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We Need an Intervention: Restoring Integrity to Referendum Zoning in Ohio

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— Note —

We Need an Intervention: Restoring Integrity to Referendum Zoning in Ohio

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Introduction

Our justice system is designed to be adversarial. When a plaintiff sues a defendant, their interests are not supposed to neatly overlap. Put simply, both sides should want to win. But what if they do not? Can someone else take up the fight?

In at least one area, the answer in Ohio is often "no." Look no further than referendum zoning. Since the 1970s, the referendum has been a "tool of great importance" for rezoning land in Ohio.[1] Yet while many of Ohio's municipalities and townships empower their residents to vote on rezoning proposals, Ohio courts regularly shun those who seek to defend the result of a rezoning referendum in court—even when no one else will. This undermines the most "profound" power "[i]n our representative democracy": the right of the people to vote.[2]

Consider the following scenario: Donnie Developer wants to rezone a parcel of land in Anytown, Ohio, for commercial purposes. Anytown's city council enthusiastically approves Donnie's proposal, primarily because commercial development will raise tax revenue for Anytown. But since Anytown's charter contains a referendum-zoning provision,

1. Edward Kancler, *Litigating the Zoning Case in Ohio: Suggestions to Fill the Textbook Void*, 24 Clev. St. L. Rev. 33, 40 (1975).
2. Adams v. DeWine, 2022-Ohio-89, ¶ 1, 195 N.E.3d 74, 76 (Ohio 2022).

a majority of Anytown voters must support Donnie's proposal in the next general election to bring it to life. They do not. Anytown's residents—particularly Donnie's neighbors—like Anytown just as it is, and they fear the increased traffic, pollution, and noise that would accompany commercial development. Naturally, both Donnie and Anytown lament this outcome. Yet Donnie's proposal remains salvageable: if Donnie sues Anytown for a declaratory judgment that his parcel's *existing* zoning classification is unconstitutional, Anytown enjoys wide latitude to settle the case. And by settling on exceedingly favorable terms to Donnie, Anytown can effectuate Donnie's rezoning proposal (or something close to it). So, instead of litigating to uphold the referendum result, Anytown quickly settles with Donnie.

Alas, this maneuver feels like a cheat code. To guard against these collusive settlements, I argue that Ohio should allow landowners to intervene in zoning disputes like Donnie's, using the federal courts' approach to intervention as a model. Simply put, if Anytown is unwilling to defend the validity of its own zoning classification, Donnie's neighbors should be able to do so. They at least have a dog in the fight.

This Note proceeds in three parts. Part I sets the stage for the problem by exploring referendum zoning's history and its tendency to produce nonadversarial lawsuits between developers and local governments. Part II considers how to address the problem, focusing on liberalizing the standard for neighboring landowners to intervene. Finally, Part III examines some of the thornier issues associated with intervention, including timeliness and limitations on its scope.

I. Nonadversarial Post-Referendum Zoning Litigation: A Primer

When a rezoning proposal fails in a referendum, the defeated developer's next step is typically to sue the local government. This Part first describes how post-referendum zoning litigation sprang from two U.S. Supreme Court decisions that originated in Northeast Ohio: *Village of Euclid v. Ambler Realty Co.*[3] and *City of Eastlake v. Forest City Enterprises, Inc.*[4] It then probes why this phenomenon tends to be so nonadversarial, to the perpetual detriment of rezoning opponents.

A. The Intersection of Euclid *and* Eastlake

In *Village of Euclid v. Ambler Realty Co.*, the Supreme Court held that a zoning restriction is unconstitutional only if it is "clearly arbitrary and unreasonable, having no substantial relation to the public

3. 272 U.S. 365 (1926).

4. 426 U.S. 668 (1976).

health, safety, morals, or general welfare."[5] After the Court announced this deferential standard, "municipal zoning of land soon became the predominant method of guiding the physical development" of American communities.[6] And with zoning comes rezoning. As communities evolve, so too do their land-use restrictions.

Because article II of the Ohio Constitution reserves "initiative and referendum powers . . . to the people of each municipality"[7] on all legislative questions, and zoning is "clearly a legislative function,"[8] rezoning "is subject to the referendum process" in Ohio.[9] Accordingly, many of Ohio's local charters and ordinances contain referendum-zoning provisions.[10] For example, in 1971, voters in the City of Eastlake adopted a charter amendment requiring a proposed rezoning both to (1) gain city council approval and (2) earn at least 55 percent of the vote in a citywide election.[11] Meanwhile, Forest City Enterprises, a local developer, owned an eight-acre parcel of land in Eastlake on which it wished to construct a high-rise apartment building.[12] But there was a problem: the parcel was designated for industrial use only.[13]

Naturally, Forest City sought a rezoning from Eastlake's zoning board. The zoning board recommended the change to city council, which approved the recommendation. Forest City then returned to the zoning board for a parking-and-yard permit.[14] But this time the zoning board said no. Since Eastlake voters had yet to ratify Forest City's proposal, as required by the recent charter amendment, Forest City would have to wait.[15]

In response, Forest City sued Eastlake, alleging that the referendum provision arbitrarily and unreasonably delegated legislative power to residents.[16] And although Forest City prevailed in the Ohio Supreme

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5. *Euclid*, 272 U.S. at 395 (first citing Cusack Co. v. City of Chicago, 242 U.S. 526, 530–31 (1917); and then citing Jacobson v. Massachusetts, 197 U.S. 11, 30–31 (1905)).

6. Ronald H. Rosenberg, *Referendum Zoning: Legal Doctrine and Practice*, 53 U. Cin. L. Rev. 381, 381 (1984).

7. Ohio Const. art. II, § 1(f).

8. Forest City Enters., Inc. v. City of Eastlake, 324 N.E.2d 740, 743 (Ohio 1975), *rev'd on other grounds*, 426 U.S. 668 (1976).

9. *Id.* (citing Hilltop Realty, Inc. v. City of South Euclid, 164 N.E.2d 180, 180 (Ohio Ct. App. 1960)).

10. Rosenberg, *supra* note 6, at 423.

11. *Voters' Approval in Zoning Upheld*, N.Y. Times, June 22, 1976, at 22.

12. *See* City of Eastlake v. Forest City Enters., Inc., 426 U.S. 668, 670 (1976).

13. *Id.*

14. *Id.* at 670–71.

15. *Id.* at 671.

16. *See id.*

Court,[17] the U.S. Supreme Court reversed, upholding the constitutionality of the referendum requirement. Writing for the Court, Chief Justice Burger chided the Ohio Supreme Court for miscasting the referendum provision as a delegation of power. Citing James Madison's *Federalist No. 39*, the Court explained that because "all power derives from the people," a referendum is not a delegation of power but a *reservation* of power.[18] The Court touted the referendum as "a means for direct political participation" and compared it favorably to a town meeting.[19]

As Chief Justice Burger noted, Forest City did not argue that Eastlake's zoning restriction violated the *Euclid* standard.[20] If Forest City had considered the industrial classification unreasonable, though, "the zoning restriction would have been open to challenge in state court."[21] This aside would prove prescient. Today, when Ohio voters reject a rezoning proposal at the ballot box, that is rarely the end of the story. Almost as a matter of course, the losing developer will challenge the existing zoning classification's constitutionality. And when these lawsuits settle—as most do[22]—the losing developer often ends up with something close to its original proposal, referendum results notwithstanding.

Take a recent example from the Sixth Circuit. In *Benalcazar v. Genoa Township*,[23] Benton and Katherine Benalcazar owned a forty-three-acre parcel of land "zoned mainly for rural use" featuring "many rural qualities—plenty of trees, few houses, plenty of undeveloped land."[24] Seeking to develop the property as a residential neighborhood, the Benalcazars applied to Genoa Township for a zoning change. Although Genoa's board of trustees approved, Genoa residents successfully petitioned for a referendum on the issue. The ultimate vote was not close: "Over 75% of voters supported the referendum and opposed the development."[25]

17. *See* Forest City Enters., Inc. v. City of Eastlake, 324 N.E.2d 740, 746 (Ohio 1975).

18. *Eastlake*, 426 U.S. at 672–73.

19. *Id.*

20. *Id.* at 676–77.

21. *Id.* at 677.

22. Theodore Eisenberg & Charlotte Lanvers, *What Is the Settlement Rate and Why Should We Care?*, 6 J. Empirical Legal Stud. 111, 112 (2009) (observing that "[s]ettlement dominates outcomes of civil litigation in the United States").

23. 1 F.4th 421 (6th Cir. 2021).

24. *Id.* at 423.

25. *Id.*

Undeterred, the Benalcazars sued Genoa in federal court. And after barely litigating the case, the parties settled.[26] Genoa agreed to rezone the Benalcazars' property for residential use, while the Benalcazars agreed to downsize their proposed development and dismiss their claims against Genoa.[27] This was perfectly lawful. Under the Ohio Revised Code, "a township may settle any court action by a consent decree or court-approved settlement agreement which may include an agreement to rezone any property . . . ."[28]

That would have been the end of the case, but then two intervenors crashed the party. Dissatisfied with Genoa and the Benalcazars' "sham process" that "silence[d] the voice of its neighbors," a group of nearby landowners moved to intervene as defendants shortly after learning of the settlement.[29] Two weeks later, another neighboring couple joined them.[30] The district court allowed them to intervene, but there was a catch: the neighbors were permitted entry into the litigation only "for the limited purpose of challenging the sufficiency of [the Benalcazars'] Complaint."[31]

Needless to say, this presented an uphill battle. While the intervenors could now file a motion to dismiss—which Genoa had not done—that did nothing to hinder Genoa and the Benalcazars' ability to settle the case. Thus, to prevent the settlement, the intervenors had to show that the Benalcazars' complaint was so frivolous as to deprive the court of subject-matter jurisdiction, in which case the statute authorizing the settlement would not have applied.[32]

This, unsurprisingly, would prove too tall an order. The district court approved the settlement, and the Sixth Circuit found that the Benalcazars' constitutional claims were at least arguable, so it affirmed.[33] Nevertheless, Judge Sutton acknowledged "the intervenors' frustration that their successful referendum was minimized by this lawsuit and the resulting settlement—and that their right to vote in

26. Benalcazar v. Genoa Township, No. 2:18-CV-01805, 2020 WL 1853212, at *1–3 (S.D. Ohio Apr. 13, 2020) (noting that the parties "engaged in very limited motion practice" and that very little "energy [was] devoted towards discovery" before settling).

27. *Benalcazar*, 1 F.4th at 424.

28. Ohio Rev. Code Ann. § 505.07 (2021).

29. Motion of GTRRD, Inc. to Intervene at 2, Benalcazar v. Genoa Twp., No. 2:18-CV-01805, 2020 WL 1853212 (S.D. Ohio Apr. 13, 2020).

30. Motion of Luke and Janine Schroeder for Leave to Intervene at 1, Benalcazar v. Genoa Twp., No. 2:18-CV-01805, 2020 WL 1853212 (S.D. Ohio Apr. 13, 2020).

31. *Benalcazar*, 2020 WL 1853212, at *7.

32. *Benalcazar*, 1 F.4th at 424–25.

33. *Id.* at 426–27.

the referendum seemingly came to naught."[34] But absent a full-on repeal of the settlement statute, the neighbors were out of luck.[35]

B. Why Defendants Play Offense

As *Eastlake* and *Benalcazar* illustrate, when a rezoning proposal reaches a referendum, some local body—usually a zoning board or city council—has already approved it. Otherwise, there would be no need for a referendum. And when local leaders have voiced their support for the rezoning, residents who object understandably question how vigorously these leaders will defend the referendum result in court. After all, the leaders wanted the zoning change in the first place. How adverse could they possibly be to a lawsuit that demands *their preferred outcome*?

Of course, a city leader acting in good faith could both support a developer's rezoning proposal and, following a referendum defeat, zealously defend the community's decision to reject the proposal. But all too often, that does not happen.

For instance, in *Deitrick v. City of Mentor*,[36] residents rejected a rezoning proposal that would have allowed developers to build a Walmart Supercenter on a fifty-four-acre parcel. In accordance with Mentor's charter, city council had approved the proposal before it was put to a citywide vote. When the referendum failed, the developers sued Mentor.[37] And "almost immediately," city officials agreed to rezone the parcel for retail development.[38]

After learning of the settlement, Mentor resident Donald Deitrick filed a taxpayer suit. He alleged that city officials had not settled the Walmart developers' lawsuit in good faith—and in fact had colluded with them to sidestep the charter's referendum provision.[39] Discovery revealed several oddities with the developers' case. For starters, the developers had tipped off Mentor's leaders, including its law director, about their plans to sue at a luncheon. Yet these leaders did not discuss the merits of the developers' claims for weeks, until the developers had already filed their complaint.[40] In addition, Mentor's law director "had little to do with drafting" a joint stipulation of facts that accompanied the parties' settlement agreement, even though the stipulations forecasted "an economic apocalypse descending on Mentor absent the

34. *Id.* at 427.
35. *Id.*
36. 2008-Ohio-2138 (Ohio Ct. App. 2008).
37. *Id.* ¶¶ 2–5, 25.
38. *Id.* ¶ 64 (O'Toole, J., dissenting).
39. *Id.* ¶ 28.
40. *Id.* ¶ 67 (O'Toole, J., dissenting).

settlement."[41] Finally, the law director gave the developers' lawyer "advice" for its summary-judgment motion, which Mentor did not oppose.[42]

Nevertheless, a divided Eleventh District Court of Appeals affirmed summary judgment for Mentor, focusing on municipalities' broad discretion to settle litigation.[43] In dissent, Judge Colleen Mary O'Toole found Mentor's handling of the developers' lawsuit "remarkable," using the record to paint a picture of "Mentor's city fathers rushing into the developers' arms, bursting with relief that the developers had found a way, in court, to circumvent the will of the voters . . . ."[44]

If *Deitrick* represents one extreme—city leaders' summarily folding in the face of a developer's lawsuit—then *Shemo v. Mayfield Heights*[45] typifies the other end of the spectrum. *Shemo* involved two developers who wished to build a Costco on land zoned for single-family housing.[46] After city leaders rejected the developers' proposal, the developers sued Mayfield Heights, precipitating a fourteen-year odyssey through Ohio's court system that would prove especially consequential in the referendum-zoning context.[47]

The *Shemo* developers argued that because several other commercial properties bordered the south end of their parcel, it was unreasonable for Mayfield Heights to deny them a similar use.[48] Mayfield Heights countered that the developers' parcel was also abutted by a residential neighborhood, and it wanted to preserve the area's "residential character," "maintain a balanced mix of uses in the city," and minimize "traffic congestion and noise in the area."[49] Ultimately, the Ohio Supreme Court sided with the developers, holding that the single-family zoning classification contravened *Euclid*.[50] Despite this

41. *Id.* ¶ 65 (O'Toole, J., dissenting).

42. Memorandum in Support of Jurisdiction of Appellant Donald A. Deitrick at 2, Deitrick v. City of Mentor, No. 2008-1196 (Ohio June 19, 2008).

43. *Deitrick*, 2008-Ohio-2138, ¶¶ 37, 50–54.

44. *Id.* ¶¶ 68, 72 (O'Toole, J., dissenting). Incidentally, due to unanticipated "wetlands issues" with the parcel, the developers ultimately abandoned the project. *See* Betsy Scott, *Mentor Wal-Mart Supercenter Still Stalled*, News-Herald, https://www.news-herald.com/2009/09/15/mentor-wal-mart-supercenter-still-stalled/ [https://perma.cc/RZJ5-XPZW] (July 16, 2021, 1:20 AM).

45. 722 N.E.2d 1018 (Ohio 2000).

46. Jenny May, *Mayfield Hts. Settles Lawsuit*, News-Herald (Aug. 5, 2006), https://www.news-herald.com/2006/08/05/mayfield-hts-settles-lawsuit/ [https://perma.cc/QP68-4FET].

47. *Id.*

48. *Shemo*, 722 N.E.2d at 1022–23.

49. *Id.* at 1022.

50. *See id.* at 1024.

ruling, Mayfield Heights kept litigating the case, squabbling with the developers over ownership of the parcel's "paper streets"[51] and whether a taking had occurred.[52] Finally, in August 2006, Mayfield Heights settled with the developers, agreeing to pay them $3 million.[53]

Shemo quickly became something of a bogeyman, "put[ting] the fear of God in everybody"[54] and "turn[ing] the municipal law world upside down."[55] To wit, when voters in the City of Euclid rejected a church's rezoning proposal in 2004, Euclid leaders publicly cited *Shemo* to justify settling the church's subsequent lawsuit.[56] And when residents in the City of South Euclid faced a referendum in 2011 to rezone a golf course for commercial use, *Shemo* loomed large over their decision.[57]

Shemo's legacy thus extends far beyond the Costco that now flanks Interstate 271 in Mayfield Heights. For local governments that already support a rezoning proposal, it provides yet another reason to shy away from post-referendum zoning litigation, further transforming referendum zoning into settlement zoning. This quandary raises an obvious question: when a local government is unwilling to defend a negative rezoning referendum in court, who can?

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51. Paper streets "are planned streets that were drawn on a city map under the expectation that they may eventually be built, but never actually were." Martin Austermuhle, *'Paper Streets' Aren't Real—But They Can Lead to Big Problems for Developers*, NPR (Feb. 18, 2020), https://www.npr.org/local/305/2020/02/18/807050062/paper-streets-aren-t-real-but-they-can-lead-to-big-problems-for-developers [https://perma.cc/QBB4-RC74].

52. *See* Shemo v. City of Mayfield Heights, 765 N.E.2d 345, 348–49 (Ohio 2002) (describing the procedural history of the case following the Supreme Court of Ohio's ruling that the single-family zoning classification was unconstitutional).

53. May, *supra* note 46. The developers eventually opened a Costco on the property.

54. David S. Glasier, *Some Call NIMBY 'Democracy in Action'; Others Not So Sure*, News-Herald (Mar. 9, 2008), https://www.news-herald.com/2008/03/09/some-call-nimby-democracy-in-action-others-not-so-sure/ [https://perma.cc/QP68-4FET].

55. Jennifer Seward, *Norton Meeting Set for Friday*, News-Herald (Dec. 18, 2003), https://www.news-herald.com/2003/12/18/norton-meeting-set-for-friday/ [https://perma.cc/2FH9-SAEX].

56. Glasier, *supra* note 54.

57. *See* James Ewinger, *Oakwood Commons Project in South Euclid Could Proceed, Regardless of Referendum Outcome*, Plain Dealer, https://www.cleveland.com/metro/2011/10/oakwood_commons_project_in_sou.html [https://perma.cc/MWY4-HQQJ] (Oct. 10, 2011, 12:07 AM).

II. The Promise of Intervention

In general, the residents who most oppose a rezoning proposal are those who live near the property at issue. But after a negative referendum, a developer sues only the local government responsible for the zoning classification—not neighboring landowners. If these neighbors want to litigate against the developer's claims, then, they must intervene as defendants in the developer's case. But can they?

This Part first surveys the Ohio caselaw addressing this question, discovering that, over the past two decades, courts have grown increasingly hostile to intervention in zoning cases. It then proposes three solutions to reverse this trend, ultimately arguing that Ohio courts should return to a broader approach to intervention given federal intervention jurisprudence.

A. Neighborly Intervention in Ohio: A Downward Trend

Under Rule 24(A)(2) of the Ohio Rules of Civil Procedure, one is entitled to intervene in a lawsuit when three elements are met. First, "the intervenor must claim an interest relating to the property or transaction that is the subject of the action." Second, "the intervenor must be so situated that the disposition of the action may, as a practical matter, impair or impede the intervenor's ability to protect his or her interest." And third, "the intervenor must demonstrate that his or her interest is not adequately represented by the existing parties."[58]

The first prong of the Rule 24(A)(2) test—whether the proposed intervenor has an interest in the property at issue—has proved difficult for rezoning opponents to satisfy. Though not an intervention case, *Driscoll v. Austintown Associates*[59] illustrates why. In *Driscoll*, the Ohio Supreme Court held that a group of neighboring landowners were not necessary defendants to a developer's declaratory-judgment action against a local government that denied his rezoning request.[60] The *Driscoll* court reasoned that although the neighbors had a practical interest in the developer's property, they had no legal interest in it, so the lawsuit could proceed without them.[61]

Still, *Driscoll* said nothing about intervention. In theory, then, a neighboring landowner could lack the requisite interest to be a *necessary* defendant in a developer's declaratory-judgment action, yet still have enough of an interest to intervene under Rule 24(A)(2), which

58. Velocity Dev., LLC v. Perrysburg Twp. Bd. of Trs., 2011-Ohio-6192, ¶ 15 (Ohio Ct. App. 2011) (citing Ohio R. Civ. P. 24(A)(2)).

59. 328 N.E.2d 395 (Ohio 1975).

60. *Id.* at 401–02.

61. *Id.* at 402.

"should be liberally construed to permit intervention."[62] But the court's intervention jurisprudence has seemingly foreclosed this possibility: pointing to *Driscoll*, both *In re Schmidt*[63] and *Rumpke Sanitary Landfill, Inc. v. State*[64] establish that Rule 24(A)(2) intervenors must possess a "legally protectable" interest in the property at issue.[65]

Yet Ohio's intermediate appellate courts have not always construed Rule 24(A)(2)'s legal-interest requirement so rigidly—particularly in the zoning context. For example, in *City of Norton v. Sanders*,[66] a new zoning plan adopted by the city council was defeated in a referendum. The city was unsure whether this reinstated its previous zoning plan, so it sued for a declaratory judgment on the issue. After the trial court ruled that it did not, Norton declined to appeal, frustrating a group of Norton residents who supported the old plan. Accordingly, the residents moved to intervene as plaintiffs in Norton's lawsuit. And because some of them owned land "*adjacent* to property with conditions they claim[ed were] in violation" of the old ordinance, the Ninth District held that Rule 24(A)(2) permitted them to do so.[67]

Building on *Sanders*, in *State ex rel. Sneary v. Miller*,[68] the Third District allowed a group of neighbors to intervene as defendants in a landowner's mandamus action seeking a rezoning. The *Miller* court focused solely on the third prong of the Rule 24(A)(2) test—whether American Township, the original defendant in the case, adequately represented the neighbors' interest—and implicitly accepted the trial court's determination that the neighbors had a sufficient interest in the plaintiff's property to intervene.[69]

When the Village of Pataskala attempted to settle a resident's zoning challenge four years later, eight of the resident's neighbors moved to intervene as defendants in the lawsuit.[70] The trial court denied the neighbors' motion, but the Fifth District reversed, finding that the neighbors had an interest in the plaintiff's property because they were "either contiguous property owners or nearby neighbors to the property

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62. Dep't of Admin. Servs., Off. of Collective Bargaining v. State Emp. Rels. Bd., 562 N.E.2d 125, 128 (Ohio 1990) (discussing Blackburn v. Hamoudi, 505 N.E.2d 1010, 1013 (Ohio Ct. App. 1986)).
63. 496 N.E.2d 952 (Ohio 1986).
64. 2010-Ohio-6037, 941 N.E.2d 1161 (Ohio 2010).
65. *Schmidt*, 496 N.E.2d at 957; *Rumpke Sanitary Landfill*, 2010-Ohio-6037, ¶¶ 5–6, 941 N.E.2d at 1167.
66. 574 N.E.2d 552 (Ohio Ct. App. 1989).
67. *Id.* at 554–55 (emphasis added).
68. 621 N.E.2d 785 (Ohio Ct. App. 1993).
69. *Id.* at 788.
70. Peterman v. Village of Pataskala, 702 N.E.2d 965 (Ohio Ct. App. 1997).

at issue."[71] Importantly, the neighbors had laid out specific reasons for their opposition to the plaintiff's desired rezoning, "cit[ing] the potential health and safety hazards from the low permeability of the soil, the lack of a central sewer system, and the increased traffic" that a new zoning classification would bring.[72] While these factors were not dispositive, they strengthened the neighbors' case.

More recently, however, Ohio courts have been less inclined to allow neighborly intervention. For instance, when Liberty Township asked the Butler County Court of Common Pleas to determine whether it could construct homes on undeveloped property, the Twelfth District held that *Driscoll* prevented neighboring landowners from intervening in the lawsuit.[73] Less than a year later, in *Classic Properties, Inc. v. Board of Trustees*,[74] the same Twelfth District panel doubled down on this view, finding intervention improper where a group of neighbors lacked "a legally protectable interest in the subject property."[75] The panel distinguished the *Peterman* neighbors' motion to intervene on timeliness grounds, overlooking the *Peterman* court's conclusion that an ownership interest in the plaintiff's property was not a prerequisite for intervention.[76] And it mischaracterized the *Sanders* intervenors as having "a legal interest in the outcome of the action as applied to their own specific parcels of real property,"[77] when in fact they did not—again, their interest stemmed from the fact that "[s]ome of them" owned land adjacent to land that was implicated in the lawsuit.[78]

Returning to Mentor, a referendum was front and center in *DZN Holdings LLC v. City of Mentor*.[79] In 2003, residents "pummeled" a proposal to rezone a 380-acre conservation district for mixed residential, retail, and conservation use.[80] Shortly thereafter, the parcel's owners sued Mentor, alleging that the conservation designation was unconstitutional. A neighboring couple opposed to the proposal moved to intervene as defendants in the case, but the Lake County Court of

71. *Id.* at 966–67.

72. *Id.*

73. Liberty Township v. Woodland View, Inc., No. CA2001-02-038, 2001 WL 938757, at *1–2 (Ohio Ct. App. Aug. 20, 2001).

74. No. CA2001-05-051, 2002 WL 104592 (Ohio Ct. App. Jan. 28, 2002).

75. *Id.* at *3.

76. *Id.* (discussing *Peterman*, 702 N.E.2d. 965).

77. *Id.* (discussing Norton v. Sanders, 574 N.E.2d 552 (Ohio Ct. App. 1989)).

78. *Sanders*, 574 N.E.2d at 554.

79. DZN Holdings LLC v. City of Mentor, No. 03-CV-002378 (Lake Cnty. Ct. Com. Pl. filed Dec. 2, 2003).

80. Jennifer Seward, *Norton Meeting Set for Friday*, News-Herald (Dec. 18, 2003), https://www.news-herald.com/2003/12/18/norton-meeting-set-for-friday/ [https://perma.cc/4G6U-C3ZV].

Common Pleas denied their motion.[81] Mentor quickly settled with the owners, and the couple voluntarily dismissed their own appeal.[82]

Similarly, a group of neighbors in Perrysburg Township were denied the opportunity to intervene in a developer's zoning challenge that sought to overturn the results of a 2009 referendum.[83] The neighbors relied on *Peterman* in their motion, but the Sixth District found it unavailing, reasoning that the *Peterman* intervenors had shown "a legally protected interest in the subject [property]" by citing concerns about "low soil permeability and the lack of a central sewer system."[84] Because the Perrysburg Township neighbors did not express similar concerns, the court held that *Driscoll* and *Rumpke Sanitary Landfill* barred intervention.

Thus, when a neighboring landowner moves to intervene in a zoning dispute in Ohio, the landowner's likelihood of success is hard to predict—but the recent caselaw is inauspicious. This trend is problematic, because neighborly intervention helps avoid potentially nonadversarial lawsuits between developers and local governments—and the collusive settlements they threaten to produce. Fortunately, this problem remains fixable.

B. Potential Solutions

First, the Ohio General Assembly could enact a law that expressly liberalizes intervention in zoning cases. This would enable rezoning opponents to intervene under Rule 24(A)(1), rendering the Rule 24(A)(2) debate moot.[85] The law could narrowly apply to post-referendum cases only, or it could broadly apply to all zoning litigation. Moreover, it could require the proposed intervenor to establish that the existing parties do not adequately represent his or her interest, much like Rule 24(A)(2) does.[86] Of course, these are just some of the policy issues that such a law would pose.

Second, the General Assembly could bypass intervention altogether and enact a law limiting local governments' ability to rezone property

81. Jennifer Seward, *Newell Creek Moves Ahead*, News-Herald (Jan. 23, 2004), https://www.news-herald.com/2004/01/23/newell-creek-moves-ahead/ [https://perma.cc/772M-ACEB].

82. *See id.*; Motion to Dismiss, DZN Holdings LLC v. City of Mentor, No. 2004-L-033CA (Ohio Ct. App. Mar. 30, 2004).

83. Velocity Dev., LLC v. Perrysburg Twp. Bd. of Trs., 2011-Ohio-6192, ¶ 19 (Ohio Ct. App. Dec. 2, 2011).

84. *Id.* ¶¶ 18–19. To reiterate, though, the *Peterman* neighbors' interest was primarily "based upon the fact that [they were] either contiguous property owners or nearby neighbors to the property at issue." Peterman v. Village of Pataskala, 702 N.E.2d 965, 967 (Ohio Ct. App. 1997).

85. Rule 24(A)(1) permits "anyone" to intervene "when a statute of this state confers an unconditional right to" do so. Ohio R. Civ. P. 24(A)(1).

86. *Velocity Dev.*, 2011-Ohio-6192, ¶ 15.

by settling litigation. This would not be unprecedented: in recent years, the Wisconsin Supreme Court has rejected challenges to state laws that prevent the attorney general from settling litigation without legislative approval.[87] Using this model, the general assembly might consider requiring a referendum to approve a settlement that rezones property after voters have rejected a rezoning proposal for that property. This would force residents to weigh the benefits of preserving the existing zoning classification against the cost to taxpayers of continuing to litigate the classification's constitutionality.

Third, and perhaps most realistically, Ohio courts—including the Ohio Supreme Court—could adopt the *Peterman* approach going forward, either excepting neighboring landowners from Rule 24(A)(2)'s legal-interest requirement in zoning challenges or characterizing their interest as legally protectable. This solution would accord with Ohio courts' "duty to preserve the integrity of the right of referendums."[88] And it would mirror the Sixth Circuit's approach to intervention, which carries considerable weight given that Rule 24(A)(2) is practically identical to its federal counterpart.[89]

In *Michigan State AFL-CIO v. Miller*,[90] the Sixth Circuit made clear that "the interest sufficient to invoke intervention of right" is "rather expansive."[91] Indeed, "an intervenor need not have the same standing necessary to initiate a lawsuit," nor a "specific legal or equitable interest" in the property or transaction at issue.[92] These principles flow from the U.S. Supreme Court's decision in *Cascade Natural Gas Corp. v. El Paso Gas Co.*,[93] which "indicate[s] that the term 'interest' in [Federal Rule 24(a)(2)] should be construed liberally."[94]

This approach to intervention naturally favors neighboring landowners who seek to intervene in zoning disputes. For example, in

87. *See* Serv. Emp. Int'l Union Loc. 1 v. Vos, 2020 WI 67, ¶¶ 54–69, 946 N.W.2d 35, 52–56 (Wis. 2020); League of Women Voters of Wis. v. Evers, 2019 WI 75, ¶ 42, 929 N.W.2d 209, 223 (Wis. 2019).

88. Harbour v. Olmsted Township, Nos. 40098, 40191, 1980 WL 354425, at *6 (Ohio Ct. App. Jan. 10, 1980).

89. Fairview Gen. Hosp. v. Fletcher, 591 N.E.2d 1312, 1314 (Ohio Ct. App. 1990) ("Given the limited Ohio case law on the subject of intervention, the Staff Notes to [Ohio's Rule 24] suggest referring to federal case law interpreting [Federal Rule 24], which is analogous to [Ohio's Rule 24].").

90. 103 F.3d 1240 (6th Cir. 1997).

91. *Id.* at 1245.

92. *Id.* (quoting Purnell v. City of Akron, 925 F.2d 941, 948 (6th Cir. 1991)).

93. 386 U.S. 129 (1967). In this case, the Court allowed California and assorted private gas companies to intervene in an antitrust suit against a competing gas company. *Id.* at 135–36.

94. Hatton v. Cnty. Bd. Educ., 422 F.2d 457, 461 (6th Cir. 1970).

Joseph Skillken & Co. v. City of Toledo,[95] a district judge had ordered Toledo's city council to rezone part of an affluent neighborhood to allow for the construction of public housing.[96] Residents in the neighborhood swiftly moved to intervene in the case, arguing that the ordered rezoning would drastically reduce their property values. While the district court had found this interest insufficient to justify intervention, the Sixth Circuit reversed, allowing the neighbors to intervene because they had relied on the neighborhood's existing zoning classification when they bought and developed their properties.[97]

More recently, the Sixth Circuit considered a similar question in the context of referendum zoning. In *Midwest Realty Management Co. v. City of Beavercreek*,[98] voters rejected a referendum to rezone undeveloped, agricultural land to accommodate a planned apartment complex.[99] The apartment developer sued Beavercreek, and once the parties agreed to settle, four neighbors moved to intervene. The district court found the neighbors' motion untimely, but the Sixth Circuit reversed.[100] Notably, the court did not even question whether the neighbors could meet Federal Rule 24(a)(2)'s interest requirement.[101] "[I]t is clear," the court explained, that the neighbors were "entitled to assert their interests in this litigation . . . ."[102]

Finally, in *Wineries of the Old Mission Peninsula Ass'n v. Township of Peninsula*,[103] the Sixth Circuit reiterated that "indirect impacts on property interests can suffice" to justify intervention.[104] There, several wineries challenged a host of zoning ordinances in a bucolic Michigan township. After the parties neared a settlement, a "watchdog" group called Protect the Peninsula—which consisted of local property owners who "monitored the Township's policies and decisions related to land use inconsistent with the community's agricultural and residential character"—moved to intervene.[105] As in *Joseph Skillken* and *Midwest Realty*, the district court denied the

95. 528 F.2d 867 (6th Cir. 1975), *vacated and remanded on other grounds*, 429 U.S. 1068 (1977).

96. *Id.* at 870.

97. *Id.* at 870, 874–76.

98. 93 F. App'x 782 (6th Cir. 2004).

99. *Id.* at 783.

100. *Id.* at 783–88.

101. *See id.* at 787 ("The proposed intervenors undoubtedly knew that this litigation could affect their legal interests from the beginning.").

102. *Id.* at 789.

103. 41 F.4th 767 (6th Cir. 2022).

104. *Id.* at 772.

105. *Id.* at 769–70 (cleaned up).

motion, but the Sixth Circuit reversed. The court reasoned that if the wineries were simply to violate the zoning ordinances, "some of Protect the Peninsula's members might be able seek injunctive relief . . . absent the Township's willingness to enforce its own laws."[106] And since the wineries' lawsuit threatened the validity of the ordinances, it bore directly on the members' property interests, thereby "satisfy[ing] the substantial-interest requirement of Rule 24(a)."[107]

The core concern underlying *Midwest Realty* and *Wineries of the Old Mission Peninsula*—a government authority's preferring to settle while another party wants to intervene and litigate—extends beyond zoning. Just last Term, the Supreme Court decided *Cameron v. EMW Women's Surgical Center, P.S.C*,[108] in which Kentucky's attorney general had moved to intervene to defend a state abortion law ruled unconstitutional by the Sixth Circuit.[109] Kentucky's secretary for Health and Family Services, who had litigated the case in the district court and on appeal, had chosen not to file a petition for rehearing en banc or a petition for a writ of certiorari, but the attorney general desired further review.[110] A divided Sixth Circuit denied the attorney general's motion to intervene,[111] but the Supreme Court reversed, concluding that Kentucky's "opportunity to defend its laws in federal court should not be lightly cut off."[112]

This logic applies with similar force to lawsuits that threaten to subvert a referendum requirement. For instance, in response to the *Benalcazar* neighbors' motion to intervene, both the developer and Genoa Township had argued that the neighbors' interest in preserving their property values did not justify intervention.[113] Nevertheless, the district court rejected this narrow characterization of the neighbors' interest, finding that the neighbors were intervening not merely for

106. *Id.* at 773, 777.

107. *Id.* at 773.

108. 142 S. Ct. 1002 (2022).

109. *Id.* at 1008; *see also* EMW Women's Surgical Ctr., P.S.C. v. Friedlander, 960 F.3d 785, 790–91, 811–12 (6th Cir. 2020) (finding the Kentucky abortion law unconstitutional), *vacated*, No. 19-5516, 2022 WL 2866607 (6th Cir. July 21, 2022), *and abrogated by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

110. *Cameron*, 142 S. Ct. at 1008.

111. EMW Women's Surgical Ctr., P.S.C. v. Friedlander, 831 F. App'x 748, 753 (6th Cir. 2020), *rev'd and remanded*, 142 S. Ct. 1002, 1008, 1013 (2022).

112. *Cameron*, 142 S. Ct. at 1011.

113. Benalcazar v. Genoa Twp., No. 2:18-CV-01805, 2020 WL 1853212, at *5 (S.D. Ohio Apr. 13, 2020).

economic reasons, but also "to preserve their right . . . to decide whether to amend Genoa Township's zoning map."[114]

By the same token, an interest in defending a referendum result, without more, does not justify intervention. This too finds support in recent Supreme Court precedent. In 2008, California voters passed Proposition 8, which amended the California Constitution to ban same-sex marriage.[115] Two same-sex couples promptly challenged Proposition 8's constitutionality in federal court. They prevailed, and California officials declined to appeal the ruling. But the district court had allowed Proposition 8's "official proponents" to intervene as defendants, and they did pursue an appeal.[116] The Supreme Court held that they lacked standing and dismissed their appeal.[117] Because the intervenors "ha[d] no role—special or otherwise—in the enforcement of Proposition 8," their interest was nothing more than a "generalized grievance" shared by every California citizen who supported Proposition 8.[118]

As the district court in *Benalcazar* observed, *Midwest Realty* provides a sensible framework for intervention in zoning cases.[119] Unlike the intervenors in *Hollingsworth*, the neighbors in *Midwest Realty* asserted more than just a "generalized grievance"; their proximity to the subject property gave them a personal stake in the enforcement of Beavercreek's existing zoning plan. And given Beavercreek's referendum requirement, they also had an interest in preserving their authority over the zoning plan, somewhat akin to the Kentucky attorney general's interest in *Cameron*.

To be sure, the proposed intervenors in these cases may not always have pure motives. In *Joseph Skillken*, for instance, the district court had denied the neighbors' motion to intervene in part because of their "bigotry, intolerance, and selfishness" in opposing the proposed low-income housing.[120] More broadly, since the law tends to favor

114. *Id.* (citing Midwest Realty Mgmt. Co. v. City of Beavercreek, 93 F. App'x 782, 788 (6th Cir. 2004) ("Where the City's first re-zoning of this property to allow residential development was overturned by referendum, the City's second attempt to accomplish the same re-zoning . . . through settlement of litigation under the imprimatur of federal court order, certainly poses conflicts of legitimate interests that bear further scrutiny.")).

115. Hollingsworth v. Perry, 570 U.S. 693, 701 (2013).

116. *Id.* at 702–03.

117. *Id.* at 700–01.

118. *Id.* at 706–07 (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 573–75 (1992)).

119. *See* Benalcazar v. Genoa Township, No. 2:18-CV-01805, 2020 WL 1853212, at *5 (S.D. Ohio Apr. 13, 2020).

120. Joseph Skillken & Co. v. City of Toledo, 528 F.2d 867, 874 (6th Cir. 1975), *vacated*, 429 U.S. 1068 (1977).

development,[121] critics often accuse rezoning opponents of espousing a not-in-my-backyard ethos.[122] Yet while these concerns are legitimate, they are concerns about referendum zoning generally. If bigots are abusing a city's referendum requirement, the proper recourse would be for the city to abandon referendum zoning—not for courts to insulate the city from intervenors whenever a developer sues. Likewise, bigotry—or any other reprehensible attitude—plays no part in the intervention analysis under Rule 24(A)(2). But it may give a court reason to reject the intervenors' claims on the merits.

In sum, to the extent that Ohio courts have read *Driscoll* and its progeny to foreclose neighborly intervention in post-referendum zoning litigation, federal intervention jurisprudence justifies a reversal of course. And barring corrective action by Ohio lawmakers, this common-law solution is likely necessary to stem the tide of developers and local governments using collusive settlements to circumvent negative referendums.

III. Liberalized Intervention: Issues and Implications

If Ohio courts take a broader approach to intervention, prospective intervenors need to know (1) when to intervene and (2) what to expect from their involvement in the litigation. This Part first addresses timeliness, finding that intervention does not become appropriate until the developer and local government have agreed to settlement terms. It then concludes by discussing potential limitations on the scope of intervention in referendum-zoning cases.

A. When to Intervene?

The issue of timeliness often impedes intervenors in post-referendum zoning litigation. To wit, in *Peterman*, *Midwest Realty*, and *Benalcazar*, the developer plaintiffs and local-government defendants all argued that the neighbors' motions to intervene were untimely.[123] "This lawsuit has been pending for some time now," they essentially

121. *See* Driscoll v. Austintown Assocs., 328 N.E.2d 395, 404 (Ohio 1975) ("Our legal system does not favor restrictions on the use of property.").

122. *See, e.g.*, Glasier, *supra* note 54; Owen Milnes, *How Central Ohio Housing Developers Can Get Ahead of Residential Pushback*, Columbus Bus. First (Jan. 19, 2022, 12:56 PM), https://www.bizjournals.com/columbus/news/2022/01/19/how-housing-developers-can-get-ahead.html [https://perma.cc/8NPB-GJ2A].

123. Peterman v. Village of Pataskala, 702 N.E.2d 965, 967–68 (Ohio Ct. App. 1997); Midwest Realty Mgmt. Co. v. City of Beavercreek, 93 F. App'x 782, 786–87 (6th Cir. 2004); *Benalcazar*, 2020 WL 1853212, at *2–4.

told the neighbors. "And you want to intervene *after* we have agreed to settle?"[124]

But moving to intervene before a settlement is generally not an option for neighbors who oppose a rezoning proposal. After all, Rule 24(A)(2) expressly bars intervention when "the applicant's interest is adequately represented by existing parties."[125] And when a local government has yet to settle with a developer, it adequately represents its residents' interest.[126]

What is more, the onset of settlement negotiations, standing alone, does not necessarily signal to concerned neighbors a need to intervene. For example, in *Midwest Realty*, the developer and Beavercreek began settlement talks in March 2000.[127] While these talks had been private, the district court nevertheless ruled that they "represent[ed] constructive notice to interested residents that [Beavercreek] might compromise their interests."[128] Accordingly, because the neighbors had waited until June 2001 to move to intervene, the district court found their motion untimely.[129]

On appeal, the Sixth Circuit rejected the district court's constructive-notice standard and emphasized that the neighbors did not *actually* know about the parties' settlement negotiations until April 2001.[130] Likewise, the court distinguished between the neighbors' awareness of the negotiations and their awareness of "objectionable terms in a proposed settlement."[131] According to the court, only the latter would have alerted them of the need to intervene.[132]

The *Peterman* court took a similar view. Specifically, because the parties' settlement terms avoided "the constitutional questions raised in [the developer's] declaratory judgment action" and merely "ma[de]

124. *See, e.g.*, *Midwest Realty*, 93 F. App'x at 786 ("The district court was troubled by the fact that [the developer's] action was commenced in July 1998, had progressed to the point of a tentative settlement, and was subject to a conditional dismissal order by the time the proposed intervenors filed their motion on June 4, 2001.").

125. Ohio R. Civ. P. 24(A)(2).

126. *See Peterman*, 702 N.E.2d at 967 (finding that defendant village stopped representing the neighbors' interests only after it "entered into the agreed judgment entry granting [the developer's] zoning change").

127. *Midwest Realty*, 93 F. App'x at 786.

128. *Id.* at 787.

129. *Id.* at 786.

130. *Id.* at 787.

131. *Id.* at 788.

132. *Id.* at 787–88 (citing *In re* Telectronics Pacing Sys., Inc., 221 F.3d 870, 882 (6th Cir. 2000) (explaining, in the context of a class action, that "[u]nnamed members of the class will rarely suspect a shortfall in the adequacy of representation before learning the terms of the settlement")).

the zoning change originally requested by [the developer]," the neighbors' motion to intervene was timely even though it came after a settlement.[133] Looking to Sixth Circuit factors governing the timeliness of a motion to intervene, the court also stressed the lack of prejudice to the existing parties and the fact that the neighbors "ha[d] no other method, available to them, to protect their interests."[134]

Cameron, too, grappled with timeliness. There, the Sixth Circuit had found the Kentucky attorney general's motion to intervene untimely "because it came after years of litigation . . . and after the panel had issued its decision [invalidating the Kentucky abortion law]."[135] But to the Supreme Court, what mattered was that the attorney general had "sought to intervene 'as soon as it became clear' that [Kentucky's] interests 'would no longer be protected by' the parties in the case."[136] In this regard, the Kentucky attorney general resembled the neighbors in *Peterman* and *Midwest Realty*, biding his time until intervention became appropriate.

To developers and local governments celebrating a settlement, it is no doubt frustrating that rezoning opponents may seek intervention and reignite the litigation. But under Rule 24(A)(2), this is how the system must work. And if the possibility of intervention happens to deter collusive settlements, all the better.

B. Defining Intervention's Scope

When one plaintiff sues two defendants, it is not uncommon for the plaintiff to settle with one defendant and continue to litigate, at least for some time, with the other. In other words, the fact that one defendant wants to litigate the plaintiff's case does not prevent the other defendant from choosing to settle.[137] When money damages are at issue, this notion is straightforward. When the case involves the constitutionality of a zoning classification, though, things can get messy.

Recall the case of Donnie Developer and Anytown from this Note's Introduction, where Donnie sued Anytown for a declaration that his parcel's zoning classification was unconstitutional. Now imagine that Donnie's neighbors have successfully intervened in the case as defendants and plan to vigorously defend the classification's constitutionality. Yet Anytown, for its part, still wishes to settle—and

133. Peterman v. Village of Pataskala, 702 N.E.2d 965, 967 (Ohio Ct. App. 1997).

134. *Id.* at 967–68 (citing Grubbs v. Norris, 870 F.2d 343, 345 (6th Cir. 1989)).

135. Cameron v. EMW Women's Surgical Ctr., P.S.C, 142 S. Ct. 1002, 1012 (2022).

136. *Id.* (quoting United Airlines, Inc. v. McDonald, 432 U.S. 385, 394 (1977)).

137. *See* Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 528–29 (1986) ("It has never been supposed that one party . . . could preclude other parties from settling their own disputes . . . .").

the terms of any settlement would likely include an agreement to rezone Donnie's property in accordance with his proposal. If this happens, what is left for the intervenors to litigate?[138]

Given these complications, courts may limit the scope of intervention for neighboring landowners. In *Benalcazar*, for instance, the neighbors intervened for the sole purpose of moving to dismiss the developer's claims.[139] And in *Scott v. Jerome Township*,[140] a Southern District of Ohio judge suggested that referendum-zoning cases were uniquely suited for limited intervention because they are "complicated, non-adversarial, and implicate[] the public interest."[141] This approach makes practical sense for intervenors concerned about the cost of litigation. And if nothing else, their presence in a case could force a less developer-friendly settlement.

As for those free to litigate to a final judgment, it is possible that local governments will be less inclined to settle when their side of the "v." includes intervenors. For one thing, when vocal members of the community are parties to the case, local leaders may fear blowback from agreeing to a settlement that is seen as overly favorable to the developer. For another, if the intervenors truly want to pay for it, they can offer to handle the heavy lifting, filing dispositive motions on their own and even taking the lead at trial.

Conclusion

Referendum zoning in Ohio is broken. In *Eastlake*, the Supreme Court envisioned it as "a means for direct political participation, allowing the people the final decision, amounting to a veto power, over enactments of representative bodies."[142] In practice, though, it operates as little more than an administrative hassle for developers and local governments intent on actualizing a rezoning proposal. This wastes time and erodes voter confidence.

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138. "Non-settling parties generally have no standing to challenge the settlement" unless they "can show plain legal prejudice resulting from the settlement." Ball v. DeWine, No. 20-3927, 2021 WL 4047032, at *3 (6th Cir. June 30, 2021) (citing Agretti v. ANR Freight Sys., Inc., 982 F.2d 242, 246 (7th Cir. 1992)). And so long as a settlement "does not interfere with any contractual or contribution rights" or eliminate an asserted claim, it does not cause a party to suffer legal prejudice. *Id.*

139. Benalcazar v. Genoa Township, No. 2:18-CV-01805, 2020 WL 1853212, at *7 (S.D. Ohio Apr. 13, 2020).

140. No. 2:21-CV-3993, 2021 WL 6143654 (S.D. Ohio Dec. 30, 2021).

141. *See id.* at *2 (citing United States v. City of Detroit, 712 F.3d 925, 932 (6th Cir. 2013)).

142. City of Eastlake v. Forest City Enters., Inc., 426 U.S. 668, 673 (1976).

Eastlake does not *require* local governments to use referendum zoning—it merely ruled the practice constitutional.[143] When a local government chooses to use referendum zoning, then, that choice ought to mean something. Right now, it usually means just a slightly longer wait before developers get what they want.

To remedy this, Ohio courts should follow the federal courts' lead and allow neighboring landowners to intervene in these cases. At a minimum, this would ensure a more adversarial proceeding when neighbors oppose a rezoning proposal strongly enough to seek intervention. A liberalized intervention regime may prolong litigation, and it may pose novel issues for Ohio courts to sort out. But it is vastly preferable to effectively nullifying a community's right to vote.

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143. *Id.* at 679.

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