LEGISLATIVE RESPONSES TO THE REGULATORY TAKINGS CONUNDRUM

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As a housing shortage grips many American towns and cities, some local policymakers are exacerbating the lack of housing options by reducing property owners' rights to provide housing. This paper proposes a renewal of state legislation that would enshrine protections against downzonings[1] into law or into state constitutions without respect to the degree of diminution of value. This approach, which was successfully pursued by a handful of states in the 1990s and 2000s, is ripe for revival at a time when state zoning reforms have been gaining momentum and economists have been underlining the role of down-zonings on increasing housing scarcity. Legislative initiatives have the potential to fortify existing property rights against further encroachment while complementing courtroom efforts to strengthen the regulatory takings doctrine.

This paper first examines the history of downzonings in the United States, showing how early zoning entitlements had a tendency to be whittled away over time, even as demand for real estate increased and land values rose. Some down-zonings, such as those of New York City in 1961 and San Francisco in 1978, are well known to students of urban history, but the process has been nationwide and remains ongoing. Secondly, the paper examines legislative responses to downzoning, including Florida's Harris Act, Oregon's Measure 37 and Arizona's Proposition 207. All three laws provide some protections for property owners who lose development rights through land use regulations, and Proposition 207 in particular is, an effective alternative to regulatory takings litigation. The paper recommends that other states concerned with high housing costs consider a similar policymaking approach.

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[1] The act of amending zoning to lessen owners' entitled development rights, whether through lowered height limits, increased setbacks, decreased floor area ratio (FAR), fewer allowed units, larger minimum frontages or lot sizes, increased parking requirements or other similar changes. *See Downzoning is Legal, Within Limits*, LAW OFFICE OF JAMES KAKLAMANOS, https://realestatelawyernh.com/downzoning_legal.htm (last visited Jan. 3, 2025).

ZONING, DOWNZONING, AND HOUSING AFFORDABILITY

When *Euclid v. Ambler*[2] upheld the constitutionality of local zoning rules in 1926, the legality of these rules had been anything but certain. Many judges and legal scholars thought that the Fifth Amendment takings clause prevented such regulations without governments compensating property owners for the resulting reduction in their property values. Today, while zoning is no longer controversial among most legal scholars, zoning regulations are widely blamed as a cause of increasing housing affordability problems across the country.[3]

As living standards have risen in many areas of the economy, housing is an exception for many. Since the 1980s the share of income that the median renter household spends on rent has increased by 25% as the share of households that rent has remained almost flat.[4] The picture is even worse in the regions of the country with the highest wages. The housing affordability problem is due in large part to local policymakers repeatedly reducing their property owners' rights to build land.

A Declining Trend: A Primer on Downzoning Over the Past Century

Recently, some high-profile state- and local-level reforms have sought to reverse course by upzoning–expanding property owners' rights to develop their land with housing.[5]

In general, however, initial zoning ordinances adopted in the first half of the 20th century were much more permissive than what cities allow today. Across the country, zoned capacity has been slashed repeatedly since localities adopted their first ordinances, and in many places, additional growth control measures have been layered on to stand in the way of new housing supply.

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[2] Ambler Realty Co. v. Village of Euclid, 297 F. 307, 313, 316 (N.D. Ohio 1924), *rev'd*, 272 U.S. 365 (1926).

[3] Emily Hamilton**,** *Land Use Regulation and Housing Affordability*, in *Regulation and Economic Opportunity: Blueprints for Reform*, CENTER FOR GROWTH AND OPPORTUNITY (2021), https://www.thecgo.org/books/regulation-and-economic-opportunity-blueprints-for-reform/land-use-regulation-and-housing-affordability/ (last visited Sept. 18, 2024).

[4] *American Community Survey 2022*, Steven Ruggles et al., *IPUMS USA: Version 14.0* (dataset), U.S. CENSUS BUREAU (2023), https://doi.org/10.18128/D010.V14.0.

[5] Emily Hamilton, *Learning From Houston's Townhouse Reforms* MERCATUS CENTER (2023), https://www.mercatus.org/research/policy-briefs/learning-houstons-townhouse-reforms#:~:text=Small%2Dlot%20reform%20in%20Houston,to%20live%20in%20existing%20neighborhoods (for example, Houston policymakers reduced minimum lot sizes citywide, Austin policymakers have upzoned for extensive multifamily construction and reduced minimum lot sizes more recently, and California state policymakers have limited local zoning authority in myriad ways, including legalizing accessory dwelling units statewide).

As an example, while New York City's 1916 Zoning Resolution seemed like a drastic intervention in the real estate market at the time, it left property owners collectively across the city with the right to build enough housing for an estimated 55 million people, more than six times the city's peak population.[6] In 1961, however, a zoning rewrite drastically curtailed what the city allowed. Following that ordinance, New York City's housing construction plummeted and never recovered.[7] Today, New York City's zoned capacity can accommodate an estimated 16.6 million people, reflecting an untold destruction of property value compared to pre-1961 zoning.[8]

One factor in this early wave of downzonings – which began at least as early as the 1940s[9] – was the federal government's increasingly heavy-handed encouragement of low-density residential land use restrictions during the New Deal Era. With the establishment of the Federal Housing Administration in 1934, the Roosevelt Administration sought to limit federal exposure to defaults in the mortgages it insured. Its underwriting standards stated, "Of prime consideration to the [FHA] Valuator is the presence or lack of homogeneity regarding types of dwellings and classes of people living in the neighborhood."[10] Developments were denied FHA financing if local zoning rules didn't constrain development to their standards, generally including limiting development to detached single-family zoning.[11]

Starting around 1970, a slow growth movement emerged with the stated intention of limiting development for environmental protection purposes. At the same time, a reaction to top-down freeway building and urban renewal projects led to a call for citizen input in local planning, including public hearings to debate individual development proposals.[12] The practical effect of slow growth regulation has been to reduce the density of new development, leading to more expensive new housing, reduced housing construction, and as a result higher prices for all housing.[13]

One notable chapter in this era was Los Angeles' adoption of 35 "Community Plans" rather than a single citywide plan, which led to widespread reductions in planned growth. Overall, zoned population capacity in Los

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6 *City Planning History*, NYC DEPARTMENT OF CITY PLANNING, https://www.nyc.gov/site/planning/about/city-planning-history.page (last visited Sept. 18, 2024).

7 Edward L. Glaeser, Joseph Gyourko & Raven Saks, *Why Is Manhattan So Expensive? Regulation and the Rise in Housing Prices*, 48 J.L. & ECON. 331, 334 (2005).

8 Jason Barr, *Floor Area Ratio (FAR) and How It Shapes Urban Skylines*, BUILDING THE SKYLINE (January 31, 2022), https://buildingtheskyline.org/floor-area-ratio-4/ (last visited Sept. 18, 2024).

9 *See* Simon v. Needham, 42 N.E.2d 516, 518-21 (1942).

10 Ed Pinto, Tobias Peter and Emily Hamilton, *Light Touch Density: A Series of Policy Briefs on Zoning, Land Use, and a Solution to Help Alleviate the Nation's Housing Shortage*, AMERICAN ENTERPRISE INSTITUTE https://www.aei.org/light-touch-density/ (last visited Sept. 18, 2024).

11 *Id.* at 14.

12 *See e.g.*, JERUSALEM DEMSAS, ON THE HOUSING CRISIS: LAND, DEVELOPMENT, DEMOCRACY (Zando 2024).

13 BERNARD J. FRIEDEN, THE ENVIRONMENTAL PROTECTION HUSTLE (MIT 1979).

Angeles fell from an estimated 10 million people in 1960 to 4.3 million people in 2010.[14]

By 2010, the city's actual population had reached 92% of zoned capacity, contributing to widespread housing affordability problems, overcrowding, and rising homelessness. A major downzoning of San Francisco followed in 1978.[15] By that point, California's housing supply was so constrained that the state's home prices started to pull away from the rest of the country.[16]

Following the house price recovery after the 2007-2008 financial crisis, zoning began to gain bipartisan recognition as a source of housing supply constraints and affordability problems.[17] In spite of this recognition, policymakers continue to implement widespread downzonings. When Michael Bloomberg took office as New York City Mayor in 2002, zoning reform to support economic development and housing affordability was a major part of his platform. While some of his administration's most high-profile zoning changes were major upzonings, including Downtown Brooklyn and Hudson Yards, many others were downzonings or "hybrid rezonings," in which a neighborhood saw some parcels upzoned and others downzoned.[18] For example, land along a neighborhood's commercial corridor might be upzoned while side streets were downzoned. Ironically, these side street downzonings were often triggered by changing market conditions that made redevelopment under pre-existing zoning economically feasible. Once residents started to see construction in their neighborhoods, they lobbied for downzoning, resulting in a clear loss of valuable development rights that some property owners would have exercised.

In 2019, Washington, DC Mayor Muriel Bowser announced an ambitious target of 36,000 new housing units by 2025. Her administration led an effort to increase allowed housing growth by 15 percent in a comprehensive plan revision.[19] Still, her administration downzoned some neighborhoods that had active redevelopment markets.[20] These downzonings followed the

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14 GREG MORROW, THE HOMEOWNER REVOLUTION: DEMOCRACY, LAND USE AND THE LOS ANGELES SLOW-GROWTH MOVEMENT, 1965-1992 (Ph.D. dissertation, Univ. of Cal., L.A. 2013).

15 S.F. DEPARTMENT OF CITY PLANNING, ENVIRONMENTAL IMPACT REPORT (1978).

16 FRIEDEN, THE ENVIRONMENTAL PROTECTION HUSTLE (MIT 1981).

17 *See e.g.*, THE WHITE HOUSE, HOUSING DEVELOPMENT TOOLKIT (2016); Press Release, WHITE HOUSE, PRESIDENT DONALD J. TRUMP IS TEARING DOWN RED TAPE IN ORDER TO BUILD MORE AFFORDABLE HOUSING (2019); The White House, Reforming Permitting Requirements to Lower the Cost of Building New Housing and Increase Housing Affordability (2024).

18 LEO GOLDBERG, GAME OF ZONES: NEIGHBORHOOD REZONINGS AND UNEVEN URBAN GROWTH IN BLOOMBERG'S NEW YORK CITY 43, 46 (2015) (M.A. thesis, Mass. Inst. of Tech.).

19 Ally Schweitzer, *What Is D.C.'s Comprehensive Plan And Why Are People Arguing Over It Again?*, DCIST (Nov. 17, 2020), https://dcist.com/story/20/11/17/comprehensive-plan-development-housing-dc-urban-growth/.

20 Nena Perry-Brown, *A Public Hearing is Next Step for a New Residential Zone in DC*, URBANTURF (May 1, 2020), https://dc.urbanturf.com/articles/blog/a-public-hearing-for-new-residential-

Bloomberg Administration's pattern of restricting property rights in relatively low-density residential neighborhoods that had some excess zoned capacity when a group of residents lobbied to slow down construction.

The pattern of downzoning over time is not limited to major cities. Smaller cities and suburban jurisdictions regularly implement zoning changes that reduce their jurisdictions' capacity to grow over time. In 2024, Iowa City policymakers recently reduced allowable heigh in part of the city from 35-feet to 27-feet in one- and two-unit zones. This change will likely reduce the viability of two-unit redevelopment by reducing opportunities to add square footage on lots that are already developed with single-family houses.[21]

The Long Judicial Prelude to State Intervention

Legal challenges to local laws restricting the use of land arose before comprehensive zoning and initially seemed to resolve the matter in favor of private property rights. Specifically, a series of state cases in the late 19th century held that rights to use property were no less protected than the right to possess it. For example, in 1893 the Missouri Supreme Court struck down a 40-foot front setback ordinance imposed on certain properties by the City of St. Louis, holding that prohibiting an owner from any construction on a large portion of his property was unquestionably a taking.[22] This line of cases was abrogated by the United States Supreme Court in 1927's *Gorieb v. Fox*, in which the Court held that a front setback was unquestionably *not* a taking.[23] The decision by then came as no surprise, as the Court had in the 1926 case of *Euclid v. Ambler* held that a restriction on the use of property by way of zoning not only was not a taking, but was presumptively valid.[24]

With the question of whether zoning was a taking of property apparently resolved, the takings clause was left with little room to maneuver, and in the following years witnessed the development of what one jurist called "a collection of incongruous and inadequate takings inquiries" using a "cryptic and

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zone/16788; Nick Sementelli, *The Kingman Park Historic District Is a Little Bigger Now*, GREATER GREATER WASHINGTON (Dec. 10, 2020), https://ggwash.org/view/79831/the-kingman-park-historic-district-is-a-little-bigger-now.

21 Isabelle Foland, "IC Northside Neighborhood Association succeeds in attempt to change city housing code," *The Daily Iowan*, January 24, 2024.

22 *See* St. Louis v. Hill, 22 S.W. 861, 862 (Mo. 1893) (stating that "[i]f this [the setback ordinance] is not a 'taking' by mere arbitrary edict, it is difficult to express in words the meaning which should characterize the act of the city."). *See e.g*. Carter v. Chicago, 57 Ill. 283 (Ill. 1870), Philadelphia v. Linnard, 97 Pa. St. 242 (Pa.1881); Irving v. Ford, 32 N.W. 601 (Mich. 1887); Val Fruth v. Board of Affairs, 84 S.E. 105 (W. Va. 1915).

23 Gorieb v. Fox, 274 U.S. 603, 605 (1927).

24 Vill. of Euclid, Ohio v. Ambler Realty Co., 272 U.S. 365, 380 (1926).

convoluted" jurisprudence.[25] Under the Supreme Court's insistence that land use regulations could not be takings, courts fashioned a dichotomy between takings of intangible property rights – which received little or no takings protection even if the rights lost were worth tens of millions of dollars – and physical intrusions upon property, which were held to be *per se* takings even if the intrusion was minor in comparison.[26]

This view of property rights, which the Supreme Court itself had once called "vulgar and untechnical,"[27] was modified by the holding that regulations *could* amount to a taking after all, but only if they prohibited all economically viable use of land.[28] This test was in practice nearly impossible to satisfy, but has been tempered by some state courts in recent years to allow landowners to prevail on inverse condemnation claims where the economic uses left by regulation are trivial rather than nonexistent, or where a viable use does exist on paper but applications for that use are denied by city councils or zoning commissions.[29]

The success these doctrines have achieved in protecting property rights from the effects of regulation has been modest in relation to the amount of time and attention that has been devoted to them by attorneys, scholars and judges. A recent study of over 2,000 cases found that only 9.9% of regulatory takings lawsuits were successful, far less than the rate of success of takings claims involving physical invasion, governmental enterprises (such as infrastructure projects), flooding, exactions, or condemnation for blight.[30] In

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25 Ganson v. City of Marathon, 222 So. 3d 17, 20 (Fla. Dist. Ct. App. 2016) (Shepherd, J., dissenting).

26 *See* Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 CORNELL L. REV. 6 1549, 1650 (2003) (stating that "[a]ccording to [the] *Penn Central* [case], when a regulation strips use rights, people tend not to suffer any loss of utility-even when they lose tens of millions of dollars. But according to *Loretto*, when a regulation restrains the right to exclude, demoralization profiles spike off the charts. Not only is the affected owner massively demoralized, many of her neighbors-who would have been indifferent had she lost only use rights-now fear that they, too, may lose their exclusionary rights. Are human beings naturally this schizophrenic, and is it reasonable to found a system of takings law on the assumption that they are?"). *See also* J. David Breemer & R.S. Radford, *The (Less?) Murky Doctrine of Investment–Backed Expectations After Palazzolo, and the Lower Courts' Disturbing Insistence on Wallowing in the Pre–Palazzolo Muck*, 34 SW. U.L. REV. 101, 102 (2005) (similarly referring to regulatory takings jurisprudence as "schizophrenic.")

27 United States v. Gen. Motors Corp., 323 U.S. 373, 377 (1945) (stating that "[t]he critical terms are 'property,' 'taken' and 'just compensation'. It is conceivable that the first was used in its vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law. On the other hand, it may have been employed in a more accurate sense to denote the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it.").

28 Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1004 (1992).

29 *See* City of Las Vegas v. 180 Land Co., 546 P.3d 1239 (Nev. 2024); *see also* Tampa–Hillsborough Cnty. Expressway Auth. v. A.G.W.S. Corp., 640 So.2d 54, 58 (Fla.1994), *as clarified* (June 23, 1994) (setting a standard of "substantially all" viable use of land, rather than "all").

30 James E. Krier and Stewart E. Sterk, *An Empirical Study of Implicit Takings*, 58 WM. & MARY L. REV. 1, 59 (2017).

contrast to this federal jurisprudence, the following section discusses three state statutes that offer stronger property rights protections.

STATE RESPONSES TO DOWNZONING: A GOLDILOCKS APPROACH TO REGULATORY TAKINGS

The first successful state effort of note at legislating protections for property owners against infringement of existing zoning entitlements such as the downzonings previously described came in 1995 when Florida enacted the Bert J. Harris, Jr., Private Property Rights Protection Act ("Harris Act"). It was the first of three[31] significant statewide initiatives specifically targeted at countering local downzoning: Florida's Harris Act, enacted in 1995, Oregon's Measure 37 (2004) as modified by Measure 49 (2007), and Arizona's Proposition 207 enacted in 2006.[32] In Goldilocks fashion, Florida's act was perhaps too timid, Oregon's too aggressive, but Arizona's – having the benefit of the experience of both states – was just right, or at least struck a reasonable balance between localities' power to regulate and landowners' property rights that has proven effective and durable.[33]

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[31] Many other states have proposed or adopted property rights protection provisions either by statute or by amendment to state constitutions, particularly after *Kelo*, but these three states have the strongest explicit protection against regulatory takings, rather than eminent domain. For example, see New Hampshire's Issue 1, a constitutional amendment approved in 2006, that provides that "No part of a person's property shall be taken by eminent domain and transferred, directly or indirectly, to another person if the taking is for the purpose of private development or other private use of the property," but does not address regulatory takings. *See* N.H. CONSTITUTION Art. 12-a.

[32] Codified at FLA. STAT. ANN. § 70.001 (1995); ARIZ. REV. STAT. § 12-1134 (2006); and ORE. REV. STAT. §§ 195.300 – 195.336 (2009).

[33] Note that California's Housing Crisis Bill of 2019 prohibits the approval of residential developments that would result in a net loss of units. CAL. GOVT. CODE § 66300 (Senate Bill 330). Additionally, in December 2024 the North Carolina General Assembly enacted legislation that, among other things, provides that any local zoning change that would reduce allowed land uses or density will require property owners' written consent. *See* N.C. GEN. STAT. ANN. 160D-601(d) (Senate Bill 382) (Because these laws do not take a compensation-based approach to downzoning, and because of the expiration of the California law as of January 1, 2025 and the newness and evident vulnerability to repeal of the North Carolina law as of the time of writing, this article does not include them in its analysis. For a separate evaluation of the North Carolina law, *see* Salim Furth and Charles Gardner, *New NC law protects property rights by limiting local 'down-zoning'*, THE CAROLINA JOURNAL (January 8, 2025) https://www.carolinajournal.com/opinion/new-nc-law-protects-property-rights-by-limiting-local-down-zoning/.

Florida's Harris Act (1995): "Inverse Light"[34]

Florida's Harris Act[35] was enacted in 1995 partly in response to perceived overreach by the environmental movement in the 1970s and 1980s that was seen as an impediment to Florida's farmers and aquaculturists.[36]

It continues to attract the ire of environmental advocates, who claim that development interests were also behind the bill.[37] Although the Harris Act has been amended six times since its enactment, the core of the law requiring compensation for certain reductions in value caused by land use regulation remains essentially unchanged.[38]

One distinctive feature of the Harris Act is the qualification that the infringement of a property right must be "inordinate," a lawyerly term of art which blurs the line between a justified regulatory taking and one which requires the payment of compensation. Although the term is defined in the statute, the definition is lengthy and borrows the "reasonable investment-backed expectation" language from the Supreme Court's decision in *Penn Central Transportation Co. v. New York City*:[39]

> The terms 'inordinate burden' and "inordinately burdened" . . . [m]ean that an action of one or more governmental entities has directly restricted or limited the use of real property such that the property owner is permanently unable to attain the reasonable, investment-backed expectation for the existing use of the real property. "[40]

Legal commentators have described the doctrine of "reasonable investment-backed expectations" as "murky," and the term has been criticized as being

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34 *See* Evangeline Linkous and Thomas Skuzinski, *Land use decision-making in the wake of state property rights legislation: Examining the institutional response to Florida's Harris Act*, 77 LAND USE POLICY 603, 610 (2018) (stating that "[s]ome interviewees characterized the Harris Act as "inverse light").

35 Named for its sponsor, Florida State Representative Bert J. Harris, Jr., chairman of Florida's House Agriculture Committee. *See* FLA. STAT. ANN. § 70.001 (1995).

36 Stephen Van Drake, *Elevator chat helped spark the conception of property rights act*, SOUTH FLORIDA BUSINESS JOURNAL (September 23, 2002) (Florida had implemented statewide growth management in 1972, when the state enacted several landmark planning and environmental laws; this was followed by the Growth Management Act in 1985).

37 Craig Pittman, *Florida's awful Bert Harris Act is for the birds: Law to protect landowners helps developers and hurts the environment*, THE PHOENIX (Nov. 4, 2021), https://floridaphoenix.com/2021/11/04/floridas-awful-bert-harris-act-is-for-the-birds/.

38 *See* FLA. STAT. ANN. § 70.001 (West 2024).

39 Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, *reh'g denied*, 439 U.S. 883 (1978). *See* Robert M. Washburn, *"Reasonable Investment-Backed Expectations" as a Factor in Defining Property Interest*, 49 WASH. U. J. OF URB. & CONTEMP. L. 63, 63 (1996) (noting that "[t]he concept of 'reasonable investment-backed expectations' as a factor in takings analyses first saw judicial daylight" in the *Penn Central* decision).

40 FLA. STAT. ANN. § 70.001 (West 2024).

an inferior substitute for the conceptually clearer "property rights."[41] The incorporation of this term into the Harris Act, rather than clear and unambiguous language, appears to have been part of a compromise process[42] that has undermined the effectiveness of the legislation.[43] For example, when a developer challenged Brevard County's downzoning of its 97-acre property from a minimum lot size of 1 acre per single-family home to a minimum of 2.5 acres, a state appeals court denied the developer's motion for judgment under the Harris Act, stating that "a change in land use which impacts an 'existing use' does not necessarily equal an 'inordinate burden.'"[44] Because there was evidence that the developer might not have been able to build at a density of one home per acre for other, unrelated reasons, there was a question as to whether the developer's expectations were "reasonable."[45] On the other hand, unlike Measure 37 and Proposition 207, the Harris Act lacks an exception for public health and safety, removing one of the primary lines of defense a locality would have against being held liable for compensation.[46]

Although the Harris Act does contain settlement and dispute resolution procedures triggered by written claim, the procedure requires the claimant to submit a "written appraisal report" that "supports the claim and demonstrates the loss in fair market value to the real property."[47] Settlements made out of court must nonetheless be submitted to a judge for approval, adding to the cost and reducing the value of a procedure for non-judicial resolution.[48]

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41 Steven J. Eagle, *The Rise and Rise of "Investment-Backed Expectations*, 32.3 URB. LAW. 437, 437 (2000) ("[A]t no point has the concept of 'investment-backed expectations' been defined or its implications fully explored. Its proponents have not demonstrated why the term 'investment-backed expectations' is superior to the term 'property rights' that it threatens to displace."); *see* J. David Breemer & R.S. Radford, *The (Less?) Murky Doctrine of Investment–Backed Expectations After* Palazzolo, *and the Lower Courts' Disturbing Insistence on Wallowing in the Pre–*Palazzolo *Muck*, 34 SW. U. L. REV. 351, 352 (2005).

42 *See* Evangeline Linkous & Thomas Skuzinski, *Land use decision-making in the wake of state property rights legislation: Examining the institutional response to Florida's Harris Act*, 77 LAND USE POL'Y 603, 609 (2018) (interviewees affirmed previous research . . . that describes the role of the Harris Act as a compromise solution designed to prevent a more far-reaching constitutional amendment advancing property rights. An attorney who was involved in drafting the original legislation said the State 'wanted to come up with something that would not hurt clean air and water, but would thwart egregious behavior' by local government."); *see also* Sylvia R. Lazos Vargas, *Florida's Property Rights Act: A Political Quick Fix Results in a Mixed Bag of Tricks*, 23 FLA. ST. U. L. REV. 315, 318 (1995).

43 *See* Linkous, *supra* note 42, at 610 (Interviewees observed that adjudication pursuant to the Harris Act suffers from similar issues of uncertainty and deference to government action that characterize takings jurisprudence in general. This is partly because the inordinate burden threshold falls short of providing the necessary clarity to foster a land use system that is evidently more responsive to property rights concerns.").

44 Brevard Cnty. v. Waters Mark Dev. Enter., LC, 350 So. 3d 395, 399 (Fla. Dist. Ct. App. 2022), *reh'g denied* (Nov. 8, 2022).

45 *Id*. at 399–400.

46 FLA. STAT. ANN. § 70.001(e)(2) (1995).

47 FLA. STAT. ANN. § 70.001(4)(a) (1995).

48 FLA. STAT. ANN § 70.001(4)(d)(2) (1995).

If the complaint procedure fails to resolve a property owner's complaint concerning the impact of a land use regulation, the owner's recourse is a costly and time-consuming lawsuit that larger developers may be loathe to pursue for fear of spoiling their relationship with the local government.[49] If a landowner loses, he may be liable for attorney fees and costs.[50] Finally, courts have held that the Harris Act does not apply to landowner claims that their property value has been diminished by lawful activity of adjacent properties, a point on which Oregon's Measure 37 was left ambiguous.[51] In addition to the Harris Act's lack of retroactive effect and the vagueness of its legal standard for takings, each of these factors may help explain why, as of 2008, only 202 claims had been filed under the Harris Act, as compared to 7,717 claims filed under Oregon's Measure 37 as of November 2007.[52]

Nonetheless, there is some evidence that Harris Act has had a significant deterrent effect by weighting the scales against downzoning and causing localities to refrain from many zoning changes – like the minimum lot size increases in *Waters Mark Dev. Enterprises, LC*, supra, at n. 55 – that might otherwise have been enacted. The extent of this effect is significant anecdotally.[53] Florida's housing production numbers, robust in comparison to those of other states, at least indirectly suggest that a backlash against rapid growth commonly seen elsewhere has been muted in Florida.[54]

Oregon's Measure 37 (2004): "Year Zero"[55] for Land Use

In contrast to the Harris Act, Oregon's potent Measure 37 allowed landowners to challenge even pre-existing land use regulations, with challenges

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49 *See* Evangeline Linkous and Thomas Skuzinski, *Land use decision-making in the wake of state property rights legislation: Examining the institutional response to Florida's Harris Act*, 77 LAND USE POL'Y 603, 608 (2018).

50 FLA. STAT. ANN. § 70.001(6)(c)(2) (2021).

51 *See e.g., City of Jacksonville v. Smith*, 159 So. 3d 888, 890 (Fla. Dist. Ct. App. 2015) (the appellants claimed that Jacksonville's construction and operation of a fire station next to their property "inordinately burdened" their property pursuant to the Harris Act, but the court disagreed, holding that the Act "simply does not apply where . . . property was not itself subject to any governmental regulatory action . . . .").

52 John D. Echeverria, *The Track Record on Takings Legislation: The Results From Florida and Oregon*, 60 GEORGETOWN ENVIRONMENTAL LAW & POLICY INSTITUTE PAPERS & REPORTS, 2 (2008) (unfortunately, claim statistics for Arizona's Proposition 207 are not publicly available, but according to interviewees for this article have been numerous).

53 Linkous *supra* note 48 at 611 (citing a personal communication stating that "you don't see sophisticated local governments downzoning" as a result of the Harris Act").

54 According to U.S. Census Building Permit Survey data and State Population Totals for 2023, Florida ranks third among all 50 states for per capita housing production, behind only North Carolina and Idaho. *Building Permit Survey data and State Population Totals for 2023*, U.S. CENSUS BUREAU (2023).

55 Edward J. Sullivan, *Year Zero: The Aftermath of Measure 37*, 36 ENVIRONMENTAL LAW 131, (2006).

evaluated under a pure diminution of value standard that avoided the need to prove that an infringement was inordinate. Like the Harris Act, however, Measure 37 had its genesis in a backlash against growth management policies.[56] Oregon's growth management system – more similar to those in some European countries than in other American states – was according to supporters intended to protect Oregon's productive agricultural lands while simultaneously encouraging dense and contiguous urban growth within areas served by municipal infrastructure.[57] State law requires localities to establish urban growth boundaries, outside of which land is limited to agricultural or open space uses. These boundaries have expanded with population growth, but research indicates that the Portland region's growth boundary has increased land costs in the area within the boundary where development is allowed.[58] Opponents chafed against these restrictions, claiming that farmland preservation was a rationale concocted to justify the taking land development rights without compensation.[59] Property rights advocates succeeded by introducing and prevailing on Measure 7, a diminution of value ballot initiative, in 2000. This initiative was struck down by the Supreme Court of Oregon in 2002 on narrow, free-expression grounds in a case brought by the League of Oregon Cities.[60] Four years later, however, a similar ballot initiative—entitled Measure 37—was passed by the voters with over 60 percent support[61] and upheld by the courts.[62]

Where the Harris Act was a product of compromise and was prospective in effect, Measure 37 turned back the land use clock to what one commentator referred to as "year zero"[63] by allowing pre-existing land use regulations to be challenged under the law.[64] In an approach that was mirrored by

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56 Jeff Mapes, *How a 'little old lady' nearly gutted Oregon's growth rules*, OPB NEWS (Aug. 12, 2022).

57 *See Farm & Forest Lands*, STATE OF OREGON, https://www.oregon.gov/lcd/ff/pages/index.aspx (last visited Jan. 3, 2025). ("The statewide land use planning program in Oregon works to protect working landscapes in two ways. The statewide planning goals work to limit conversion of farm and forest land to other uses and to limit conflicts for these resource industries. To limit conversion, the program requires an urban growth boundary (or UGB) around each city in the state and urban uses must to be contained within the boundary").

58 Gerrit J. Knaap, *The Price Effects of Urban Growth Boundaries in Metropolitan Portland, Oregon*, 61 LAND ECONOMICS, 26, 32 (1985).

59 *See* Mapes, *supra* note 55. ("In a 1990 appearance on OPB, [timber company executive Bill] Moshofsky charged that the growth system was 'putting Oregon in a straightjacket.' The controls aren't really about protecting farm and forest land, he said: 'The purpose is to stop everything going on outside cities and leave that area as open space without paying for it.")

60 League of Or. Cities v. State, 56 P.3d 892, 910-11 (2002).

61 *See* OR. SEC'Y OF STATE, OR. STATEWIDE ELECTION RESULTS, NOV. 2, 2004 GENERAL ELECTION (2004), https://records.sos.state.or.us/ORSOSWebDrawer/RecordView/8411085.

62 MacPherson v. Dep't of Admin. Servs., 130 P.3d 308, 312 (2006).

63 Sullivan, *supra* note 54, at 136.

64 STATE OF OR., VOTER'S PAMPHLET, MEASURE 37 (2004). https://www.oregon.gov/lcd/OP/Documents/M37_voterpamphlet-11-2004a.pdf.

Arizona's Proposition 207, Measure 37 dispensed with the Harris Act's "inordinate burden" and "reasonable investment-backed expectations" tests and implemented a pure diminution of value standard.[65] Like Proposition 207, it also simplified the procedure for making claims to compensation by omitting a requirement for a written appraisal or court approval of settlement.[66] A two-year statute of limitations was adopted for challenges both to new and existing regulations, but this was subject to an exception that potentially extended the available time period.[67] Chastened by the experience with Measure 7, which was invalidated over an attempt to allow restrictions excluding the sale of pornography, authors of Measure 37 included few regulatory exemptions and none for land conservation purposes.[68]

With its nearly unlimited scope of application, Measure 37 generated a flood of claims against Oregon municipalities, with nearly 7,000 claims during the three years the law was in effect, of which 78% of procedurally valid claims were ultimately approved.[69] The value of these claims exceeded $17 billion, leaving regulatory waivers—allowed by the law—as the only feasible response by localities.[70] The explosive effect of the law sent shockwaves through urban planners and policymakers, who contended that Measure 37 created "pandemonium"[71] that threatened "to void the state's entire land use planning system" and "the viability of the agricultural economy."[72]

Claims under Measure 37 were in fact focused in undeveloped areas: in Oregon's Willamette Valley, for example, 51 percent of the acreage under claim was in farming zones, 42 percent was in forest, and 5 percent was rural, leaving only 3 percent in urbanized areas.[73] A housing boom seemed imminent, with over 30,000 homes expected pursuant to Measure 37 claims.[74]

This "dizzying window on a UGB-less Oregon"[75] led to yet another backlash, but this time against Measure 37, which had inadvertently exposed Oregon's housing undersupply and the extent to which demand existed to

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65 Sullivan, *supra* note 54, at 136.

66 *See supra* note 63.

67 *Id.*

68 *Id.*

69 OR. DEP'T OF LAND CONSERVATION & DEV., BALLOT MEASURES 37 (2004) AND 49 (2007): OUTCOMES AND EFFECTS (2011).

70 *See* Sam Lowry, *Oregon Clips Measure 37's Wings,* 60 PLANNING & ENVTL. L. 9 (2008). (With respect to claims for value diminution, "[m]ost Oregon jurisdictions, with time limits for examining claims, few tools to argue against inflated loss claims, and no resources to pay them, chose to waive.").

71 Laura Oppenheimer, *All that Measure 37 has developed so far in Oregon is a mess,* Knight Ridder Tribune Business News, 1 (2005).

72 Margaret H. Clune, *Government Hardly Could Go on: Oregon's Measure 37, Implications for Land Use Planning and a More Rational Means of Compensation*, 38 THE URBAN LAWYER 275, 276, 287 (2006).

73 Edward Sullivan and Ronald Eber, *The Long and Winding Road: Farmland Protection in Oregon 1961-2009*, 18 SAN JOAQUIN AGRICULTURAL L. REV. 1, 51 (2009).

74 *Id.* at 52.

75 Lowry, *supra* note 68, at 9.

build in undeveloped areas. The prospect of subdivisions and development overspreading the fertile farmland of the Willamette Valley – an area that Oregon's growth management had been adopted to protect – was apparently too much for a large segment of the public to stomach.[76] Complaints were not limited to the effectiveness of the law in promoting development, however. Measure 37, unlike Arizona's Proposition 207, did not specify that waivers ran with the land, and a state attorney general opinion concluded that waiver rights were in fact not transferable, which would have been a major practical impediment to the development of land for which waivers had been issued.[77]

An amendment to limit Measure 37's scope, H.B. 3540, narrowly failed in the Oregon legislature, but when presented to voters in 2007 as Measure 49 won easy passage, even securing majority support in rural districts.[78]

Measure 49 was intended to simply rein in the perceived overreach of Measure 37, but has in practice virtually nullified its protections. First, Measure 49 revised the blanket retroactive effect of Measure 37 to regulations enacted *after* the claimant acquired the property in question,[79] putting an end to challenges to Oregon's existing farmland protections. Second, only residential, farming and forestry uses were covered, with commercial and industrial uses exempted. Third, Measure 49 limited claims to properties located entirely outside any urban growth boundary and entirely outside the boundaries of any city, thereby allowing cities to downzone urban neighborhoods without consequence.[80]

Although this last restriction was removed by a bill passed in 2009,[81] in 2020, the Court of Appeals of Oregon in *Moore v. City of Eugene* effectively negated the 2009 bill and indeed nearly interpreted Measure 49 out of existence, holding that a municipal lot coverage ordinance that reduced the home a landowner could build from 1,200 square feet to 462 square feet was not a restriction of "use" for which compensation was due.[82] By reading "use" in such a narrow manner, the Court of Appeals whittled Measure 49 down to a

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76 *See* Sullivan and Eber, *supra* note 71 at 51-52; *see also* Hannah Gosnell et al., *Is Oregon's land use planning program conserving forest and farm land? A review of the evidence*, 28 LAND USE POLICY 185, 186 (2011) (discussing that there is a question, however, as to whether Oregon's growth management measures have actually been achieving the promised conservation benefits).

77 Thomas Hillier, *Oregon voters revisit Measure 37*, DAILY JOURNAL OF COMMERCE OREGON (Jul. 26, 2007). https://djcoregon.com/news/2007/07/26/oregon-voters-revisit-measure-37.

78 Lowry, *supra* note 68, at 9-10.

79 Measure 49, DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT, https://www.oregon.gov/lcd/Measure49/Pages/index.aspx (last visited Oct. 31, 2024) (explaining that pending claims under Measure 37 are invalidated, but could be reasserted under Measure 49 to the extent applicable and vested rights under Measure 37 were temporarily allowed to continue but not transferable); *See also* OR. REV. STAT. ANN. § 195.305(3) (2014).

80 *See generally* Edward M. Sullivan & Jennifer M. Bragar, *The Augean Stables: Measure 49 and the Herculean Task of Correcting an Improvident Initiative Measure In Oregon*, WILLAMETTE LAW REVIEW 577 (2010). (for a full discussion of these changes).

81 H.B. 3225 (Ore. 2009).

82 Moore v. City of Eugene, 482 P.3d 190, 200–01 (2020). *review denied*.

stub, leaving its application limited seemingly to cases in which a locality completely eliminates a covered use. Finally, on January 1, 2021, state regulations increased the fee for filing a Measure 49 claim to $12,500.[83] Claims under Measure 37 – which was silent as to filing fees – had varied wildly according to local jurisdiction, with some as high as $12,500 and others imposing no fee at all.[84]

Accordingly, after three years of upheaval, Measure 37 was backed into a compromise posture that ultimately left most Oregon property owners without recourse if zoning rules reduce their property values.

Arizona's Proposition 207 (2006): Not Too Hot, Not Cold, but Just Right?

Following the issuance of the Supreme Court's 2005 decision in *Kelo v. City of New London*, a nationwide backlash developed against perceived abuses and excesses of the eminent domain and land use powers.[85] In 2006, Arizona, California, Washington, and Idaho all placed property rights protection acts on the ballot. Though the initiatives in the latter three states were narrowly defeated, Arizona's Proposition 207 sailed to passage with 65 percent of the vote[86] over opposition from the state's municipalities.[87] The drafters of the Proposition, having available the lessons of both the Harris Act and Oregon's Measure 37, charted a middle course that combined an unambiguous legal standard with applicability only to land use regulations adopted after its passage. The result has been a law more effective than the Harris Act and more durable than Measure 37. It, along with the model legislation of the Property Ownership Fairness Act and Private Property Protection Act, is a useful example for other states.

One impetus for Proposition 207 was the *Kelo* decision, which is prominently referenced in the preamble to the ballot measure.[88] Regulatory takings received relatively scant mention in the principal text, but in a section containing argumentative statements, downzoning was specifically identified as an example of government abuse of power that the measure was expected to address,[89] and legal commentators later noted that Proposition 207's

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83 OR. ADMIN. REG. 660-041-0520

84 *See* Keith Aoki, Kim Briscoe & Ben Hovland, Trading Spaces: Measure 37, *MacPherson v. Department of Administrative Services, and Transferable Development Rights as a Path Out of Deadlock*, 20 J. ENVTL. LAW AND LITIGATION 273, 322 n.256 (2006).

85 *Kelo v. City of New London, Conn.*, 545 U.S. 469 (2005).

86 Ryan Christenberry, *Arizona's Proposition 207: Growth Management Policy and the Property Rights Movement*, Tufts University (2007).

87 The League of Arizona Cities and Towns filed an unsuccessful lawsuit to strike Proposition 207 from the ballot. See *League of Arizona Cities & Towns v. Brewer*, 146 P.3d 58, 59 (2006).

88 Arizona 2006 Ballot Propositions, Proposition 207, at 177, https://apps.azsos.gov/election/2006/info/PubPamphlet/english/prop207.pdf.

89 *Id.* at 181–82.

regulatory takings provisions were "far more onerous to planning" in Arizona than the eminent domain provisions.[90]

Proposition 207 contains several key differences from the Harris Act and from Measure 37 that have enhanced its effectiveness. First, the provision of Proposition 207 addressing downzoning, entitled "Diminution of Value," omits the Harris Act's requirement that a regulatory infringement must be "inordinate" in order to be actionable, and makes reference to property rights rather than reasonable investment-backed expectations:

> "If the existing rights to use, divide, sell or possess private real property are reduced by the enactment or applicability of any land use law enacted after the date the property is transferred to the owner and such action reduces the fair market value of the property the owner is entitled to just compensation from this state or the political subdivision of this state that enacted the land use law."[91]

Accordingly, the test asks only whether there has been *any* loss of value as a result of loss of use, rather than a loss of reasonably expected value, a simple test which avoids the ambiguities present in the Harris Act. Secondly, the law only allows owners to submit claims for land use changes made *after* their purchase of a property, in contrast to Measure 37's retrospective effect, and contains a three-year statute of limitations.[92] Thirdly, the law expressly only applies to the reduction of "rights to use, divide, sell or possess private real property," and therefore excludes claims of indirect value diminution resulting from another owner's affirmative exercise of property rights pursuant to land use regulation. Under Measure 37, ambiguous wording left this point unclear.[93] A chart outlining some of the key elements of the Harris Act, Measure 37 and Proposition 207 is below.

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90 Alan Stephenson & Rob Lane, *Arizona's Regulatory Takings Measure: Proposition 207*, Arizona's Regulatory Takings Measure: Proposition 207, 60 PLANNING & ENV'T. L. 12 (November 2008).

91 *See supra* note 85.

92 ARIZ. REV. STAT. § 12-1134(A), (G) (2022).

93 *See* State of Oregon, Official 2004 General Election Voters' Pamphlet, Measure 37, at 103, https://www.oregon.gov/lcd/OP/Documents/M37_voterpamphlet-11-2004a.pdf. (stating that "[i]f a public entity enacts or enforces a new land use regulation or enforces a land use regulation . . . that restricts the use of private real property *or any interest therein* and has the effect of reducing the fair market value of the property, or any interest therein, then the owner of the property shall be paid just compensation." (emphasis added).

	Harris Act	Measure 37	Proposition 207
Retroactivity	No	Yes	No
General Statute of Limitations	One year	Two years[94]	Three years
Appraisal Required	Yes	No	No
Locality's Time to Consider Claim	90 days	180 days	90 days
Test for Compensation	Inordinate burden of an existing use or vested right	Pure diminution of value	Pure diminution of value
Exceptions	Public nuisance, temporary impacts (generally one year or less), flood insurance rate maps, transportation facilities	Public nuisance, public health and safety, federal law, adult-oriented businesses, and restrictions by owners or family members	Public nuisance, public health and safety, federal law, adult-oriented businesses, sex offender housing, sale of illegal drugs, liquor control, utility facilities

[94] Measure 37 contained a uniform two-year limitations period, but provided that the period would begin to run from the later of the enaction of the regulation or an owner's land use application under that regulation, potentially allowing an owner to bring a claim more than two years after the enaction of a regulation.

Like the Harris Act, Proposition 207 contains a 90-day pre-litigation complaint procedure, but Arizona's statute is much more concise[95] and lacks a requirement for the submission of a written appraisal report or the approval of any settlement by a judge.[96] Instead, a claimant can simply present a demand for compensation, with or without supporting documentation.[97] A claimant need only send a claim by mail, and is not required to serve the claim upon a specific person authorized to receive service of process.[98] Additionally, Arizona's Senate Bill 1487, enacted in 2016, has further strengthened the position of claimants by allowing them to petition state legislators directly about local violations of state laws such as Proposition 207.[99]

Upon determination by the state attorney general, a violation can result in localities losing state revenue, while likely violations are referred directly to the Arizona Supreme Court.[100] According to interviewees, claims raised under Proposition 207 rarely reach the courtroom,[101] and a search reveals only 13 reported cases citing Ariz. Rev. Stat. § 12-1134, Proposition 207's diminution of value provision, as compared to 83 for Florida's Harris Act.[102] There are at least three reasons that may help explain the lack of court intervention.

First, the legal test for diminution of value is claimant-friendly, and in those cases which do reach the courts, the claimant almost always prevails.[103] Secondly, the law increases the potential pain for localities by allowing a prevailing claimant to seek recovery of costs, expenses and reasonable attorney fees.[104] Prevailing localities, by contrast, are prohibited from recovering attorney fees and costs.[105] Third, the claim resolution process is simple, low-cost and effective, further incentivizing localities to resolve complaints before the litigation stage. Specifically, the procedures that have been developed pursuant to the law permit a city to:

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95 The Harris Act's statutory complaint procedure runs to 1798 words, compared to 193 words for Proposition 207. *See* Arizona 2006 Ballot Propositions, Proposition 207, at 177-78, https://apps.azsos.gov/election/2006/info/PubPamphlet/english/prop207.pdf.

96 ARIZ. REV. STAT. § 12-1134(D)–(F) (2006).

97 ARIZ. REV. STAT. § 12-1134(E) (2006).

98 Conversation with Christina Sandefur (August 30, 2024). *See also* Regner v. City of Flagstaff, No. 1 CA-CV 08-0415, 2009 WL 251129, at *2 (Ariz. Ct. App. 2009).

99 Conversation with Christina Sandefur (August 30, 2024). *See also* S.B. 1487, 52d Legislature, 2d Reg. Sess. (Ariz. 2016), at https://www.azleg.gov/legtext/52leg/2r/bills/sb1487p.pdf.

100 *Id*.

101 Conversation with Christina Sandefur (August 30, 2024).

102 Pursuant to Westlaw search.

103 Conversation with Christina Sandefur (August 30, 2024).

104 ARIZ. REV. STAT. ANN. § 12-1135(D) (2024).

105 ARIZ. REV. STAT. ANN. § 12-1135(A) (2024). Note that Florida's Harris Act does allow prevailing localities to recover their any action filed pursuant to this section, the governmental entity or entities are entitled to recover their costs and fees. Fla. Stat. Ann. § 70.001(6)(c)(2) (2021).

> 1) Pay damages directly to the claimant in the amount claimed, which rarely if ever occurs;
>
> 2) Waive the regulation as to the claimant's property only, with the waiver continuing to run with the land, which localities do routinely;
>
> 3) Negotiate the claim within the allowed timeframe which occurs infrequently and typically on an informal basis; or
>
> 4) Ignore or reject the claim, which entitles the claimant to file suit once time expires or the rejection is issued. Few localities will deliberately ignore a complaint and risk exposing themselves to litigation.[106]

The low cost and risk avoidance of the waiver process has a powerful appeal that typically makes it the most popular option for municipalities. For example, when an occupancy-related zoning change in 2021 left the City of Flagstaff facing over $50 million in diminution of value claims, the city elected to issue waivers to dozens of properties rather than contesting the claims.[107]

Additionally, those localities which do choose to rezone certain areas to affirmatively seek waivers from property owners in advance of the regulatory change in order to insulate themselves from the threat of claims or litigation.[108] The logistical challenge of obtaining waivers serves as a further disincentive to undertaking major downzonings, or any downzonings at all.

Although Proposition 207 adds an exception for health and safety that is not present in the Harris Act, its effect is tempered by the requirement that a locality carries the burden of proof.[109] Courts interpreting the burden-shifting provision of Proposition 207 have held that a locality's "mere declaration" that an ordinance is intended to advance public health and safety is insufficient to satisfy this standard.[110] Instead, the locality must demonstrate by a preponderance of the evidence that the ordinance was enacted for the principal purpose of health and safety.[111] The law also provides examples of purposes that might suffice to meet the standard, including fire and building codes.[112]

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106 Litigation will ordinarily involve 1) addressing whether the property owner has a valid claim under Proposition 207, including whether the locality has a health and safety justification for the regulation, and 2) if the claim is found valid, a determination of just compensation which is often by way of negotiated settlement or can be at bench trial on presentation of expert appraisals. Conversation with Christina Sandefur (August 30, 2024).

107 Brady Wheeler, *Facing $51 million in land use claims, Flagstaff will waive high-occupancy zoning enforcement for 70 properties*, ARIZONA DAILY SUN (October 22, 2021).

108 Conversation with Christina Sandefur (August 30, 2024).

109 ARIZ. REV. STAT. § 12-1134(C) (2006).

110 Sedona Grand, LLC v. City of Sedona, 270 P.3d 864, 870 (Az. Ct. App. 2012).

111 *Id*. at 869.

112 ARIZ. REV. STAT. § 12-1134(B)(1) (2006).

PUTTING A PRICE ON DOWNZONING

Under today's system of land use regulation, public officials pay no monetary price to take away property owners' development rights in most of the U.S. This creates a lopsided situation for decision-making where, in the case of historical preservation for example, preservationists are likely to landmark too much. In some cases historic districts cover buildings with no architectural or historic significance.[113] Economist Edward Glaeser recommends that cities should have a fixed number of buildings that can be landmarked for historic preservation.[114] This would force them to make choices among which buildings to preserve.

A law like Arizona's Proposition 207 requires policymakers to weigh the benefits of land use restrictions against decreasing spending in other areas of their budget or increasing tax rates. Local policymakers' pattern of responding to Proposition 207 by deciding not to pursue downzone or to issue downzoning waivers to property owners who file claims reveal that policymakers have not felt that downzoning is worthwhile when it comes with the price of compensation for lost property value. Proposition 207 puts a price tag on these regulations should the affected property owners choose to file a claim, requiring Arizona policymakers to make tradeoffs between downzoning and other spending priorities that most policymakers don't have to consider. This lack of consideration for the costs of land use regulations has enabled the land use regulations we have today, where zoning and other land use regulations have enormous costs for people who are increasingly struggling with housing affordability.

The relationship between zoning changes and property values is complicated, however, downzoning will not always reduce the value of every affected lot. Downzoning generally reduces the option value of a piece of land– the value that the piece of property owes to the option of putting it to a more intensive use in the future. If the value of that option is zero or very small, however, a property owner may not be able to show that the policy change reduced their property value. Downzoning that affects a large area of a city will reduce many property owners' option value, but it may have other effects as well. By reducing the amount of housing that can be built in a large area, a downzoning may raise the value of existing housing, which is now in greater scarcity. In other situations, downzoning could raise the value of

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113 *See, e.g.*, Nick Sementelli, *DC's historic board voted to protect a non-historic parking lot. Why?, Greater Greater Washington,* (May 31, 2023), https://ggwash.org/view/89813/dcs-historic-board-voted-to-protect-a-non-historic-parking-lot-why, (last accessed Oct. 17, 2024).

114 EDWARD GLAESER, TRIUMPH OF THE CITY: HOW OUR GREATEST INVENTION MAKES US RICHER, SMARTER, GREENER, HEALTHIER, AND HAPPIER, 161-62 (Penguin Books 2011).

affected properties by eliminating an undesirable use, such as gas stations, from a zone. In other cases, a change in allowed uses may reduce property values.

Because an unregulated city would have a built density concentrated close to job centers and other amenities, downzoning to a uniform level of density will have different effects on land value in different places. Closest to the city center, the restriction would likely cause the greatest loss to property values because demand for built space is very high. This uniform land use regulation could raise land value at the urban fringe by creating demand for housing construction where land's highest value use would otherwise be agricultural. Under a less extreme example, single-family zoning with a constant minimum lot size requirement will likely have larger effects closer to a city center than farther away. In the case of a law like Proposition 207, property owners and the government restricting their development rights can each seek to demonstrate convincingly the effects they believe a policy change has on the value of a given site. It may be that under a downzoning change, only some affected property owners could show that they have a loss of value entitling them to compensation.

Potential Negative Effects of Proposition 207 and Potential Palliatives

From a housing supply and affordability perspective, perhaps the biggest concern with Proposition 207 is that it may make policymakers more reticent to upzone. The law clearly states that property owners are not eligible for compensation if an expansion of development rights on someone else's property reduces their property value or if development on someone else's property reduces their property value. However, if lawmakers were to decide they wanted to reverse course on an upzoning, doing so could be expensive. Prior to *Euclid*, many legal scholars thought that any zoning restrictions on development rights that went beyond the police power exception for protecting health and safety required compensation for the property owner who had their rights taken away. A law like Proposition 207 is a sort of prospective reversal of Euclid, with important temporal effects. Because the law only requires compensation for property owners who make claims for compensation for lost property value for land use regulations passed *after the law went into effect*, the law may inadvertently reduce policymakers' willingness to expand development rights. This issue came up in a 2023 City Council debate over a "casita" ordinance in Tucson. Councilmembers decided to vote to allow smaller accessory dwelling units than they had previously considered legalizing, with some citing Proposition 207 as a reason to expand development rights slowly since they would potentially be costly to roll back.[115]

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115 Tim Steller, *Tweaked Rules for Tucson Casitas Will Now Go into Effect Next Month*, ARIZONA DAILY STAR (Dec. 9, 2021), https://tucson.com/news/local/tweaked-rules-for-tucson-casitas-will-now-go-into-effect-next-month/article_fe031544-5881-11ec-a60e-efd3b7aa2d42.html.

Empirically, it's not obvious that Proposition 207 has substantially reduced upzoning that would have happened in the law's absence. The Tucson City Council did vote to pass a casita ordinance, and Arizona has seen other significant upzonings since voters passed Proposition 207. In 2015, the Phoenix city council adopted an important zoning reform expanding rights to build transit-oriented development around light rail stations.[116]

Arizona state policymakers have broadly expanded development rights, preempting local zoning authority. In 2015, legislators passed a law allowing homeowners to rent out their properties as short-term rentals by preempting local ordinances that prevented them. In 2024, legislators passed three important laws expanding development rights. These new rules preempt local zoning to allow, in some cases, accessory dwelling units at the site of single-family houses, four-unit structures where only single-family houses were allowed previously, and multifamily development in commercial zones.[117] If Proposition 207 is making the politics of upzoning more difficult, it's certainly not preventing upzoning entirely.

Figure 1 below compares per capita housing permits across a selection of fast-growing Sun Belt states. During the first half of the available data, Arizona permitted housing at a higher rate than its peers, while they have converged more recently. However, many factors affected each state's permitting rates over this time period, and it's not obvious that Proposition 207 created a divergence. Causal research on Proposition 207's effects on upzoning, downzoning, and housing market outcomes is needed to better inform policy lessons from the Arizona experience. However, given that we observe cases where Proposition 207 has clearly prevented downzonings, and plenty of upzonings have happened under the law, we hypothesize it has had a positive effect on housing supply.

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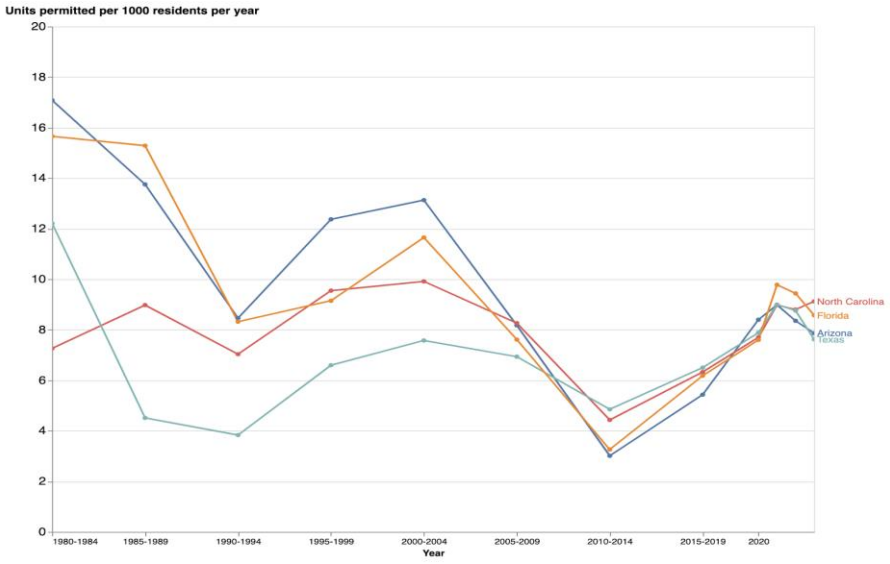
116 REINVENT PHX, https://www.phoenix.gov/pdd/reinvent-phx (last visited Sept. 18, 2024).

117 Eli Kahn and Salim Furth, *Laying Foundations: Momentum Continues for Housing Supply Reforms in 2024*, MERCATUS CENTER (2024).

Housing Units Permitted per 1,000 Residents



Source: U.S. Census, Building Permit Survey, via HousingData.app. The data are presented as 5-year averages from 1980 to 2019 and annual from 2020 to 2023.

Another commonly raised concern with Proposition 207 is that it prevents local policymakers from using zoning to conserve undeveloped land or otherwise "regulate land use for the public good" without paying for the cost of reduced property values, likely to be expensive for reductions in development rights that cover a large amount of land in or near urban areas.[118] In some cases, policymakers use zoning with the stated intention of directing growth to areas that they intend to serve with needed infrastructure. For example, as discussed above, Oregon law directs the state's metropolitan areas to establish urban growth boundaries, preserving land outside these boundaries as farms or forests unless the boundary is expanded. The agency responsible for managing the Portland urban growth boundary explains that the law "promote(s) the efficient use of land, public facilities and services inside the boundary."[119] However, beyond the blunt tool of downzoning land to prevent development, local policymakers have many ways to shape where development happens. Allowing for increased density over time in areas that are

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118 Jeffrey L. Sparks, *Land Use Regulation in Arizona After the Property Rights Protection Act*, 51 ARIZ. L. REV. 211, 213 (2009).

119 *What Is Metro?*, OREGON METRO, https://www.oregonmetro.gov/regional-leadership/what-metro (last visited Sept. 18, 2024).

already developed and have needed infrastructure is perhaps the best tool to reduce incentives for development on agricultural or wilderness land.

Additionally, policymakers can use infrastructure planning and provision to determine where urban services will be provided.[120] With so much of their attention dedicated to the regulation of private land, local policymakers have arguably invested too little time into planning for public service provision and the public realm. Dedicating more planning resources to determining where investment in infrastructure and public services will accommodate growth could help direct new housing development toward the places where policymakers can more effectively serve it.[121]

Finally, Proposition 207's incentives to waive or repeal land use restrictions are powerful, which has the significant benefit of promoting the swift resolution of claims. What the law lacks is a mechanism allowing localities that do wish to pay compensation to do so in a straightforward manner that avoids litigation and the prospect of added costs. A city may attempt to negotiate with a claimant during the 90-day claim period pursuant to the law to reach a settlement, but if the claimant is unwilling to compromise, the city will be motivated to waive the restriction rather than risk a lawsuit in which it may be held liable for the claimant's costs and attorney's fees.[122] Even if a city prefers to pay for a particular regulation, deeming it to be worth the cost to the taxpayers, these incentives will tilt the scales toward waiver. A faster and simpler process for determining the compensation owed might give offer localities a realistic choice between waiver and compensation.

Lessons and Opportunities for Other States

Downzoning is an ongoing obstacle to meeting the United States' urgent housing needs, and state legislation has a proven record of deterring or countering local efforts to reduce owners' entitlements to construct homes. The question remains as to which of the approaches discussed above is the best model for other states. This article makes several observations and recommendations that reflect more than a decade's additional experience with these laws.

Among the three laws discussed above, Arizona's has been the most successful. Simple, succinct, and straightforward, the law has had the preeminent virtue of avoiding the judicial system by incentivizing municipalities to resolve complaints early and directly. Measuring resolution in terms of days, rather than the years typical of the court system, Arizona's system has provided safeguards for property owners that individual homeowners can use

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120 NOLAN GRAY, ARBITRARY LINES: HOW ZONING BROKE THE AMERICAN CITY AND HOW TO FIX IT 189-94 (Island Press 2022).

121 *See generally*, ALAIN BERTAUD, ORDER WITHOUT DESIGN: HOW MARKETS SHAPE CITIES (The MIT Press 2018).

122 ARIZ. REV. STAT. § 12-1135(D) (2024).

yet can be scaled up to encompass entire neighborhoods objecting to municipal downzoning efforts. The language of Proposition 207 provides an excellent starting point for any state policymakers considering reform, and incorporates the following elements that are essential for successful implementation of a law to protect real property owners from regulatory takings through downzoning:

1) A simple, standardized and costless complaint procedure that does not require exhaustion of remedies as a prerequisite

2) A complainant-friendly legal standard for compensation that uses pure value diminution and contains an adequate limitations period

3) Narrow exceptions for which the burden of proof is on the locality

4) An incentive structure that encourages localities to swiftly issue waivers, such as brief time periods for responding to complaints and fee-shifting provisions that favor complainants, but which contains a mechanism allowing those localities that desire to pay for regulation to do so quickly, efficiently and without engaging in litigation

5) Durable waivers that run with the property rather than being personal to the owner

Informed by their experience working with property owners in Proposition 207 claims in Arizona, the Goldwater Institute has developed model legislation, the Property Ownership Fairness Act. The model closely resembles Proposition 207 but includes clarification on legal processes and claims timelines.[123]

The question of prospective effect is one that has arisen in the case of all three state laws. Each has taken a slightly different approach, and these rules – particularly in the case of Oregon's Measure 49 – can be somewhat complex. Arizona's approach, on the other hand, has resulted in zones in which many owners obtain waivers while others waive their rights, or simply sit on them until the claims period expires, so that a zoning district becomes riddled with exceptions. To avoid this result, in which zoning maps will tend over time to become a crazy quilt that presents an impediment to determining the scope of an owner's usage rights rather than an aid, this article recommends the following:

1) Linking the time to file a complaint to a fixed date, rather than to the date on which the owner acquired the property.

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123 Christina Sandefur and Timothy Sandefur, *Protecting Private Property Rights: The Property Ownership Fairness Act*, GOLDWATER INSTITUTE (2016); *see also the Private Property Protection Act*, AMERICAN LEGISLATIVE EXCHANGE COUNCIL (ALEC), https://alec.org/model-policy/the-private-property-protection-act/ (2017).

2) Implementing a fixed look-back period, such as 15 or 20 years, during which any subsequent purchaser may file a claim, and providing notice to purchasers of their right to file.

Oregon's "year zero" approach under Measure 37 offered the advantage of expanded property rights protection from past regulatory takings. By the same token, it went further than Proposition 207 to expand property owners' rights to develop their land, creating opportunities for badly needed housing construction that zoning rules had previously stripped away. However, at least in the context of Oregon's growth management policies, the flood of claims unleashed under Measure 37 was politically unsustainable. A political clash between conservationist and environmental interests and those favoring a broad scope for property rights protections is likely to occur in other states considering the adoption of regulatory takings legislation, and the durability of any property rights framework should be a consideration as policymakers learn lessons from the experiences of Arizona, Florida, and Oregon lawmakers.

The Proposition 207 approach, in contrast, offers strong protection from downzoning rules implemented after the law's passage, but does nothing to address the preexisting zoning rules that have led to the housing supply and affordability problems that plague a growing number of states. For this, a law like Proposition 207 would need to be paired with reforms to existing land use regulations implemented at the local or state level or litigation challenging the constitutionality of existing zoning rules.[124] As housing unaffordability grows in political salience, jurisdictions are increasingly adopting pro-housing reforms, including that statewide reforms in Arizona mentioned above.[125] A nuanced approach that takes into account lessons learned across states that have adopted property rights protections from regulatory takings will in all likelihood have the best prospects for both enactment and for remaining on the books over the long term.

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124 Recently, some legal scholars are developing strategies for overturning Euclid v. Ambler as well as more limited challenges to specific types of exclusionary land use regulations. *See e.g.* Joshua Braver & Ilya Somin, *The Constitutional Case Against Exclusionary Zoning*, 102 TEXAS L. REV. 1 (forthcoming); Charles Gardner, *Cutting Zoning Down to Size: Reevaluating the Legal Vulnerability of Urban Minimum Lot Sizes*, 61 SAN DIEGO L. REV. 2 (2024).

125 Kahn & Furth, *Laying Foundations*, *supra* note 107.