- Postpone consideration of a treaty indefinitely
- Make a bill a special order (an antiquated precedent calling for a specific time for discussion of a particular bill);
- Waive the Congressional Budget Act of 1974 (a three-fifths vote of all Senators may be necessary to set aside budget process procedures or overturn the chair's ruling regarding a provision that calls for a three-fifths vote);
- Waive objections to inclusion in a conference report of provisions not contained in either the House or Senate version of the legislation;
- Waive certain public disclosure requirements for "earmarks" (three-fifths vote required); and
- Waive or suspend provisions of the PAYGO Act that: (1) require offset regarding revenue or spending increase or decrease that is not an "emergency" measure; and (2) prohibit expedited consideration of bill or resolution that proposes changes to the Social Security Act based on the recommendations of any commission (three-fifths vote required for waiver or suspension of those provisions).

CRS, *Super-Majority Votes in the Senate*, p. 1 (Updated April 12, 2010).

be amended by a simple majority of its members, including rules that mandate supermajority votes.[52]

> The principle of majority rule dominates the work of the House of Representatives. This means that most questions are decided by vote of a simple majority, assuming the presence of a quorum. . . . In cases of a tie vote, House Rule XX, clause 1(c), states that "a question shall be lost."[53]

However: "The House has four rules that require a supermajority vote of the Members voting, a quorum being present, to pass legislation:

1. Rule XV, clause 1, requires a two-thirds vote to suspend the rules of the House.
2. Rule XV, clause 5, requires a two-thirds vote to dispense with the call of the Private Calendar on the first Tuesday of the month.
3. Rule XIII, clause 6(a), requires a two-thirds vote to consider a special rule on the same day that the Rules Committee reports it. This requirement does not apply during the last three days of a session.
4. Rule XXI, clause 5(b), requires a vote of not less than three-fifths of Members voting to approve legislation that increases federal income tax rates."[54]

The last of those rules actually could prevent a majority from passing a piece of substantive legislation—but only regarding taxation, and only if the that rule were not changed by the majority. That rule is of recent origin. It was adopted initially in 1995, when Republicans became the House majority for the first time in decades. The rule was eliminated in 2019 by a new Democratic majority.[55] The requirement was re-established in 2023, when Republicans regained the majority.[56]

By contrast to that rule, the House and Senate rules traditionally and generally have not required any supermajority votes to pass actual legislation. As mentioned, the Supreme Court has held that Congressional rules go to the "method," the determination by each House as to "how and when to conduct its business."[57] Unlike the supermajority provi-

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[52] *See, e.g.,* CRS, *Supermajority Votes in the House,* p. 2 (Updated February 3, 2023). "In addition, the rules of the House may be waived through means such as adopting a special rule from the Rules Committee." *Id.*

[53] CRS, *Supermajority Votes in the House,* p. 1 (Updated February 3, 2023).

[54] CRS, *Supermajority Votes in the House,* pp. 1-2 (Updated February 3, 2023) (footnote omitted).

[55] H.Res. 6, 116th Congress. See CRS Report R45552, *Changes to House Rules Affecting the Congressional Budget Process Included in H.Res. 6* (116th Congress).

[56] CRS, *House,* p. 2 n. 6, citing CRS Report R47384, *Changes to House Rules Affecting the Congressional Budget Process Included in H.Res. 5* (118th Congress), by James V. Saturno and Megan S. Lynch.

[57] *NLRB v. Canning,* 573 U.S. 513, 550 (2014) (addressing Senate rules), quoting *United States v. Ballin,* 144 U.S. 1, 5 (1892):

> The Constitution explicitly empowers the Senate to 'determine the Rules of its Proceedings.' And we have held that 'all matters of method are open to the determination' of the Senate, as long as there is 'a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be

sions in rezoning protest petitions statutes and ordinances, no House or Senate rule may be enforced by anyone who is not a member of that legislative body.[58]

Arguably, Rule XXI, clause 5(b), would be subject to Constitutional challenge, if it ever were used to thwart the majority will of the House. Opponents have argued, for example, that the rule conflicts with the express intentions of the Framers, with the Constitution's language and structure, and with traditional congressional practice.[59] However, it is speculative whether and when a House majority might endorse an increase in a federal income tax rate, making Rule XXI, clause 5(b), an active issue.

As mentioned, any of the rules of the House actually could be amended (or even removed) by a simple majority vote of House members. That is another way in which Congressional rules do not seem comparable to a statute or ordinance that imposes a supermajority approval requirement on a rezoning application. Unlike an internal rule of a legislative body: (1) a state statute cannot be changed by a local governing body charged with enforcing it; and (2) a state or local legislative body is not authorized to change a zoning ordinance without public notice and opportunity to be heard.

Conclusions

The many state statutes and local ordinances that require a supermajority vote by the local governing body, in order to approve a rezoning application to which a formal protest petition has been filed, are contrary to the general American principle of majority rule. Further, supermajority vote requirements have been shown to reduce the approval rate of rezoning applications.

Also, the many zoning ordinances that require the applicant for rezoning to get the consent of some nearby neighbors, in order to have the rezoning approved, seem unlawful. Although the United States Supreme Court overturned certain rezoning consent provisions early on, as violations of due process, some similar provisions still exist.

Supermajority and consent requirements are unnecessary to the achievement of any valid governmental interest, where they prevent approval of reasonable rezoning applications that would allow needed housing in a community. Those requirements constitute

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> attained' and the rule does not 'ignore constitutional restraints or violate fundamental rights.'

Canning, 573 U.S. at 550-51, quoting *United States v. Ballin*, 144 U.S. 1, 5 (1892).

[58] *Cf., e.g., United States v. Ballin*, 144 U.S. 1, 5 (1892). "The power to make rules" is "absolute and beyond the challenge of any other body or tribunal," where the rule bears "a reasonable relation" to "the result which is sought to be attained," and where it does not "ignore constitutional restraints or violate fundamental rights."

[59] *See, e.g.*, Bruce Ackerman, *et al.*, *An Open Letter to Congressman Gingrich*, 104 Yale L.J. 1539 (1995). *Cf., e.g.*, John O. McGinnis & Michael B. Rappaport, *Supermajority Rules as a Constitutional Solution*, 40 Wm. & Mary L. Rev. 365, 371 (1999) (arguing that supermajority requirement for Congressional approval of income tax rate increase is warranted by "the inherent tendency of our constitutional structure to encourage excessive spending").

regulatory barriers to housing opportunity and should be prohibited as to rezonings that would allow needed housing. The proposed EHFA is a means of doing so.

Two states that have no supermajority requirement nevertheless require a local referendum, where a formal protest petition is filed to a rezoning application. Also, when a local governing body establishes zoning rules or proposes substantial changes to them, its action often is subject to a local plebiscite. The use of local initiatives such as those cannot be considered neutral, given the persistent tendency of current residents and voters in most American communities to oppose new housing developments there.

Those "direct democracy" initiatives are strongly protected in the American system. However, regardless whether such an initiative is used, the local governing body would not be permitted under the EFHA to allow regulatory barriers to housing opportunity to exist in the jurisdiction. Nor would a local vote for a proposition that would violate federal law be valid.

The proposed EFHA is a means of prohibiting all manner of misuse of government powers, including the regulatory barriers discussed in this memorandum, which so often defeat reasonable proposals to add needed housing. Thus, the EFHA would be a powerful tool in ending the crisis-level shortage of housing across the United States.