

## Book Reviewed

### Smart Growth Meets the Neighbors

A Review Essay by Winter King\* of *Zoned Out: Regulation, Markets, and Choices in Transportation and Metropolitan Land-Use*, by Jonathan Levine (RFF Press, 2006).

*In Zoned Out: Regulation, Markets, and Choices in Transportation and Metropolitan Land-Use, Jonathan Levine argues that the primary barrier to the development of high-density, mixed-use, transit-oriented development known as “smart growth” is not the lack of market demand for such development, or an innate American preference for suburban living. Rather, it is the current structure of land use regulation, which, in general, limits the density at which landowners may develop their property. Zoned Out concludes that governments do not need to adopt regulations that force smart growth, but instead must only liberalize current land use regulations in order to allow market-driven smart growth.*

*Zoned Out supports its thesis with empirical evidence about the preferences of home purchasers and developers, and anecdotal evidence about successful and unsuccessful attempts to develop smart growth projects. But scholars have often noted that neighborhood opposition poses a significant barrier to higher-density development (and many of the anecdotes in Zoned Out support this view) and Zoned Out provides no evidence that these neighbors’ opposition to high-density development would be tempered by less restrictive land use regulations. Zoned Out consistently overlooks and underestimates the role of neighboring homeowners in the process of land use regulation, and thus fails to examine a major obstacle to high-density development, independent of whatever form land use reformation takes. Neighboring homeowners not only have the ear of their planning commission and city council; in many states, they have access to the tools of direct*

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*democracy—the referendum and the initiative—and use them to override the land use decisions of their elected and appointed officials. As such, a significant gap remains in Zoned Out’s argument.*

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#### INTRODUCTION

November 2006 was a pivotal time in the ongoing tug-of-war between property rights advocates and proponents of broad government authority to regulate land use. In the wake of the Supreme Court’s decision in *Kelo v. City of New London*,<sup>1</sup> voters in thirteen states were presented with ballot initiatives designed to limit the power of the government to take property or regulate land use.<sup>2</sup> The prevalence of these measures on ballots across the country fueled ongoing debate surrounding government regulation of private property—a debate that is particularly vitriolic when the regulations take the form of suburban growth controls known as “smart growth.” *Zoned Out: Regulation, Markets, and Choices in Transportation and Metropolitan Land-Use*<sup>3</sup> enters the fray of the smart growth land use debate at a particularly tense time.

*Zoned Out* analyzes one aspect of government regulation of property: how governments can change the way they regulate land use in order to allow higher-density, transit-oriented development. In particular, *Zoned Out* argues that the antidote to sprawl—higher-density, transit-

1. 545 U.S. 469 (2005).

2. RICHARD M. FRANK, DANIEL A. FARBER, CYMIE PAYNE & MARY ELLIOTT, PROPOSITION 90: AN ANALYSIS 8 & app. E (2006), available at <http://www.law.berkeley.edu/centers/envirolaw/prop90packet.pdf> (listing the states with eminent domain and regulatory takings initiatives on the ballot in November 2006).

3. JONATHAN LEVINE, ZONED OUT: REGULATION, MARKETS, AND CHOICES IN TRANSPORTATION AND METROPOLITAN LAND-USE (2005).

oriented development, or smart growth—can only be accomplished by liberalizing current patterns of land use regulation. The main impediment to smart growth, *Zoned Out* argues, is overly restrictive local land use regulation, which often requires the separation of commercial and residential uses and restricts residential development to low-density, single family homes. *Zoned Out* demonstrates that there is a strong demand, and an equally strong eagerness to supply, higher-density housing in metropolitan areas. If local governments allow higher-density development in urban areas, it will be built. The smart growth debate typically revolves around whether local, regional, or state governments can persuade (or force) people, via land use regulation, to give up their auto-centric suburban lifestyles for a condo in a highrise above a train station.<sup>4</sup> But *Zoned Out* argues that widespread low-density zoning restricts the market, preventing many people from living in the kinds of neighborhoods and locations that they would prefer.

Although *Zoned Out* does an admirable job of presenting both theoretical and empirical evidence to support its argument, it does not provide a satisfactory solution to the problem of overly restrictive zoning in urban areas. Its demonstration that smart growth is the product of a freer market and that suburban sprawl is the function of overregulation provides a convincing response to free market critics of smart growth. It is unclear, however, whether this argument will convince an even tougher and more politically powerful opponent to high-density, transit-oriented development: neighboring homeowners. These opponents, who live and often own homes in the neighborhoods and communities in which smart growth projects are proposed, have more than just the ear of their planning commission and city council. In many states, they have access to the tools of direct democracy—the referendum and the initiative—and use them to override the land use decisions of their elected and appointed officials. *Zoned Out* overlooks the critical role these neighbors play in the land use process.

The first part of this Essay describes *Zoned Out's* responses to the usual critiques of smart growth, and the book's powerful evidence that higher-density development will come if planning commissions allow it. Part II discusses the error in the book's suggestion that changing land use regulation to make it more permissive (and thus allow higher-density development) will be an easier task than making it more restrictive.

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4. *Id.* at 11; see also Clint Bolick, *Subverting the American Dream: Government Dictated "Smart Growth" is Unwise and Unconstitutional*, 148 U. PA. L. REV. 859, 866 (2000) ("The philosophy of smart growth is to force people back into the cities in order to cure the [cities'] problems . . ."); Bernard H. Siegan, *Smart Growth and Other Infirmities of Land Use Controls*, 38 SAN DIEGO L. REV. 693, 701 (2001) ("The smart growth advocates are seeking to impose a life style that many Americans do not prefer.").

Finally, Part III describes recent land use initiatives in Oregon and other states. These initiatives demonstrate the active interest the public takes in the process of regulating land use, and the power the public wields to change these regulations directly.

I. ZONED OUT: A SMART RESPONSE TO SMART GROWTH CRITICS

Urban sprawl is defined in *Zoned Out* as “low-density, car-dependent development that characterizes most U.S. metropolitan areas.”<sup>5</sup> Sprawl has been associated with a wide range of social, economic, and environmental harms. For example, because residents of urban sprawl live too far away from their jobs and local commercial centers to walk to them, and because public transit is generally infeasible in low-density communities, suburban residents become car-dependent.<sup>6</sup> This car-dependency results in increased traffic congestion, air pollution, greenhouse gas emissions, energy consumption, and traffic accidents. It is said to contribute to the nation’s rising levels of obesity and to a generally unfulfilling community life for suburban residents.<sup>7</sup> Sprawl has also been blamed for the loss of habitat, wetlands, and agricultural lands, and for the deterioration of inner cities.<sup>8</sup>

Significant debate surrounds the question of what, if anything, should be done about sprawl and its effects. As *Zoned Out* notes, “[t]he literature arguing for the presence of these impacts is immense, matched only by the countervailing studies questioning the causal link between metropolitan form and any particular set of outcomes.”<sup>9</sup> In particular,

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5. LEVINE, *supra* note 3, at 1. This definition is typical of that used in other land use literature. See, e.g., Robert W. Burchell & Naveed A. Shad, *The Evolution of the Sprawl Debate in the United States*, 5 HASTINGS W.-NW. J. ENVTL. L. & POL’Y 137, 141 (1999) (“Sprawl . . . refers to development that expands in an unlimited and non-contiguous (leapfrog) way outward from the solidly built-up core of a metropolitan area.” (emphasis omitted)); Francesca Ortiz, *Biodiversity, the City, and Sprawl*, 82 B.U. L. REV. 145, 145 (2002) (“Urban sprawl is the auto-dependent, scattered development of residential and nonresidential uses located just outside urban areas.” (citing Janice C. Griffith, *The Preservation of Community Green Space: Is Georgia Ready to Combat Sprawl with Smart Growth?*, 35 WAKE FOREST L. REV. 563, 565 (2000))); see also William W. Buzbee, *Urban Sprawl, Federalism, and the Problem of Institutional Complexity*, 68 FORDHAM L. REV. 57, 63 (1999).

6. LEVINE, *supra* note 3, at 1; see also Burchell & Shad, *supra* note 5, at 141; Buzbee, *supra* note 5, at 71; Nicole Stelle Garnett, *Trouble Preserving Paradise?*, 87 CORNELL L. REV. 158, 161–62 (2001).

7. LEVINE, *supra* note 3, at 1; see also Buzbee, *supra* note 5, at 71 (discussing the impacts of sprawl on traffic and air pollution); Robert H. Freilich & Bruce G. Peshoff, *The Social Costs of Sprawl*, 29 URB. LAW. 183, 189–93 (1997) (discussing the social impacts of sprawl); Garnett, *supra* note 6, at 161–62.

8. LEVINE, *supra* note 3, at 1; see also Buzbee, *supra* note 5, at 74–75 (discussing impacts of sprawl on green space, biodiversity, and water quality); Garnett, *supra* note 6, at 161; Ortiz, *supra* note 5, at 148–49 (describing the effects of sprawl on wildlife and its habitat).

9. LEVINE, *supra* note 3, at 1.

many scholars have debated whether changes in land use regulation intended to encourage smart growth—that is, higher-density, transit-oriented development in urban areas, and very low density or no development in rural areas—can prevent the negative effects of sprawl.<sup>10</sup> Others have decried any such change as an unwarranted intervention in the market, arguing that Americans prefer to purchase homes in suburban communities, and sprawling development is simply a response to that market demand.<sup>11</sup>

According to *Zoned Out*, scholars on both sides of the debate about the propriety of regulating land use to curb sprawl base their arguments on two false assumptions. First, they assume that the sprawling development patterns that currently shape the American urban landscape represent something akin to a free market.<sup>12</sup> Second, they assume any governmental intervention in that free market must be justified by proof that the intervention will solve the problems associated with sprawl.<sup>13</sup> *Zoned Out* begins by demonstrating that that neither of these assumptions is warranted.

#### A. *Urban Sprawl and the “Free” Market*

As *Zoned Out* explains, current land use patterns are not the result of the “invisible hand” of the free market, but in fact are the result of extensive governmental regulation.<sup>14</sup> What one can or cannot develop on a piece of property is governed by state and local laws ranging from zoning codes to environmental laws. The norm in land use regulation is to set maximum densities and segregate residential uses from commercial and industrial uses, thus zoning out high-density, mixed-use development.<sup>15</sup> Zoning and other land use regulations generally require landowners to develop at lower densities than they may otherwise wish to develop. These regulations are restrictive (i.e., do not reflect a free

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10. See Richard Briffault, *Smart Growth and American Land Use Law*, 21 ST. LOUIS U. PUB. L. REV. 253, 253 (2002) (defining goals of smart growth). For a somewhat broader definition of “smart growth,” see Patricia E. Salkin, *Smart Growth at Century’s End: The State of the States*, 31 URB. LAW. 601, 604–05 (1999). *Zoned Out* focuses almost exclusively on the problem of allowing higher-density residential and mixed-use development, and spends very little time on the issues of urban growth boundaries, downzoning, and other means to protect rural areas from development. See LEVINE, *supra* note 3, at 119–20 (discussing urban growth boundaries).

11. LEVINE, *supra* note 3, at 27.

12. *Id.* at 2, 9.

13. *Id.* at 9 (“A view that sprawl is primarily caused by market failures puts the burden of proof on those who would seek to remedy those failures through market interventions. The status quo of auto-oriented development then becomes a neutral choice, deviation from which is or is not justified by scientific evidence.”); see also *id.* at 181.

14. *Id.* at 8–9, 21–22.

15. *Id.* at 21–22.

development market) because they limit what landowners may develop on their property. Thus, in deciding whether to adopt smart growth-inducing land use regulations, local governments do not face a choice between the free market and regulation, but rather a choice between two forms of regulation.<sup>16</sup>

*Zoned Out* also demonstrates that sprawling development cannot be explained simply by pointing to an American market preference for the single-family home on a quarter-acre lot in the suburbs. In fact, there is a significant market demand for higher-density, mixed-use, transit-oriented development.<sup>17</sup> Profit-motivated developers frequently propose high-density developments, only to see these proposals rejected or their densities significantly reduced.<sup>18</sup> If land use regulations were less restrictive, more of these developments would be built.<sup>19</sup> The remarkably prevalent argument that achieving high-density development requires the government to force developers to build more densely than the market will bear does not square with reality.<sup>20</sup>

The conclusion *Zoned Out* draws from these facts about market regulation and housing demand is that, in order for smart growth to occur, government does not need to force developers to develop higher-density, transit-oriented neighborhoods or to force home purchasers to live in them. A significant portion of the population already wants to live in these neighborhoods, but current land use regulations make it difficult, if not impossible, for more to be developed.<sup>21</sup> Thus, to achieve smart growth, land use regulations must be *liberalized*.<sup>22</sup> Developers must be *allowed* to develop at higher densities; purchasers must be given the *choice* to live in transit-oriented neighborhoods.<sup>23</sup>

### B. *Smart Growth as a Preferred Home Rather than Cure for Societal Ills*

By establishing both of these facts—that land use is already a heavily regulated activity and that there is a strong market demand for higher-density, transit-oriented development—*Zoned Out* moves beyond the scientific debate about whether land use reform can really solve all the

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16. *Id.* at 10.

17. *Id.* at 151–68 (presenting results of study in Atlanta and Boston showing preferences for a range of types of housing, including high-density, transit-oriented housing, and the ability of consumers to satisfy their preferences).

18. *Id.* at 11–14, 137–41.

19. *Id.* at 130–31.

20. *Id.* at 14, 19, 110–11, 125–32.

21. *Id.* at 168.

22. *Id.* at 201.

23. *Id.*; see also *id.* at 43–44, 131, 168.

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ills associated with sprawl. As *Zoned Out* notes, this debate has not been resolved in the last thirty years, and is not likely to be resolved anytime soon.<sup>24</sup> By demonstrating that current land use policies prevent a significant segment of the market from purchasing the kind of housing it prefers, i.e., higher-density, transit-oriented development in a mixed-use neighborhood, *Zoned Out* refocuses the smart growth debate as one about how land use regulators can satisfy the preferences of a significant portion of the population. Once the goal of smart growth land use reform becomes satisfying consumer preferences rather than solving the problems of traffic congestion, air pollution, etc., proponents of reform no longer bear the burden of proving conclusively that the reform will solve all the ills of sprawl.

Up to this point, *Zoned Out* makes a convincing argument that there is significant demand for high-density, transit-oriented development, and that developers are eager to satisfy that demand. *Zoned Out's* next argument, however, is less convincing. Taking the preference argument one step further, the book suggests that once land use regulators realize that their current regulations keep a significant portion of the public from living in the kinds of neighborhoods they prefer, changing the current regulations to allow more high-density development will be an easier task. However, as I will discuss more in Parts II and III of this Essay, changing land use regulations is no easy task, even if planners and councilmembers are convinced it is a good idea. Unlike scholars engaged in the land use debate, planning commissions and city councils must answer to their constituents—residents and homeowners in the municipality or county where the reform takes place. Given the concerns of neighboring residents with respect to higher-density development, *Zoned Out's* arguments may not convince neighboring residents and homeowners that land use regulation should be liberalized to allow smart growth.

II. ZONED OUT'S LIMITS: THE POLITICAL REALITIES OF LAND USE REGULATION  
AND THE ROLE OF THE NEIGHBORS

*Zoned Out* provides a thoughtful analysis of the rhetoric surrounding the smart growth debate and the market for higher-density, transit-oriented development. However, the book glosses over the political and practical barriers to achieving the liberalization of land use regulations that it promotes. One glaring omission in this regard is *Zoned Out's* near silence regarding neighborhood opposition to higher-density development. This opposition can take the form of political pressure, for example, city residents voicing their concerns at planning commission

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24. *Id.* at 181.

meetings, or, in many states, direct democracy, such as referenda and initiatives. Although the role of neighborhood opposition as a force shaping the ultimate form of development arises in numerous examples presented in the book, *Zoned Out* consistently overlooks its importance. Moreover, the book makes no attempt to demonstrate how or even if its arguments will change the minds of neighbors who would otherwise oppose smart growth reforms.

*A. Neighbor Participation in the Planning Process*

Neighborhood opposition is a powerful force in the planning and permitting process necessary to develop smart growth projects. As *Zoned Out* recognizes, homeowners in particular are powerful constituents in local politics,<sup>25</sup> and they frequently use their clout to stop or significantly reduce the scale of smart growth projects. *Zoned Out* describes at least two instances in which neighborhood opposition effected a dramatic reduction in the density of proposed higher-density projects.<sup>26</sup>

In Chapter 7, *Zoned Out* compares the fates of four high-density development proposals, two in different communities in Michigan and two in different communities in California. Of the four development proposals, two were approved at the proposed high densities (the Dearborn, Michigan and San Diego, California developments), and two had their densities significantly reduced before they were finally approved (the West Bloomfield Township, Michigan and Mountain View, California developments).

*Zoned Out* concludes that a “virtual prerequisite” to the two successful high-density developments was “a proactive municipal stance toward dense development.”<sup>27</sup> In other words, in order for smart growth projects to receive approval and be developed, the municipal government had to take an active interest in the smart growth projects, and had to approve numerous variances and special permits before the projects could be approved. While this may be true, another factor appears equally important based on the book’s description: neighborhood opposition to the two successful developments was minimal, while neighborhood opposition to the less successful projects was significant.<sup>28</sup>

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25. See *id.* at 42 (noting that a development’s neighbors “as a powerful political interest affecting the decisionmaking of a municipal regulatory body are clearly central”).

26. *Id.* at 137–48.

27. *Id.* at 145.

28. *Id.* at 142 (“In contrast to the two [unsuccessful] developments discussed above, neighborhood opposition to this proposal was minimal, largely because the previous zoning had been commercial.”); see also *id.* at 144 (noting that the vicinity of the site of the second successful development “was primarily commercial, a factor that tended to mute any neighborhood opposition”).

Yet this fact is not mentioned in the subsequent sections drawing conclusions from the comparison, and *Zoned Out* makes no attempt to explain the relationship between neighborhood opposition (or lack thereof) and the proactive municipal stance.

*Zoned Out* offers two reasons for summarily dismissing the importance of neighborhood opposition as an obstacle to smart growth. First, the book argues that planning commissions and city councils should be able to ignore this opposition and act for the greater good by allowing denser developments despite the NIMBY<sup>29</sup> attitudes of neighbors. Second, *Zoned Out* incorrectly assumes that these neighbors have no power over land use planning other than complaining to their respective planning bodies. The first explanation ignores the practical workings of local politics; the second ignores the fact that, in many states, residents do have an independent source of power over land use decisions through referenda and initiatives.

### 1. *Local Regulation for Local Interests*

*Zoned Out's* argument that local governments should be able to ignore the NIMBY complaints of neighbors is premised on the power of these governments to regulate land use under the authority granted to them by the state.<sup>30</sup> Given this source of authority, *Zoned Out* argues, local governments may not act solely in the interest of those who live in their jurisdictions, but must consider the broader, and oftentimes different, needs of the state.<sup>31</sup> According to this theory, local governments should not simply regulate land use in order to increase the property values of those who already live in their city, but must consider statewide needs such as affordable housing, efficient public transportation, and preservation of open space.

Although *Zoned Out* presents an argument for why local governments *should* consider broader, state-wide land use goals in regulating local land use, the argument fails to describe how local governments actually regulate. A local government's responsiveness to the desires of landowners within its jurisdiction is unsurprising given the representative nature of local government. City councils (and often planning commissions) are elected bodies, and are therefore unlikely to

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29. NIMBY is the popular acronym for the "Not In My Back Yard" attitude of existing homeowners.

30. LEVINE, *supra* note 3, at 22 ("The view that land-use regulation is fundamentally a property right implies a broad municipal prerogative to act on local sentiment. By contrast, if cities derive their power strictly from the state, they are more accountable to public purposes beyond their borders, and less able to regulate on the basis of parochial interests alone."); see also *id.* at 38, 59–64.

31. *Id.* at 22.

approve a project, much less a significant change in policy, in the face of significant opposition from the electorate.

Some scholars, recognizing that local governments generally do not make land use decisions that run contrary to the wishes of this most vocal group of constituents, have proposed that higher levels of government must take a more direct role in land use regulation in order to curb sprawl.<sup>32</sup> *Zoned Out* does not appear to take sides in this particular aspect of the sprawl debate. Its discussion of regional or statewide measures, such as Oregon's Transportation Planning Rule, and judicial paradigms, such as Pennsylvania Supreme Court's decision in the *Girsh Appeal*,<sup>33</sup> centers on the permissive nature of those systems (e.g., Oregon's rule forces local governments to *allow* high-density, transit-oriented development in certain locations), rather than on their efficacy as regional or state-wide measures.<sup>34</sup> In general, the book touches only lightly on the specifics of regulatory reform, and these sections simply describe the kinds of reform that could bring about a liberalization of land use markets.<sup>35</sup> *Zoned Out* leaves it up to the reader to figure out how to achieve these reforms.<sup>36</sup>

## 2. *Neighbors' Access to Direct Democracy*

The second reason *Zoned Out* provides for dismissing the role of neighborhood opposition is that neighbors lack the power or authority to prevent smart growth development projects; only local planning

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32. See, e.g., Briffault, *supra* note 10, at 260–70; Buzbee, *supra* note 5; Julian C. Juergensmeyer, *Foreword: An Introduction to Urban Sprawl*, 17 GA. ST. U. L. REV. 923 (2001); Manan M. Yanjik, Comment, *Challenges to "Smart Growth": State Legislative Approaches to Comprehensive Growth Planning and the Local Government Issue*, 2004 WIS. L. REV. 229.

33. Appeal of Girsh, 263 A.2d 395 (Pa. 237 1970).

34. LEVINE, *supra* note 3, at 43–44, 133. The Oregon Transportation Planning Rule is a regulation adopted by Oregon's Land Conservation and Development Commission (LCDC) to implement the state's planning and transportation goals. For more on Oregon's land use regulations and the LCDC, see *infra* notes 70–79 and accompanying text. In the *Girsh Appeal*, the Pennsylvania Supreme Court established a "builder's remedy": If a municipality failed to comply with a state mandate to provide zones for all reasonable types of housing to accommodate population growth of all income groups, a developer seeking to construct multifamily housing in that municipality could obtain "injunctive relief in the form of specific court-mandated authorization to build on a particular site." LEVINE, *supra* note 3, at 133; see also *Appeal of Girsh*, 263 A.2d at 399.

35. See LEVINE, *supra* note 3, at 190–200.

36. See *id.* at 83 (arguing that "the main resource needed to expand housing supplies in job-rich suburban areas is the political will for the reform of exclusionary land-use regulations"); *id.* at 123 ("The missing constituency [for smart growth] is not that of the potential home buyer or renter, but rather the local body politic willing to allow compact development in its own back yard.").

commissions and city councils have this regulatory authority.<sup>37</sup> In many states, this assertion is simply incorrect, as landowners may override the decisions of these planning bodies by utilizing the tools of direct democracy—the referendum and the initiative.<sup>38</sup> *Zoned Out* overlooks the role of direct democracy in land use planning. In twenty-four states, the people have the power to overturn the government's approval of a development project by referendum.<sup>39</sup> Twenty-four states and the District of Columbia allow the people to adopt or reform land use regulation by initiative.<sup>40</sup> Moreover, these tools are frequently put to use. In 2006, seventy-five initiatives, which are new laws qualified by voter petition, were placed on ballots across the country.<sup>41</sup> Statewide initiatives mark only the tip of the iceberg of direct democracy, however. Local referenda, including referenda on local development decisions, can number in the tens of thousands annually.<sup>42</sup> Thus, it is simply not the case that strong-willed local governments can bring about smart growth developments against the wishes of neighboring landowners, as these landowners can and do override such land use decisions through the processes of referenda and initiatives.

The power of the referendum is apparent in some of *Zoned Out's* anecdotal evidence, although the book does not discuss it. For example, *Zoned Out* describes how the town council in Scarborough, Maine approved a high-density, mixed-use development that was supported by prodevelopment and environmental interests alike, only to have its approval overturned by referendum.<sup>43</sup> The result of the referendum was subsequently challenged in court, and out of that lawsuit came a settlement which allowed a reduced version of the original development proposal to go forward. Although the direct intervention of the town's residents through the referendum process delayed and ultimately reduced

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37. See, e.g., *id.* at 42 (“Neighborhood opposition affects development only when translated into the regulatory decisions of bodies like city councils and municipal planning commissions.”); *id.* at 40 (“Objections by the community at large would have little relevance for the prospects of New Urbanist development but for the transformation of these objections into legally binding land-use regulation.”); *id.* at 22 (“Thus [high-density] development proposals are said to fail because of ‘neighborhood opposition’—as if this sentiment were a force independent of the regulatory authority required to operationalize it.”).

38. See discussion *infra* Part III.

39. See Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1512 (1990); Cody Hoesly, Comment, *Reforming Direct Democracy: Lessons from Oregon*, 93 CAL. L. REV. 1191, 1195 n.25 (2005).

40. Hoesly, *supra* note 39, at 1194 n.23.

41. INITIATIVE & REFERENDUM INSTITUTE, BALLOTWATCH, ELECTION RESULTS 2006 at 1 (Nov. 2006), available at [http://www.iandrinstitute.org/BW%202006-5%20\(Election%20results-update\).pdf](http://www.iandrinstitute.org/BW%202006-5%20(Election%20results-update).pdf).

42. Eule, *supra* note 39, at 1510 n.25.

43. LEVINE, *supra* note 3, at 199.

the density of the project, *Zoned Out* does not pause to investigate this point, instead concluding that “[t]he primary obstacle to relatively compact development in this area . . . was the deployment of local regulatory power in a fashion that demanded very low-density growth.”<sup>44</sup>

Neighbors can also take control of land use decisions at the legislative level by the ballot initiative process. As discussed at greater length in Part III of this Essay, twelve of the seventy-five statewide initiatives on the ballot in 2006 proposed to change the government’s ability to take property or regulate land use.<sup>45</sup> In 2004, Oregonians passed Measure 37, which severely limited the efficacy of that state’s progressive, smart growth-oriented land use system. The short shrift given to neighborhood opposition in *Zoned Out* is particularly problematic in light of this recent movement toward direct voter control over land use via the initiative process.

### B. Neighbors’ Concerns about Smart Growth

Given the significant role of neighboring landowners in the planning process, the question remains whether *Zoned Out’s* analysis would convince otherwise skeptical neighbors to support smart growth-oriented reform of land use regulation—or even to support an individual approval of higher-density development. Although some scholars may oppose land use regulation aimed at curbing sprawl because they think it necessarily constitutes an unjustified intervention in the market, neighbors, particularly homeowners, may have other reasons for their opposition, unrelated to the workings of the market. *Zoned Out* provides a powerful argument to convince the scholars of their error, but does little to address the concerns of homeowners.

Other scholars have attempted to identify the concerns neighboring homeowners have about the development of higher-density residential housing.<sup>46</sup> According to these scholars, homeowners can generally be counted on to oppose any change in the neighborhood that could possibly reduce the value of their homes or reduce the quality of public services provided in their community.<sup>47</sup> Given homeowners’ interests, it is unlikely that they would be concerned with whether particular land use regulations interfere with the free market. Rather, the question raised by the homeowner is whether this higher-density development will reduce

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44. *Id.* at 200.

45. INITIATIVE & REFERENDUM INSTITUTE, *supra* note 41, at 1 (noting that eminent domain measures were on the ballot in more states than any other kind of measure).

46. See, e.g., WILLIAM A. FISCHEL, THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES 229–31 (2001).

47. *Id.*

the value of his or her asset. Indeed, *Zoned Out* recognizes this fact in discussing how neighbors use the zoning process to exclude more affordable housing types, including multifamily housing, from suburban communities:

Suburban populations which are generally conservative—and one would suspect believers in permitting the free market to operate—don't trust the free market to operate to serve their own interests. They have employed the power of the state to protect their own very selfish desire to create a community that is amenable to themselves, but to prohibit the large mass of the population from sharing in those amenities. They have not bought the land, but instead have done the cheap and nasty thing of employing the police power to protect their own interest in the land and to exclude the largest part of the population.<sup>48</sup>

The tendency of homeowners to oppose any change in the neighborhood that could reduce the value of their property—even if the chances of such a reduction are quite slim—is discussed by Professor Fischel in *The Homevoter Hypothesis: How Home Values Influence Local School Finance, Government Taxation, and Land-Use Policies*.<sup>49</sup> Fischel relates a story from his time on the Hanover, New Hampshire zoning board.<sup>50</sup> A developer had proposed to develop about a dozen single-family homes on large lots in a lightly populated residential district.<sup>51</sup> According to Fischel, “The proposed homes would be nicer than those already in the neighborhood, and all of them would be out of sight of adjacent homeowners.”<sup>52</sup> Nevertheless, neighbors came out and voiced opposition to the project, raising a number of issues (including that the development would have a negative impact on community “character”) that Fischel thought were baseless.<sup>53</sup>

Fischel proposes that this neighborhood opposition to a project that would have the likely effect of improving the value of existing homes was due to neighbors using the zoning procedure to insure against any possible adverse impact to the value of their own homes.

[The complaining neighbor is] not worried about the likely, expected effect of the development, which was benign. He's worried about the variance (statistical, not legal) in the outcome. He, like almost everyone else in town who appears at these hearings, owns his home. It constitutes nearly all of his nonretirement assets. He can insure it

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48. LEVINE, *supra* note 3, at 82 (quoting Jerome Aument, *Domestic Land Reform*, 5 CITY 56, 56 (1971)).

49. FISCHEL, *supra* note 46.

50. *Id.* at 9.

51. *Id.*

52. *Id.*

53. *Id.*

against fire and theft, but he cannot insure it against adverse neighborhood effects. So Tom (the NIMBY) was doing his best in the absence of insurance to reduce the possibility that some unlikely event would adversely affect the value of his home.<sup>54</sup>

Given that there is no insurance market that protects homeowners from lost property values due to a change in the neighborhood for the worse, “zoning offers a kind of second-best institution” that can accomplish something similar.<sup>55</sup> The neighbor’s participation in the zoning process is a way to insure the value of his property by attempting to stop all change in the neighborhood, even if that change could be for the better.<sup>56</sup>

If Fischel’s analysis of what motivates a homeowner is correct, a neighboring homeowner is not interested in whether the planning commission imposes a more or less restrictive land use regulation, but in “reduc[ing] the possibility that some unlikely event would adversely affect the value of his home.”<sup>57</sup> *Zoned Out* does not attempt to demonstrate that liberalizing land use regulation, as opposed to making it more restrictive, will address these concerns.

### III. OREGON & ARIZONA: THE NEIGHBORS AS LEGISLATORS

In addition to flexing their significant political muscle to prevent unwanted higher-density development in their own communities,

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54. *Id.* (emphasis omitted).

55. *Id.* at 10.

56. To be sure, Fischel’s explanation for why a neighboring homeowner would oppose the construction of nicer homes in his community is a narrow one. Another explanation proposed by a colleague of mine is that owners of older homes do not want to be outdone by new development. If nicer, newer, bigger homes go in down the street, suddenly the older homes in the neighborhood could appear shabby or run-down. Even if their property values go up due to the new development, neighbors may still find it distasteful to feel like poor relations to the new residents.

57. FISCHEL, *supra* note 46, at 9. As an aside, this idea that homeowners use zoning as a kind of property value insurance appears to be in some tension with Fischel’s main thesis that “homeowners, who are the most numerous and politically influential group within most localities, are guided by their concern for the value of their homes to make political decisions that are *more efficient* than those that would be made at a higher level of government.” *Id.* at 4 (emphasis added). According to Fischel’s analysis of the planning commission incident, the homeowner opposes all neighborhood change, even if it looks like it will be change for the better, because of the off chance that such change may in fact bring about neighborhood decline. *Id.* at 9. The homeowner does not oppose or support development in his neighborhood on the basis of “the rationally expected outcome from the development.” *Id.* In Fischel’s example, the rationally expected outcome would be an improvement in the complaining homeowner’s property values. Thus, under this analysis, the homeowner actually makes the land use market less efficient, because he would stop development that would likely improve all land values in the community. To solve the problem of the inefficient NIMBY, Fischel proposes a system of home-value insurance. *Id.* at 268–70. However, these inefficiencies may suggest that homeowners are ill-equipped to determine optimal development in the community, even if they are better equipped than political decisionmakers at determining the optimal expenditure on public services.

homeowners and neighbors in twenty-four states can also use the tools of direct democracy to control local land use regulations at the state-wide, legislative level. One dramatic example of this use of direct democracy was the passage of Measure 37, a regulatory takings initiative, in Oregon in 2004. Similar initiatives appeared on ballots across the nation in November 2006.<sup>58</sup> These measures would require state and local governments to pay landowners for a reduction in land value caused by government action.<sup>59</sup> Most of the debate around these measures has focused on their extraordinary cost, their potential to spark years if not decades of litigation, and the chilling effect they will have on government regulation of land use.<sup>60</sup> These measures are relevant to *Zoned Out's* analysis for a different reason: they demonstrate how landowners can and do take direct action to control land use regulation. Moreover, they provide some insight into the kinds of land use reform the public is willing to embrace.

It is perhaps no coincidence that the first state-wide regulatory takings initiative was adopted in Oregon, the state that, until then, had

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58. See FRANK ET AL., *supra* note 2, at 8 & app. E (listing the states with eminent domain and regulatory takings initiatives on the ballot in November 2006).

59. *Id.* app. E; see also Proposition 207, art. 2.1, § 12-1134 (Ariz. 2006), available at [http://www.azsos.gov/election/2006/Info/PubPamphlet/Sun\\_sounds/english/Prop207.htm](http://www.azsos.gov/election/2006/Info/PubPamphlet/Sun_sounds/english/Prop207.htm); Cal. Att'y Gen., Proposition 90: Government Acquisition, Regulation of Private Property. Initiative Constitutional Amendment, Official Title and Summary (2006), available at [http://www.sos.ca.gov/elections/vig\\_06/general\\_06/pdf/entirevig\\_nov06.pdf](http://www.sos.ca.gov/elections/vig_06/general_06/pdf/entirevig_nov06.pdf); Proposition 2: Initiative Limiting Eminent Domain When Used for Economic Development; Defining Land Use Law; and Permitting Just Compensation for Regulatory Takings § 4(5) (Idaho 2006), available at <http://www.idsos.state.id.us/elect/inits/06init08.htm>; Montana Initiative No. 154 (Mont. 2006), available at <http://sos.state.mt.us/elb/archives/2006/1/I-154.asp>; Initiative Measure No. 933 §3 (Wash. 2006), available at <http://www.secstate.wa.gov/Elections/initiatives/text/i933.pdf>. The Montana Initiative was subsequently invalidated by the Montana Supreme Court due to fraud and deception used by petition gatherers, and thus did not appear on the November ballot. Mike Dennison, *State High Court Rules Out Initiative—Unanimous Decision Cites 'Pervasive Fraud' By Signature Gatherers*, BILLINGS GAZETTE, Oct. 27, 2006, at A1, available at <http://billingsgazette.net/articles/2006/10/27/news/state/20-initiatives.txt>; Opinion, *High Court Upholds Initiative Process Integrity*, BILLINGS GAZETTE, Nov. 2, 2006, at A4, available at <http://billingsgazette.net/articles/2006/11/02/opinion/gazette/gazetteopinion.txt>.

60. See, e.g., FRANK ET AL., *supra* note 2, at 26; Californians Against Taxpayer Trap, No on Prop 90, <http://www.noprop90.com/> (last visited 2/1/2007) (arguing that Proposition 90 will cost taxpayers billions each year, create unending lawsuits, and prevent state and local governments from enacting or enforcing land use and environmental protection laws); Citizens for Community Protection, No on Initiative 933, <http://www.noon933.org> (last visited 2/1/2007); Greater Yellowstone Coalition, Idaho—Vote NO on Proposition 2, <http://www.greateryellowstone.org/issues/issue.php?threatID=34> (last visited 2/1/2007); Neighbors Protecting Idaho, No on Prop 2, <http://www.neighborsprotectingidaho.org> (last visited 2/1/2007); Protecting Arizona Taxpayers Coalition, Vote No on Proposition 207!, <http://www.noprop207.org> (last visited 2/1/2007). See generally Center for Public Integrity, Takings Initiatives Accountability Project, <http://www.takingsinitiatives.org/index.php> (providing information on the regulatory takings initiatives in Arizona, California, Idaho, Nevada, Montana, and Washington).

created the most aggressive smart growth land use structure in the nation.<sup>61</sup> In 1973, the Oregon legislature adopted Senate Bill (SB) 100, which laid the groundwork for Oregon's statewide planning system.<sup>62</sup> SB 100 created the Land Conservation and Development Commission (LCDC).<sup>63</sup> This agency is charged with developing statewide planning "goals" and establishing the requirements local planning agencies must satisfy to meet those goals.<sup>64</sup> Since its inception, the LCDC has created nineteen planning goals, including goals for the conservation of farmland and open space, the improvement of air and water quality, the stabilization of economic development, the development of sensible transportation infrastructure, and increased public involvement in the planning process.<sup>65</sup> These goals not only facilitate higher-density development in already urbanized areas, but also restrict development in rural areas.<sup>66</sup> Pursuant to state law, most land use decisions made by state or local governments must be consistent with these goals.<sup>67</sup> SB 100 also required every city and county to amend its comprehensive land use plan, or to develop one if none existed previously, to be consistent with these goals.<sup>68</sup>

The results of this land use program are evident. In Portland, for example, the demarcation between urban areas and rural ones is sharp.<sup>69</sup> Although Portland's urban growth boundary is periodically expanded into the outlying rural areas, city officials estimate that the total metropolitan footprint of Portland is about half what it would have been without the state's land use program.<sup>70</sup> According to these results, SB 100 has been very effective at curbing sprawl.

In 2004, however, the voters of Oregon voted 61 percent in favor of Measure 37, an initiative that created a statutory right to government payment when a state or local agency "enacts or enforces" a "land use

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61. Daniel Brook, *How the West Was Lost*, LEGAL AFF., Mar./Apr. 2005, at 44.

62. Edward J. Sullivan, *Year Zero: The Aftermath of Measure 37*, 36 ENVTL. L. 131, 134-35 (2006). Oregon's unique system of state-wide land use regulation and the effects of Measure 37 have been analyzed in a number of other law review articles. See, e.g., Symposium, *Ballot Measure 37: The Redrafting of Oregon's Landscape*, 36 ENVTL. L. 1 (2006) (including numerous essays and articles on the causes and effects of Measure 37); Sara C. Galvan, Comment, *Gone Too Far: Oregon's Measure 37 and the Perils of Over-Regulating Land Use*, 23 YALE L. & POL'Y REV. 587 (2005); William A. Van Vector, Jr., Comment, *The Backlash to Land Use Regulation Continues: An Analysis of Oregon's Measure 37*, 26 J. LAND RESOURCES & ENVTL. L. 221 (2005).

63. Sullivan, *supra* note 62, at 134-35.

64. *Id.*

65. *Id.* at 135.

66. *Id.*

67. *Id.*

68. *Id.*

69. Brook, *supra* note 61, at 45.

70. *Id.* at 45-46.

regulation” that restricts the use of property and reduces its value.<sup>71</sup> Once a landowner files a valid claim for compensation, the government has two options. Either it can pay the landowner for the devaluation of her property, or it can “modify, remove or not . . . apply the land use regulation” causing the alleged devaluation of property, and thus allow the landowner to use the property in a way that was permitted at the time she purchased it.<sup>72</sup>

The cost of enforcing a land use regulation can be staggering. For example, one landowner filed a Measure 37 claim for 150 acres within the boundaries of a national park, proposing to develop the property with a mining operation and a forty-eight-unit subdivision.<sup>73</sup> The price of denying the development: \$203 million.<sup>74</sup> The state could not pay that sum, and thus was forced to waive the land use regulation that had prevented the development.<sup>75</sup> Today, the mining operations are underway.<sup>76</sup> Indeed, because waiving the land use regulation does not require the government to pay the landowner, some scholars have argued that, given fiscal constraints, the only real option under Measure 37 is for local governments is to waive the offending regulation.<sup>77</sup> To date, only one offer to pay, rather than to waive the regulation, has been made out of thousands of claims.<sup>78</sup>

In November 2006, regulatory takings initiatives similar to Measure 37 were on the ballot in California, Washington, Idaho, and Arizona.<sup>79</sup> Like Measure 37, all of these propositions would have required the government to pay landowners for loss of value to their property caused by governmental action.<sup>80</sup> Unlike Measure 37, however, most of these

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71. OR. REV. STAT. § 197.352 (2006); Sullivan, *supra* note 62, at 139. Measure 37 was quickly challenged as unconstitutional. Early in 2006, the Oregon Supreme Court rejected the challenge and upheld the measure. See *MacPherson v. Dep’t of Admin. Servs.*, 130 P.3d 308 (Or. 2006).

72. OR. REV. STAT. § 197.352(8) (2006).

73. ERIC DE PLACE & COLLEEN KALEDA, SIGHTLINE INSTITUTE, TWO YEARS OF MEASURE 37: OREGON’S PROPERTY WRONGS 3, 6 (2007), available at [http://www.sightline.org/research/sprawl/res\\_pubs/property-fairness/measure-37-report/two-years-m37-report](http://www.sightline.org/research/sprawl/res_pubs/property-fairness/measure-37-report/two-years-m37-report).

74. *Id.*

75. *Id.*

76. *Id.*

77. Sullivan, *supra* note 62, at 143.

78. DE PLACE & KALEDA, *supra* note 73, at 3.

79. FRANK ET AL., *supra* note 2, app. E.

80. See Proposition 207, art. 2.1, § 12-1134 (Ariz. 2006) (requiring just compensation for reduction of the fair market value of property caused by the enactment or application of any land use law enacted after the proposition is passed that limits the owner’s rights to use, divide, sell, or possess the property); Cal. Att’y Gen., *supra* note 59, § 3 (proposed amendment to California Constitution section 19, article I, defining damage to property, for which compensation is necessary, to include “government actions that result in substantial economic loss to private property”); Proposition 2: Initiative Limiting Eminent Domain When Used for Economic Development; Defining Land Use Law; and Permitting Just Compensation for

initiatives also contained limitations on the government's ability to use eminent domain to acquire property.<sup>81</sup> In the wake of the Supreme Court's decision in *Kelo v. City of New London*, the idea of limiting the government's power of eminent domain was an extremely popular one with voters across the county.<sup>82</sup>

Voters in Arizona passed their regulatory takings initiative, Proposition 207, with 65 percent of the vote.<sup>83</sup> Similar initiatives failed in California, Washington, and Idaho. In California, the vote was close: only 52 percent voted no.<sup>84</sup> In Washington, where the measure did not include eminent domain reform, the measure lost 58 to 42 percent.<sup>85</sup> Seventy-four percent of Idahoans voted to defeat Proposition 2.<sup>86</sup>

Arizona's Proposition 207 and Oregon's Measure 37 present significant new hurdles for state and local governments in Arizona and Oregon seeking to adopt certain kinds of smart growth oriented regulations. The most obvious hurdle is that these measures require local governments to pay to use key tools in the smart growth arsenal, such as downzoning property outside areas designated for urban growth.<sup>87</sup> Whereas federal and state constitutional laws generally only require regulators to pay for a "taking" of property when a regulation precludes any economical use of the property,<sup>88</sup> these regulatory takings measures require regulators to pay whenever a regulation reduces the value of property.

The passage of Measure 37 and Proposition 207, as well as the very presence of three other statewide regulatory takings initiatives on ballots in 2006, is relevant to *Zoned Out's* analysis because it reveals the power

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Regulatory Takings § 4(5) (Idaho 2006) (amending IDAHO CODE § 67-8003(5) to "If an owner's ability to use, possess, sell, or divide private real property is limited or prohibited by the enactment or enforcement of any land use law after the date of acquisition by the owner of the property in a manner that reduces the fair market value of the property, the owner shall be entitled to just compensation . . ."); Initiative Measure No. 933 §3 (Wash. 2006) (requiring government agencies to pay compensation for enforcing or applying any ordinance, regulation or rule that would damage the use or value of private property).

81. Only Washington's initiative was a pure, regulatory takings initiative.

82. 545 U.S. 469 (2005); FRANK ET AL., *supra* note 2, at 8.

83. See INITIATIVE & REFERENDUM INSTITUTE, *supra* note 41, at 3.

84. *Id.* at 4.

85. *Id.* at 9.

86. *Id.* at 5.

87. See *supra* note 10.

88. Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992); FRANK ET AL., *supra* note 2, at 9–10 (describing contours of regulatory takings law); see also Lingle v. Chevron U.S.A., Inc., 544 U.S. 528 (2005) (describing a balancing test to be used to determine whether a regulatory taking has occurred); Dolan v. City of Tigard, 512 U.S. 374 (1994) (holding that government exactions may constitute regulatory takings); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987) (holding that government exactions may constitute regulatory takings); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978).

and interest of voters in controlling land use regulations. As noted above, the power of voters to change (or maintain) land use regulations is much greater than suggested in *Zoned Out*. Even if a state government makes smart growth a top priority and enacts a progressive system designed to allow higher-density, transit-oriented development in urban areas, and to preserve rural areas, as Oregon did, voters are able to override their elected officials through the initiative process.<sup>89</sup>

These initiatives may also provide some insight into what kinds of land use reform voters can be expected to embrace and, indeed, whether *Zoned Out's* argument in favor of smart growth would be persuasive to them. Interpreting the voters' intent in enacting initiatives can be a tricky business, however. As the literature on direct democracy demonstrates, voters often have only a hazy understanding of the initiatives on the ballot.<sup>90</sup> Moreover, there is a strong correlation between the amount of money spent on an initiative campaign and the election outcome, suggesting that voters may vote based on a media campaign more than on their own preferences.<sup>91</sup> Further complicating matters, many of the 2006 regulatory takings initiatives were supported in large part by organizational donations backed by a single individual, Howard Rich.<sup>92</sup> This fact, when taken together with the fact that three out of four of the regulatory takings initiatives on the ballot last November failed, may suggest that the prevalence of these measures was not a true sign of popular support for increased property rights.<sup>93</sup> However, there is no disputing that Arizonans and Oregonians voted in favor of Proposition 207 and Measure 37 by significant margins, and other initiatives, such as Proposition 90 in California, were only narrowly defeated.

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89. *Zoned Out* is by no means the only scholarly work to overlook the importance of direct democracy to policy reform. In *Suburban Growth Controls: An Economic and Legal Analysis*, Professor Ellickson proposes a system of rules requiring payment of damages to property owners in the event that government regulation diminishes the value of their property. Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385 (1977). Ellickson quickly dismisses the possibility of legislative enactment of these rules, and instead argues that the judiciary is the most appropriate body to implement them. *Id.* at 473–75. Ellickson makes no mention of direct democracy. See also FISCHER, *supra* note 46, at 260–89 (discussing possible reforms to local government without mention of role of direct democracy).

90. See, e.g., Garnett, *supra* note 6, at 173 (“[V]oters often have absolutely no idea what they are doing when they vote on initiatives.” (citing DAVID B. MAGLEBY, DIRECT LEGISLATION: VOTINGS ON BALLOT PROPOSITIONS IN THE UNITED STATES (1984))).

91. *Id.* at 172.

92. See Josh Israel, *Who's Bankrolling the Initiatives?*, TAKINGS INITIATIVES ACCOUNTABILITY PROJECT, Oct. 3, 2006, <http://www.takingsinitiatives.org/index.php?Itemid=65>.

93. But see Elizabeth Garrett, *Who Directs Direct Democracy?*, 4 U. CHI. L. SCH. ROUNDTABLE 17, 19 (1997) (“Most efforts to submit a question to the people fail to surmount the procedural hurdles standing in the way of ballot access.”).

At first blush, the purpose embodied in these regulatory takings initiatives appears to support *Zoned Out's* premise that higher-density development may receive a warmer welcome if it is demonstrated that such development is the result of liberalizing land use regulation. After all, regulatory takings initiatives appeal to a voter's sense that landowners should be able to do what they want with their property, and that government interference should be limited.<sup>94</sup> In theory, the value of one's property is diminished when governmental regulation limits the kind and intensity of development that can be placed on the property. The passage of these initiatives suggests that voters and landowners would be more receptive to changes in land use regulation that liberalize property uses than to changes that restrict property use.

From the perspective of a landowner wishing to enhance the value of her property, however, limiting government's ability to restrict land use is a double-edged sword. On one hand, the landowner may be freer to develop her property as she sees fit. On the other hand, her neighbor is similarly entitled. By limiting the government's ability to regulate land use, the voters also tie their own hands. As described above, under the current system of land use regulation, neighbors may participate in the development process by applying political pressure against unpopular projects. Similarly, in many states neighbors can override development approvals by referendum. Under the newly adopted regulatory takings measures, however, these same activities will come at a price: the price of paying their neighbors not to develop their property.<sup>95</sup>

It is difficult to determine whether voters in California, Idaho, and Washington recognized this fact in voting down the regulatory takings measures in their states. As with all initiatives, the failure of these three measures could be unrelated to their actual substance. In general, most ballot questions fail.<sup>96</sup> Moreover, the campaigns against these measures tended to focus on the costs of implementing the new regulatory takings

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94. To be precise, Proposition 207 in Arizona and Measure 37 in Oregon aim at limiting government interference without compensation for the interference that can be expected by the landowner. To that end, Measure 37 defines landowner expectation by the regulations in effect at the time the owner purchased the property; Proposition 207 defines this expectation as the regulations in effect at the time the initiative was adopted.

95. Perhaps an even bigger concern from the perspective of *Zoned Out* is that, in states where such regulatory takings measures have been adopted, local governments will be loathe to liberalize land use regulations for fear that, in the future, the government will have to pay a heavy price for any restriction it imposes on what may be developed. See, e.g., Sullivan, *supra* note 62, at 156–57.

96. Garrett, *supra* note 93, at 23 (“Even where there is one-sided spending in favor of a proposition, voters defeat the proposals two-thirds of the time.”). But see INITIATIVE & REFERENDUM INSTITUTE, *supra* note 41, at 1 (noting that 68 percent of ballot propositions were approved in 2006). Voters who are unsure of the meaning of a ballot measure generally vote “no.” See also Garnett, *supra* note 6, at 174.

schemes and the potential for abuse, rather than on the voter's potential loss of control over neighborhood development.<sup>97</sup> However, reports of landowner discontent with the effects of Measure 37 (passed in 2004) in Oregon were also circulating by the time these measures were on the 2006 ballot.<sup>98</sup> In addition to its tremendous cost, a major complaint about Measure 37 was that landowners could no longer count on land use laws to prevent nearby developments from impacting their property value and locating incompatible uses almost literally in their back yards.<sup>99</sup> For example, Oregon farmers saw residential subdivisions sprout up next to their orchards and fields.<sup>100</sup> The failure of the regulatory takings measures to pass in California, Idaho, and Washington might be attributed, at least in part, to this realization.

In short, liberalizing land use regulations—allowing landowners to develop more densely or with different uses than are currently allowed—may be as unpalatable to neighboring homeowners as placing increased restrictions on property. Given the political power of local homeowners in the development review process and their independent power through direct democracy, *Zoned Out's* analysis would have benefited from some discussion of how its free market arguments would or would not persuade this important group of constituents.

#### CONCLUSION

*Zoned Out* provides a significant service to smart growth advocates by persuasively demonstrating that a market exists for higher-density, transit-oriented development, both on the supply and demand sides of the equation. Moreover, *Zoned Out* clearly shows that the main barrier to this smart growth is the current pattern of land use regulation, which uniformly places caps on how densely a landowner may develop her property. Therefore, what is needed to achieve smart growth, *Zoned Out* concludes, is a *liberalization* of zoning and other land use regulations to *allow* higher-density development in urban areas.

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97. See, e.g., Frank D. Russo, *Attention California Voters on Prop 90: New Poll Shows Oregon Voters Now Regret Similar Measure They Passed in 2004*, CAL. PROGRESS REP., Oct. 25, 2006, [http://www.californiaprogressreport.com/2006/10/attention\\_calif.html](http://www.californiaprogressreport.com/2006/10/attention_calif.html).

98. *Id.*

99. See DE PLACE & KALEDA, *supra* note 73, at 4–5, 8–14 (reporting development of mining operation next to alpaca farm, and residential subdivisions in the midst of farmland, vineyards, and forests). In response to these negative impacts, Oregonians voted in November 2007 to limit Measure 37 and to curb these types of impacts. See Or. Sec'y of State, Measure 49—Explanatory Statement (2007), available at [http://www.oregonvotes.org/nov62007/guide/m49\\_es.html](http://www.oregonvotes.org/nov62007/guide/m49_es.html) (describing Measure 49); Or. Sec'y of State, November 6, 2007, Special Election Abstract of Votes, available at <http://www.oregonvotes.org/nov62007/abstract/results.pdf> (noting the passage of Measure 49).

100. See DE PLACE & KALEDA, *supra* note 73, at 4–5, 8–14.

While *Zoned Out* may change the minds of those who oppose smart growth because they believe it unduly interferes with the workings of the free market, it may not convince neighboring homeowners who are averse to seeing a higher-density, mixed-use development spring up in their neighborhood. *Zoned Out's* analysis fails insofar as it overlooks the power these local adversaries wield to stop such smart growth. The prevalence of regulatory takings initiatives on the ballot in 2006 demonstrates that it takes more than political willpower on the part of local officials to institute any change in land use regulation, whether that change liberalizes or restricts permissible land use; what is necessary is the support of the people whose land will be regulated.