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Standing To Sue In Land Use Litigation

Daniel R. Mandelker
Washington University in St. Louis School of Law, mandelker@wustl.edu

STANDING TO SUE IN LAND USE LITIGATION

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Author's Synopsis: Third party standing to sue is essential in land use litigation. Questionable land use decisions will not be taken to court unless a third party can sue, but third party standing is limited. Standing law is fragmented, obstinate, excessively restrictive, and split between judicial and statutory requirements. Reform is necessary so that third parties can have access to court to protect public values. This Article explains why third party standing should be expanded, and it includes a conceptual model that can guide reform. It discusses conflicting third party standing rules in the Supreme Court, including the dominant restrictive rule that requires injury, and similar rules in the states. Nuisance-driven and statutory rules for third party standing in zoning cases are also discussed. I recommend reform that gives standing in court in land use cases to all participants in public hearings, and a gatekeeper function that blocks standing when it is bias-based.

* Daniel R. Mandelker, Stamper Professor of Law, Washington University in Saint Louis. I would like to thank Chelsea Rothschild for her extensive and excellent research, Rachel Mance for her editorial assistance, and all of my colleagues who helped find resources. I would also like to thank the law school for its financial support. Sara C. Bronin, Peter Buchsbaum, Bob Kuehn, Ronald Levin, Ed Sullivan, Dan Tarlock, and Christian Turner read earlier drafts of the Article and offered helpful suggestions. Statutes and ordinances cited in this Article were current at the time this Article was written.

I. INTRODUCTION

Your city approves a special land use permit for two 96–foot tall buildings in downtown that includes apartments and commercial space.[1] A trial court describes the approval as absurd.[2] The historic preservation commission approves a renovation of an important historic residence. Objectors claim it compromises historic integrity.[3] A city significantly rezones more sites for industrial and heavy commercial development in

[1] *See* N. Mich. Env't Action Council v. City of Traverse City, No. 332590, 2017 WL 4798638, at *1 (Mich. Ct. App. Oct. 24, 2017) (standing granted for individual but deferred for organization); *see also* Duddles v. City Council of W. Linn, 535 P.2d 583, 588–93 (Or. App. 1975) (rezoning for shopping center held to violate comprehensive plan; standing issue not decided).

[2] *See N. Mich.*, 2017 WL 4798638, at *1.

[3] *See* Hist. Alexandria Found. v. City of Alexandria, 858 S.E.2d 199, 203 (Va. 2021) (standing denied); *see also* Tenth St. Residential Ass'n v. City of Dallas, 968 F.3d 492, 500 (5th Cir. 2020) (denying organization standing to challenge demolition of dilapidated historic buildings; diversion of resources to attend landmark commission meetings to oppose demolition policy and to intervene in pending demolition cases held not injury in fact). Decisions on compliance with historic preservation requirements are subject to judicial review. *See, e.g.*, Parker v. Beacon Hill Architectural Comm'n, 536 N.E.2d 1108, 1114 (Mass. 1989) (upholding denial of additional floor on row house as it would be inimical to historic appearance of building and diminish picturesque silhouette of row houses in historic district); Rocky Hill Citizens for Responsible Growth v. Plan. Bd. of Borough of Rocky Hill, 967 A.2d 929, 944–45 (N.J. App. Div. 2009) (upholding approval of age restrictive development as compatible with historic district); Sanchez v. Town of Beaufort, 710 S.E.2d 350, 356 (N.C. App. 2011) (reversing decision to limit height of dwelling to twenty-four feet because height not incongruous with rest of district); *see also* David L. Callies, *Historic Preservation Law in the United States*, 32 ENV'T L. REP. NEWS & ANALYSIS 10348 *passim* (2002). For a local ordinance, see SEATTLE, WA., ZONING CODE, ch. 25.12 (1977) (landmark preservation).

racial residential areas. Critics claim damaging racial impact.[4] Do they have standing to sue?

Municipalities[5] overperform or underperform[6] when they consider land use change, and change dominates land use regulation.[7] Change

[4] *See* Andrew H. Whittemore, *The Role of Racial Bias in Exclusionary Zoning*: *The Case of Durham, North Carolina, 1945-2014*, *in* ZONING: A GUIDE FOR 21ST CENTURY PLANNING 200, 211–15 (Elliot Sclar et al. ed., 2020); *see also* Lake Lucerne Civic Ass'n, Inc. v. Dolphin Stadium Corp., 801 F. Supp. 684, 688 (S.D. Fla. 1992) (discussing construction of stadium and accompanying commercial development in the midst of predominantly black middle-class residential neighborhood; association standing limited to injunctive relief); Craig Anthony Arnold, *Planning Milagros: Environmental Justice and Land Use Regulation*, 76 DENV. U. L. REV. 1, 121 (1998) ("Residents of low-income and minority neighborhoods may find that property zoned for non-intensive uses, for example residential, may be rezoned for industrial uses through the application of a floating zone at the request of the landowner."); Vicki Been, *What's Fairness Got to Do with It? Environmental Justice and the Siting of Locally Undesirable Land Uses*, 78 CORNELL L. REV. 1001, 1009–15 (1993) (discussing studies finding that noxious and unwanted land uses are more likely to be located in racial areas).

[5] In this Article, the term "municipality" refers to a city, county, town, or township.

[6] The causes of underperformance are contested. Early scholarship argued that developer capture was an important factor in underperformance. It claimed that land developers put irresistible pressure on local governments for zoning and other changes that do not comply with regulations. *See* Harvey Molotch, *The Political Economy of Growth Machines*, 15 J. URB. AFF. 29, 31–34 (1993) (arguing that growth machines control the land use process); Harvey Molotch, *The City as a Growth Machine: Toward a Political Economy of Place*, 82 AM. J. SOC. 309 *passim* (1977); JOHN R. LOGAN & HARVEY L. MOLOTCH, URBAN FORTUNES: THE POLITICAL ECONOMY OF PLACE 1 *passim* (1987); *see also* Greg Morrow, The Homeowner Revolution: Democracy, Land Use, and the Los Angeles Slow-Growth Movement, 1965–1992 (2013) (Ph.D. dissertation, UCLA) (eScholarship.org); Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385, 404–09 (1977) (arguing that developers control urban areas and homeowners suburban areas, and that land developers are the "largest investors in municipal politics in the United States"); Arnold Fleishman & Carole Pierannunzi, *Citizens, Development Interests, and Local Land Use Regulations*, 52 J. POL. 838, 841 (1990) (discussing developer influence). The Oregon Supreme Court noted "the dangers of the almost irresistible pressures that can be asserted by private economic interests on local government" when holding that zoning change must be consistent with a comprehensive plan. Fasano v. Bd. of Cnty. Comm'rs of Wash. Cnty., 507 P.2d 23, 30 (Or. 1973). The growth machine theory may no longer by valid. *See* Daniel P. Selmi, *Reconsidering the Use of Direct Democracy in Making Land Use Decisions*, 19 UCLA J. ENV'T POL'Y 293, 331 (2001-2002) (discussing, but criticizing, growth machine theory).

[7] Change will likely be even more frequent as residential densities are raised to meet housing shortages and commercial buildings are repurposed for residential use. *See* AM. PLANNING ASS'N, GROWING SMART LEGISLATIVE GUIDEBOOK: MODEL STATUTES FOR PLANNING AND THE MANAGEMENT OF CHANGE, 10-7 to 10-9 (Stuart Meck ed., 2002)

occurs repeatedly through rezoning,[8] special exceptions,[9] variances,[10] wetland[11] and floodplain[12] development, residential subdivisions,[13] site plans,[14] and planned communities.[15] Overperformance occurs when a municipality *rejects* a land use project but may have violated land use regulations or constitutional restrictions. Underperformance occurs when a municipality *approves* a project and may have violated a land use regulation or a constitutional restriction.[16] A developer can attack

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(discussing changing face of development review and use of discretionary approvals in zoning process), https://www.planning.org/growingsmart/guidebook/ten01/ [https://perma.cc/XR98-CH3S]; Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls As Problem of Local Legitimacy*, 71 CAL. L. REV. 837, 841 (1983) ("Local land decisions can make a mockery of orderly and predictable planned development"; individual land decisions amount to deals with landowners and developers); E-mail from Gary Feder, Senior Counsel, Husch Blackwell LLP, to author (Feb. 27, 2019, 08:37 CST) (on file with author) (noting that landowners and developers, in forty-five years of land use practice, always engaged him as project legal counsel "because their plans require that a local government provide discretionary land use approval of some kind," such as a rezoning or a conditional use permit).

[8] *See* Daniel R. Mandelker, *Spot Zoning: New Ideas for an Old Problem*, 48 URB. LAW. 737 *passim* (2016) (describing spot zoning objections to rezoning).

[9] *See* U.S. DEP'T OF COM., A STANDARD STATE ZONING ENABLING ACT § 7 (1926).

[10] *See id.*

[11] *See, e.g.*, CONN. GEN. STAT. ANN. § 22a-42 (authorizing municipal regulation of wetlands); N.Y. ENV'T CONSERVATION L. § 24-0903 (local governments to adopt regulations based on minimum state land use regulations); *see also* Cherry v. Town of Hampton Falls, 846 A.2d 508, 513 (N.H. 2004) (upholding denial of permit for subdivision road under local wetlands ordinance though state permit was obtained because there had been no consideration of whether alternative route was feasible as required by ordinance).

[12] Municipalities must adopt a floodplain ordinance in order to participate in the National Flood Insurance Program. *See* Beth Davidson, *How Quickly We Forget: The National Flood Insurance Program and Floodplain Development in Missouri*, 19 WASH. U. J. OF L. & POL'Y 365, 372 (2005) (discussing program). For a typical floodplain ordinance, see CREVE COEUR, MO. CODE, ch. 415, Flood Hazard Control Regulations, https://ecode360.com/28144310 [https://perma.cc/ECL9-QSLW]. All state statutory citations in this Article refer to the current statute unless otherwise indicated.

[13] *See* U.S. DEP'T OF COM., A STANDARD CITY PLANNING ENABLING ACT TITLE 2 (1928).

[14] *See, e.g.*, N.Y. Town Law § 274-a(2) (providing authority to planning board).

[15] *See* DANIEL R. MANDELKER, PLANNED UNIT DEVELOPMENTS 40–47 (Hecimovich, ed., AM. PLANNING ASS'N 2007) (discussing planning commission authority to approve development plans).

[16] Underperformance can occur outside the decision process. For example, sea rise has prompted some states to mandate planning to remedy sea rise problems. Local governments may underperform by not meeting statutory requirements. *See* William Butler

overperformance in court. Underperformance will not be attacked unless a third party, not the developer or the municipality, can attack it in court,[17] but third party standing to sue is not easy. Judicial control is needed. There also is limited state statutory and administrative control over underperformance.[18]

This Article reviews the law of third party standing in land use litigation. It does not consider intervention by third parties, which raises similar issues,[19] nor taxpayer standing, which some states grant more easily.[20] I argue that standing law is fragmented, obstinate, excessively

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et al., *Mandated Planning for Climate Change*: *Responding to the Peril of Flood Act for Sea Rise Adaptation in Florida*, 87 J. AM. PLAN. ASS'N 370 *passim* (2021) (discussing Florida experience). A third party could attack a land use change because the municipality underperformed, and the change was based on a sea rise plan that did not meet statutory requirements.

[17] A project approval can be attacked by a developer, however, if the developer disagrees with conditions to the approval.

[18] State intervention began with legislation in a limited number of states that primarily advanced environmental goals. Today, it seeks to advance economic opportunity, decrease inequality, and advance economic growth by undoing restrictive local zoning. For reviews of the state programs, see Timothy S. Chapin, *From Growth Controls, to Comprehensive Planning, to Smart Growth: Planning's Emerging Fourth Wave*, 78 J. AM. PLAN. ASS'N 5 *passim* (2012) (describing three historic phases of local, regional, and state approaches to managing growth and newer and more positive approach to growth and development); Anika Singh Lemar, *The Role of States in Liberalizing Land Use Regulations*, 97 N.C. L. REV. 293 *passim* (2019) (discussing recent legislation). State controls may not always be effective. *See* Butler et al., *supra* note 15; *see also* Patricia E. Salkin, *The Quiet Revolution and Federalism: Into the Future*, 45 J. MARSHALL L. REV. 253 *passim* (2012) (examining federal role in land use planning and regulation).

[19] *See* George L. Blum, Annotation, *Right to Intervene in Court Review of Zoning Proceedings*, 47 A.L.R. 6th 439 *passim* (2009); *see, e.g.*, Buckler v. DeKalb Cnty., 659 S.E.2d 398, 401–02 (Ga. Ct. App. 2008) (denying zoning variances; intervenor failed to establish that its interests were not adequately represented by defending county, and county had not abandoned any possible defenses nor lacked motivation to uphold the decision); Bredberg v. City of Wheaton, 182 N.E.2d 742, 747 (Ill. 1962) (discussing rezoning, adjoining neighbor; intervention frequently desirable to protect interest jeopardized by pending litigation to which intervenor is not a party or to avoid relitigation of issues in another suit); Council v. Town of Boone Bd. of Adjustment, 551 S.E.2d 907, 910–11 (N.C. Ct. App. 2001) (holding intervention allowed if applicant claims an interest relating to the property or transaction that is the subject of the action, and disposition of the action may as a practical matter impair or impede his or her ability to protect that interest, unless applicant's interest is adequately represented by existing parties).

[20] *See, e.g.*, Loigman v. Twp. Comm. of the Twp. of Middletown, 687 A.2d 1091, 1095 (N.J. Super. Ct. App. Div. 1997) ("There must be a substantial likelihood the plaintiff will experience some harm . . . ."); *see also* Susan L. Parsons, *Taxpayers' Suits: Standing*

restrictive, and erratically split between judicial and statutory requirements. Reform is necessary so that third party litigation can protect public values.[21] States should reject federal standing law and standing rules for zoning litigation based on nuisance-driven property ownership. Standing should be available for all participants in public hearings.

Part II discusses third party beneficiary standing, explains why it should be treated differently at state and local government levels, and describes an explanatory model I apply to my analysis of standing issues. Part III discusses standing rules the Supreme Court has adopted to determine the injury necessary for third party standing, while Part IV describes third party standing rules in the state courts, which too often accept restrictive federal standing doctrine. Distinctive nuisance-driven rules for third party standing in zoning cases are discussed in Part V. Statutory rules for third party standing that often require aggrievement are discussed in Part VI. Part VII recommends reform that gives standing to all participants in public hearings and discusses a gatekeeper function that is necessary to block standing claims that are abusively bias-based. Part VIII concludes.

II. THE BASIS FOR THIRD PARTY STANDING IN LAND USE LITIGATION

A. The Beneficiary Distinction

Regulation has either objects or beneficiaries. An object of regulation is an entity affected by the regulation, such as a property owner who is restricted by a zoning ordinance. The general public, limited classes of the general public, or even individuals are the beneficiaries of regulation. An

Barriers and Pecuniary Restraints, 59 TEMP. L.Q. 951, 952–54 (1986); Joshua G. Urquhart, *Disfavored Constitution, Passive Virtues? Linking State Constitutional Fiscal Limitations and Permissive Taxpayer Standing Doctrines*, 81 FORDHAM L. REV. 1263, 1278 (2012). Standing in exclusionary zoning cases also is excluded. *See, e.g.*, Warth v. Seldin, 422 U.S. 490, 517–18 (1975) (denying standing).

[21] Norman Williams famously described the real party in interest in land use cases. *See* Norman Williams, Jr. & John M. Taylor, 1 AM. LAND PLAN. L. § 2:1 (Rev. ed., updated July 2021). Either a landowner sues a municipality to challenge a restriction on her property, or a third party plaintiff sues a municipality because it acted favorably for a landowner. "In one sense, therefore, the municipality is not a separate party in interest in land use conflicts, but merely the ally of one or the other of two primary parties in interest." *Id.*

object of regulation who is restricted by overperformance can sue in court.[22] Beneficiaries may not be able to sue.

Originally, beneficiaries were not treated differently. Federal standing law followed a public model that did not require a relationship between the entity claiming standing and the substance of an issue. A plaintiff's right to sue in the late nineteenth and early twentieth centuries was based on common law, statutory law, or constitutional rights, or sometimes a mixture of these remedial opportunities. It did not require substantial interest, injury, or harm.[23] There were no barriers to litigation if a plaintiff could make a substantive claim.[24]

Then-judge Antonin Scalia changed the dialogue in an influential article[25] written in 1983. Someone who is the object of a law's regulation

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[22] *See* Patricia E. Salkin, 4 AM. L. ZONING § 42:9 (5th ed., updated May 2021). The applicant can argue the county has applied the ordinance incorrectly. *See id.* The applicant can also argue the refusal to grant the permit is a taking of property, *see* Penn Cent. Transp. Co. v. City of N.Y., 438 U.S. 104, 115–19 (1978) (restriction on historic landmark claimed to be a taking), or that a permit should have been granted, *see* Buttrey v. United States, 690 F.2d 1170, 1173 (5th Cir. 1982) (Clean Water Act dredge and fill permit). There are some limitations. In takings cases there must be a final decision, but the landowner does not have to sue in state court before suing in federal courts. *See* Knick v. Twp. of Scott, 139 S. Ct. 2162, 2163 (2019). For a discussion of limitations on substantive due process claims brought by landowners, see Daniel R. Mandelker, *Litigating Land Use Cases in Federal Court: A Substantive Due Process Primer*, 55 REAL PROP. TR. & EST. L.J. 69 *passim* (2020).

[23] *See* Comm. to Elect Dan Forest v. Emps. Pol. Action Comm., 853 S.E.2d 698, 710–12 (N.C. 2021) (explaining early American experience; writs of mandamus and statutory successor to writ of *quo warranto* were broadly available to vindicate common public rights without a personal interest requirement as a matter of substantive, not constitutional, law)*;* F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275, 284 (2008) ("Early American law adopted the English rule that the violation of every right carried a remedy."); Gene R. Nichol, Jr., *Justice Scalia, Standing, and Public Law Litigation*, 42 DUKE L.J. 1141, 1151 (1993) ([I]njury was not a requisite for judicial authority in either the colonial, framing, or early constitutional periods.").

[24] *See* William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 224 (1988) ("In the late nineteenth and early twentieth centuries, a plaintiff's right to bring suit was determined by reference to a particular common law, statutory, or constitutional right, or sometimes to a mixture of statutory or constitutional prohibitions and common law remedial principles."). The Michigan Supreme Court, as part of its reformed standing doctrine, held a legal cause of action can confer standing. *See* Lansing Sch. Educ. Ass'n v. Lansing Bd. of Educ., 792 N.W.2d 686, 690 (Mich. 2010).

[25] *See* Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881 *passim* (1983). He had just been appointed to the District of Columbia Court of Appeals. For a discussion of Scalia's article, see Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and*

or prohibition, he wrote, should always have standing.[26] Standing should frequently be unavailable, however, when a plaintiff is "complaining of an agency's unlawful failure to impose a requirement or prohibition upon someone else."[27] This is underperformance. "[G]overnment default," he claimed, would receive "fair consideration in the normal political process."[28]

Justice Scalia carried his standing theory, which is especially hostile to environmental regulation,[29] into *Lujan v. Defenders of Wildlife*,[30] where his opinion made his standing theory respectable.[31] Two environmental organizations were denied standing to challenge a federal agency regulation that prevented agency consultation on harm to endangered species overseas.[32] Proof of standing, he wrote, "depends considerably"

Article III, 91 MICH. L. REV. 163, 215–16 (1992); *see also* Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1436 (1988).

[26] *See* Justice Scalia, *supra* note 25, at 894.

[27] *Id.*

[28] *Id.* at 896. He also believed it would be a "good thing" if important legislative purposes were lost or misdirected in the federal bureaucracy. *Id.* at 897. Presumably, he would also agree it would be a good thing if important legislative purposes got lost or misdirected in a local bureaucracy.

[29] Justice Scalia's hostility was deeply embedded. In his article, for example, he quoted from and spoke disdainfully about *Calvert Cliffs' Coordinating Committee, Inc. v. United States Atomic Energy Commission*, the leading case holding the National Environmental Policy Act was judicially enforceable. Scalia, *supra* note 25, at 883–85 (quoting Calvert Cliffs' Coordinating Comm., Inc. v. U.S. Atomic Energy Comm'n, 449 F.2d 1109, 1115 (D.C. Cir. 1971)). He held the plaintiff's interest in the case did not exist; called it "the judiciary's long love affair with environmental litigation"; and suggested, "perish the thought," that it might be a front for the U.S. Army Corps of Engineers, which was "reputed" to prefer dams to the nuclear power issue the case considered. Scalia, *supra* note 25, at 883–85.

[30] *See* Lujan v. Defs. of Wildlife, 504 U.S. 555, 578 (1992). For criticism of the *Lujan* case, see Nichol, *supra* note 23, at 1168 ("Justice Scalia's view of separation of powers threatens to constitutionalize an unbalanced scheme of regulatory review."); Richard J. Pierce, Jr., Lujan v. Defenders of Wildlife*: Standing As A Judicially Imposed Limit on Legislative Power*, 42 DUKE L.J. 1170, 1170–71 (1993) ("[I]nsupportable judicial contraction of the legislative power"; "source of widespread harm to the process of agency policymaking"; "opinions . . . difficult to interpret"); Brandon D. Smith, Note, Lujan v. Defenders of Wildlife*: A Slash-and-Burn Expedition Through the Law of Environmental Standing*, 28 U.S.F. L. REV. 859, 902 (1994) ("[S]erious blow to environmental plaintiffs and will detrimentally alter the future of environmental law.").

[31] The Court had not considered this issue before.

[32] *Lujan* considered a key requirement in the federal Endangered Species Act that requires federal agencies to consult with the Department of Interior to ensure that any

on whether the plaintiff is the object of the action.[33] If so there is "ordinarily little question" that the action or inaction has caused him injury,[34] but "much more is needed" if someone else is regulated. Standing is not precluded but is ordinarily "substantially more difficult" to establish when the plaintiff is not the object of the government action or inaction.[35]

B. The Different Constitutional Foundation for Standing Against State and Local Government

State standing law does not have to accept Justice Scalia's restrictive standing law.[36] Federal standing rules are based on the "case or controversy" clause in the federal constitution,[37] but almost no state constitutions have this clause.[38] Federal standing rules are also based on a

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action authorized, funded, or carried out by the agency "is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical." 16 U.S.C. § 1536(a)(2). When a regulation interpreted the statute to apply only in the United States and on the high seas, environmental organizations sued claiming it violated the statute. *See Lujan*, 504 U.S. at 557.

[33] *Lujan*, 504 U.S. at 561.

[34] *Id.*

[35] *Id.*

[36] *See* G. Alan Tarr, *Interpreting the Separation of Powers in State Constitutions*, 59 N.Y.U. ANN. SURV. AM. L. 329 *passim* (2003) (explaining differences between federal and state constitutions).

[37] *See* U.S. CONST. art. III, § 2; Allen v. Wright, 468 U.S. 737, 750 (1984) ("The 'case or controversy' requirement . . . defines with respect to the Judicial Branch the idea of separation of powers on which the Federal Government is founded."). As Chief Justice Earl Warren explained, the case or controversy clause limits "the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process," and "define[s] the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government." Flast v. Cohen, 392 U.S. 83, 95 (1968). *Compare* Jonathan R. Siegel, *A Theory of Justiciability*, 86 TEX. L. REV. 73, 96 (2007) (noting that the Court has appealed "to an intuitive, incompletely articulated sense," and holding that the limits the courts place on standing "must be good and must protect us from excessive judicial power"), *with* Flast v. Cohen 392 U.S. 83, 95 (1968) ("Justiciability is the term of art employed to give expression to this dual limitation placed upon federal courts by the case-and-controversy doctrine.").

[38] A Westlaw search did not find a "case or controversy" clause in a state constitution similar to this clause in the federal constitution. *See* ASARCO Inc. v. Kadish, 490 U.S. 605, 617 (1989) ("We have recognized often that the constraints of Article III do not apply to state courts, and accordingly the state courts are not bound by the limitations of a case

constitutional separation of powers, but Professor Hershkoff argues that separation of powers does not have the same strength at the state level.[39] State government, she explains, is "diverse, redundant, overlapping, and often [has] semiprivate governance structures."[40] Many of the assumptions underlying federal jurisdiction do not apply to state courts,[41] "the standard critique of judicial activism . . . does not apply,"[42] and "[s]tate [judicial] power . . . is plenary and inherent."[43]

There could be an argument for restricting third party beneficiary standing in state courts despite these differences if the administrative

or controversy or other federal rules of justiciability."); Jasmine Networks, Inc. v. Super. Ct., 103 Cal. Rptr. 3d 426, 432 (Cal. Ct. App. 2009) ("[N]o similar requirement in our state Constitution."); Hon. Jack L. Landau, *State Constitutionalism and the Limits of Judicial Power*, 69 RUTGERS L. REV., 1309, 1316 ("So far as I can tell, none contains a case-or-controversy limitation."); *see also* Dreyer v. Illinois, 187 U.S. 71, 84 (1902) (distribution of power is for the states). *But see* ALA. CONST. amend. 328, § 6.02(b) ("The Supreme Court shall have original jurisdiction (1) of cases and controversies as provided by this Constitution. . . . ."); IND. CONST. art. X, § 5(g) (referring to case or controversy clause in state debt section); Plan Helena, Inc. v. Helena Reg'l Airport Auth. Bd., 226 P.3d 567, 569 (Mont. 2010) ("[C]ases at law and in equity" language of constitution include same limitations imposed on federal courts by "case or controversy" language of Article III).

[39] *See* Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1881–85; *see also* Hans A. Linde, *The State and the Federal Courts in Governance*: Vive La Différence!, 46 WM. & MARY L. REV. 1273, 1276 (2005) (noting federal separation of powers model was not followed at state level; Judge Linde was a distinguished jurist on the Oregon Supreme Court).

[40] Hershkoff, *supra* note 39, at 1834.

[41] Hershkoff discusses state court differences, state legislative disadvantage, the availability of popular lawmaking, and state executive plurality. *See id.* at 1885–97.

[42] *Id.* at 1888.

[43] *Id.*

process for land use decisions was fair and principled,[44] but it is not.[45] As a famous jurist explained, "[w]hen administrators provide a framework for principled decision-making, the result will be to diminish the importance of judicial review by enhancing the integrity of the administrative process."[46] This framework is not available at the local level because there is a lack of separation of powers,[47] and the distinction between legislative and administrative action blends.[48]

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[44] Integrity is provided at the federal level by an Administrative Procedure Act. *See* 5 U.S.C. §§ 551-554; *see also* Casey Adams, *Home Rules: The Case for Local Administrative Procedure*, 87 FORDHAM L. REV. 629, 634–39 (2018) (discussing Act). It requires principled decision making by federal agencies. The American Planning Association included comprehensive procedures for adjudicative decisions in its model land use legislation. *See* Meck, *supra* note 7, §§ 10-1 to 10-90; *see also* Daniel R. Mandelker, *Model Legislation for Land Use Decisions*, 35 URB. LAW. 635 *passim* (2003). The American Bar Association later adopted similar model legislation based on the APA model. *See* MODEL STATUTE ON LOCAL LAND USE PROCESS, JOINT TASK FORCE OF THE STATE AND LOCAL GOV'T AND ADMIN. L. AND REGUL. PRAC. SECTIONS OF THE AM. BAR ASS'N (2008), http://landuselaw.wustl.edu/ModelLandUseCode.pdf [https://perma.cc/T7Z7-AQ3W]; *cf.* Adams, *supra* note 44, at 656–69 (discussing arguments for and against local administrative procedure and Model State Local Administrative Procedure Act).

[45] *See* Nestor M. Davidson, *Localist Administrative Law*, 126 YALE L.J. 564, 606 (2017) (procedural due process is "a particular legal concern in local administration").

[46] *See* Env't Def. Fund, Inc. v. Ruckelshaus, 439 F.2d 584, 598 (D.C. Cir. 1971) (Bazelon, J., also stating that principled decision making will "improve the quality of judicial review in those cases where judicial review is sought").

[47] *See, e.g.*, Citizens for Reform v. Citizens for Open Gov't, Inc., 931 So. 2d 977, 989 (Fla. Dist. Ct. App. 2006); Tendler v. Thompson, 352 S.E.2d 388, 388 (Ga. 1987); State v. Buncich, 51 N.E.3d 136, 144 (Ind. 2016); Martin v. Murray, 867 N.W.2d 444, 450-51 (Mich. Ct. App. 2015); Ball v. Fitzpatrick, 602 So. 2d 873, 878 (Miss. 1992) (Banks, J., concurring); Est. of Romero *ex rel.* Romero v. City of Santa Fe, 137 P.3d 611, 616 (N.M. 2006); City Council of Reading v. Eppihimer, 835 A.2d 883, 893 (Pa. Commw. Ct. 2003); Moreau v. Flanders, 15 A.3d 565, 579 (R.I. 2011); Hubby v. Carpenter, 350 S.E.2d 706, 710 (W. Va. 1986); *see also* Lewis v. Brown, 409 F.3d 1271, 1273 (11th Cir. 2005) ("While the actions of some government officials can easily be categorized as legislative or executive, for others, like county commissioners who act in both a legislative and executive capacity, sorting out which hat they were wearing when they made a decision can be difficult."); Mandelker, *supra* note 22, at 104–06 (noting that action by legislative body is not always legislative, and discussing distinction between legislative and quasi-judicial action).

[48] *See* Davidson, *supra* note 45, at 595–605 (stating that a common definition is that a legislative body acts quasi-judicially when it applies existing law); Carol M. Rose, *New Models for Local Land Use Decisions*, 79 NW. U. L. REV. 1155, 1157 (1985) (discussing cases holding that rezoning is a legislative act). State tests vary on when a legislative body action is quasi-judicial. *See, e.g.*, Md. Overpak Corp. v. Mayor of Balt., 909 A.2d 235, 245 (Md. 2006) (holding action quasi-judicial if "(1) the act or decision is reached on

Land use decisions are made under a haphazard, chaotic tangle of statutes and ordinances that do not provide adequate control.[49] The Standard State Zoning Enabling Act, which state legislation usually follows, does not specify decision procedures for the amendment of zoning ordinances[50] and has virtually none for variances and conditional uses.[51] Only a few zoning statutes require adequate hearing procedures,[52] and procedures in zoning ordinances are rare.[53] Zoning boards and

individual, as opposed to general, grounds, and scrutinizes a single property; and (2) there is a deliberative fact-finding process with testimony and the weighing of evidence") (internal citation omitted); Mandelker, *supra* note 22, at 104 (discussing tests).

[49] It is possible, of course, that rules of procedure included elsewhere in the land use ordinance could apply.

[50] *See* Meck, *supra* note 7, at 10-7 to 10-9 (discussing zoning as a discretionary system).

[51] Legislative bodies make zoning amendments, but necessary procedures are not included for hearings, such as notice of hearings, the taking of evidence, and findings of fact. Arbitrary decisions are possible. Boards of zoning adjustment or appeals are required to keep minutes of its meetings showing votes, abstentions, and absences. They are not required to provide a decision in writing but are only required to keep "records of its examinations." U.S. DEP'T OF COM., A STANDARD STATE ZONING ENABLING ACT, § 7 (1926).

[52] *See* FLA. STAT. § 163.3215(4) (stating local government which adopts minimum specified statutory procedures for local process for review of consistency with comprehensive plan will have judicial challenge to decision reviewed by writ of certiorari); N.J. REV. STAT. § 40:55D-10 (specifying hearing procedures for certain actions, including allowing development and adoption, revision, or amendment of master plan); OR. REV. STAT. § 197.763 (requiring notice and availability of documents to public); *Id.* § 215.412(2) (requiring all decisions made by governing body to be based on factual information); *Id.* § 215.416(9)-(10) (stating approval or denial to be based on brief statement explaining criteria and standards considered relevant to decision, facts relied upon, and justification; notice is required); *Id.* § 227.170 (requiring all decisions to be based on factual information).

[53] *See, e.g.*, DURHAM, N.C., UNIF. DEV. ORDINANCE § 3.2.5(E) (2021) (requiring public or quasi-judicial hearing), https://durham municipal.codes/UDO/3.2.5 [https://perma.cc/E9T6-8HS8]; MIAMI, FLA. 21 CODE § 7.1.1.4(d)(2) (2010) ("The Planning, Zoning and Appeals Board shall establish rules of procedure necessary to its governing and the conduct of its affairs, in keeping with the applicable provisions of Florida law, and the City charter, ordinances and resolutions."), https://codehub.gridics.com/us/fl/miami#/081c7bc5-1ede-4469-9754-b6706daa4489/69a6216a-0f5b-4d87-b80f-0345a450a74c/1c3b6ebe-df1f-46cd-a164-7548dbc091dc/7948dd02-b74a-4596-8082-96d76f5bdf49 [https://perma.cc/S2AT-KBFU]; NORFOLK, VA., ZONING ORDINANCE § 2.3 (2021) (describing Standard Review Procedures for notice and when public hearing required), https://www norfolk.gov/DocumentCenter/View/35581/Adopted-Zoning-Ordinance?bidId= [https://perma.cc/4AGX-797W]; *see also* Coral Reef Nurseries, Inc. v. Babcock Co., 410 So. 2d 648, 652 (Fla. Dist. Ct. App. 1982) (zoning ordinance then provided due notice, a fair opportunity

commissions can require procedures, but without statutory direction they may be inadequate.[54]

Historic district commission[55] procedures are also incomplete. They can be provided by statute, [56] ordinance, [57] the historic district commission,[58] or by local procedures that cover all agencies.[59] They may

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to be heard in person and through counsel, the right to present evidence, and the right to cross-examine adverse witnesses).

[54] *See, e.g.*, PHILA., PA., CITY OF PHILA. ZONING BD. OF ADJUSTMENT RULES & REGULS. § 5 (2015) (minimal procedures); N.H. Office of Strategic Initiatives, THE ZONING BD. OF ADJUSTMENT IN N.H., III-8 to III-18 (2021) (same); TOWN OF HOLDENESS, N.H. ZONING BD. OF ADJUSTMENT RULES OF PROC. § 5 (2015) (same).

[55] *See* DANIEL R. MANDELKER & MICHAEL ALLEN WOLF, LAND USE LAW §§ 11.26-11.37 (6th ed. 2015, updated 2020) (discussing historic preservation).

[56] *See, e.g.*, CONN. GEN. STAT. ANN. § 8-2j ("[S]hall state upon the record the reasons for its decision."); MICH. COMP. LAWS ANN. § 399.205(9) (stating local historic district commission "shall adopt its own rules of procedure"); MISS. CODE. ANN. § 39-13-13 (certificate of appropriateness; denial must be in writing); 53 PA. STAT. ANN. § 8004(c) ("[P]erson applying for building permit . . . [to] be given notice of the meeting of the Board of Historical Architectural Review which is to counsel the governing body, and of the meeting of governing body which is to consider the granting of a certificate of appropriateness for the . . . permit, and may appear before the . . . meetings to explain his reasons [for the permit].").

[57] *See, e.g.*, BOULDER, COLO., LAND USE CODE § 9-11-15 (requiring quasi-judicial hearing); NEW ORLEANS, LA., COMPREHENSIVE ZONING ORDINANCE § 3.4 ("The public hearing will be conducted in accordance with the rules and regulations of the body conducting the hearing."), https://czo.nola.gov/article-3/#3-4 [https://perma.cc/YKX6-A5FJ]. Historic preservation ordinances may not specify a procedure. *See* CHARLESTON, S.C., ZONING CODE § 54-232 (no procedure specified), https://library municode.com/sc/charleston/codes/zoning?nodeId=ART2LAUSRE_PT6OLHIDIOLDIRE_S54-232CODESTDIPERECEAP [https://perma.cc/MJD5-9WJ4].

[58] *See*, *e.g.*, CITY OF NEW ORLEANS HISTORIC DIST. LANDMARKS COMM'N, ADMIN. RULES, POLICIES & PROCS. (Jan. 2019), https://www.nola.gov/hdlc/documents/2019-01-11_16-rules-regulations/ [https://perma.cc/VBM8-EEC9].

[59] Local historic district commissions are almost always governed by procedures for both designating historic properties and for issuing certificates of appropriateness when people propose to alter designated historic properties. These procedures may encompass meeting notices, consent requirements, protest rights, and rights to be heard, among other things. State statutes will often provide very specific guidance for designation processes, but will not always provide specific guidance for certificates of appropriateness. For a small number of cities, municipal law outlines procedures specific to historic district commissions. More often, municipal law provides procedures for all local commissions,

include meeting notices, consent requirements, protest rights, and rights to be heard, but they may not cover certificates of appropriateness for changes in designated historic properties. Similarly, floodplain statutes[60] and ordinances[61] often do not provide procedures. For subdivision review, the Standard City Planning Enabling Act, which state legislation usually

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which historic district commissions follow. Other times, historic district commissions adopt special procedures outside of the ordinance.

See e-mail from Sara C. Bronin, Professor of City & Reg'l Plan., Cornell Coll. of Architecture Art & Plan. Assoc. Fac. Member, Cornell L. Sch. to author (Dec. 25, 2020, 8:55 CST) (on file with author); *see also* SARA C. BRONIN & RYAN M. ROWBERRY, HISTORIC PRESERVATION LAW IN A NUTSHELL 66–71, 203–09 (2d ed. 2018).

[60] *See, e.g.*, MINN. STAT. § 103F.121 Subd. 1(4) (stating local governments shall adopt floodplain management ordinances authorizing "the regulation of the use of land in the floodplain"); N.C. GEN. STAT. § 143-215.54(a) ("[L]ocal government may adopt ordinances to regulate uses in flood hazard areas and grant permits for the use of flood hazard areas . . . ."); WASH. REV. CODE § 86.12.200 ("[E]stablishing land use regulations that preclude the location of structures, works, or improvements in critical portions of such areas subject to periodic flooding . . . .").

[61] *See, e.g.*, MENIFEE, CAL., CODE OF ORDINANCES § 4.2.040 (naming officer "to administer, implement, and enforce this [ordinance] by granting or denying development permits in accord with its provisions."); CREVE COEUR, MO., FLOOD HAZARD CONTROL REGULATIONS § 415.030 ("Duties of the Floodplain Administer shall include. . . [i]ssu[ing] floodplain development permits for all approved applications . . . ."), https://ecode360.com/28144329 [https://perma.cc/W37H-XGTD]; MODEL FLOODPLAIN ORDINANCE § 11.2 (MINN. DEP'T OF NAT. RES., rev. Apr. 12, 2021) (permit application requirements), https://www.dnr.state.mn.us/waters/watermgmt_section/floodplain/sample_ordinances.html [https://perma.cc/63V3-EW5G].

follows,[62] requires a public hearing and notice to adjoining property owners and the applicant.[63] Hearing procedures are not provided.[64]

Problems with incomplete procedures might be ignored if public hearings had visibility that attracts public notice and local political response, but this is not likely. Notice is usually limited.[65] Hearings, even if well attended, are usually limited to a specific site and not likely to attract wide public notice. Mobilizing political action for wide social grievances is difficult because individual injury is slight and benefits are

[62] *See, e.g.*, KY. REV. STAT. ANN. § 100.281 (stating subdivision regulations to include "[t]he procedure for the submission and approval of preliminary and final plat"); N.J. STAT. ANN. § 40:55D-37(a) (planning board authorized to approve subdivisions); 45 R.I. GEN. LAWS § 45-23-42(b) (major subdivisions; notice); *see also* ROBERT H. FREILICH & MICHAEL M. SCHULTZ, MODEL SUBDIVISION REGULATIONS 109 n.81 (2d ed. 1995) (citing statutes). They require hearings on subdivision applications but do not specify procedures. *See id.* § 3.2(3)(a) (public hearing on sketch plat for minor subdivision); *Id.* § 3.3(2) (public hearing on preliminary approval).

[63] *See* U.S. DEP'T OF COM., *supra* note 13, § 15. The American Planning Association model legislation includes a Model Statute for Subdivision Control based on the Standard Act and state legislation. *See* AM. PLANNING ASS'N , *supra* note 7, § 301, at 8-61. It does not include procedures but does reference adjudicative procedures provided in another chapter of the Act. For a review of the subdivision process and subdivision statutes, *see id.* at 8-56 to 8-67.

[64] *But see* S.D. CODIFIED LAWS § 11-2-17.1 ("Any interested person shall be given a full, fair, and complete opportunity to be heard at the hearing . . . .").

[65] Zoning is an example. The Standard State Zoning Enabling Act provided for only newspaper notice of proposed zoning changes. *See* U.S. DEP'T OF COM., *supra* note 9, § 4. A supermajority vote to change the ordinance was required only after protest by adjacent property owners. *See id.* § 5. The Act did not provide notice for variances and exceptions. *See id.* § 7.

concentrated on the few.[66] Democratic response, as Justice Scalia argued, cannot remedy problems with local decision making.[67]

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[66] *See* Evan Caminker, *The Constitutionality of* Qui Tam *Actions*, 99 YALE L.J. 341, 386 (1989) (noting the argument that legislature and executive are likely to respond in an accountable fashion to generalized grievances disregards much political science literature on collective action response to ubiquitous and intangible injuries); John D. Echeverria, *Critiquing* Laidlaw*: Congressional Power to Confer Standing and the Irrelevance of Mootness Doctrine to Civil Penalties*, 11 DUKE ENV'T L. & POL'Y F. 287, 291 (2001) (Justice Scalia's argument ignores both practical realities and contemporary academic analysis of American political process; almost a commonplace observation that diffuse widely shared public interests tend to get lost rather than vindicated in the political branches); Roderick M. Hills, Jr. & David N. Schleicher, *Balancing the "Zoning Budget*,*"* 62 CASE W. RSRV. L. REV. 81, 97 (2011) ("[A]bsence of strong political parties in local legislatures can lead to pervasive NIMBYism . . . ."); Jonathan R. Siegel, *What if the Universal Injury-in-Fact Test Already is Normative*?, 65 ALA. L. REV. 403, 410 (2013) (arguing the political process has collective action problems because the injury inflicted on the many by an illegal action can be slight, but the action can provide concentrated benefits to a few; "the many may have great difficulty asserting their political strength"); Siegel, *supra* note 37, at 101 ("[H]owever, widely shared injuries are the *worst* kind of injuries to try to rectify through the political process."). *See generally* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION 5 *passim* (Harv. Econ. Stud. vol. 124, 1971).

[67] There are competing factors to consider. Jan Krasnowiecki, while recognizing the importance of third party standing as the guardian of our zoning system, suggested in an early article that third party plaintiffs should post a bond to guarantee defendants against losses should the third party prevail in the litigation. *Cf.* Jan Z. Krasnowiecki & L.B. Kregenow, *Planned Unit Development: A Challenge to Established Theory and Practice of Land Use Control*, 114 U. PA. L. REV. 47, 55–63 (1965); Jan Z. Krasnowiecki & L.B. Kregenow, *Zoning and Planning Litigation Procedures Under the Revised Pennsylvania Municipalities Planning Code*, 39 VILL. L. REV. 879, 905 (1994) (arguing third party standing "gives our land use control system a significant anti-development bias"). A California court has also noted competing risks. *See* Stocks v. City of Irvine, 170 Cal. Rptr. 724, 730 (Cal. Ct. App. 1981). One risk is that the judiciary will invade the powers of the other branches of government by issuing advisory opinions. The opposite risk is to shut off "all reasonable avenues of judicial redress to a truly aggrieved plaintiff." *Id.* The New York Court of Appeals noted the importance of litigating public policy issues when it held "there is much to be said for permitting judicial review at the request of any citizen, resident or taxpayer" when the welfare of the entire community is at stake in the enforcement of a zoning law. Sun-Brite Car Wash, Inc. v. Bd. of Zoning & Appeals of Town of N. Hempstead, 508 N.E.2d 130, 133 (N.Y. 1987). But it added that "permitting everyone to seek review could work against the welfare of the community by proliferating litigation, especially at the instance of special interest groups, and by unduly delaying final dispositions." *Id.*

C. A Conceptual Model For Standing

An effective standing rule is needed, and modeling can identify the issues courts must consider when they adopt a standing rule. Professors Hall and Turner provide a model for standing rules that conceptualize standing as a form of agenda control.[68] Courts, like all decision-making institutions, must decide what questions they will consider. Their decisions explicitly or implicitly construct an agenda for answering these questions, and this agenda can be ad hoc, governed by rules, or something in between.[69] Standing is a mixed agenda rule "where an agenda item is evaluated based on some relation between the entity raising the issue and the substance of the issue."[70] Defining that relationship is the problem that standing law must solve.

III. FEDERAL RULES FOR THIRD PARTY STANDING

We begin by reviewing the federal rules for third party standing, which influence third party beneficiary standing in the states. Two conflicting federal standing rules receive state attention. In *Baker v. Carr*,[71] the Court upheld judicial review of legislative malapportionment and adopted a functional test for third party standing. Citizens who suffered vote dilution based on malapportionment, the Court held, had standing to sue under the Equal Protection Clause. The Court explained:

> A federal court cannot "pronounce any statute, either of a state or of the United States, void, because irreconcilable with the constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies." Have the appellants alleged such a

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[68] *See* Matthew Hall & Christian Turner, *The Nature of Standing*, 29 WM. & MARY BILL RTS. J. 67, 67–68 (2020).

[69] Categorical standing rules identify classes of competent entities for for particular categories of issues . . . . [S]pecific standing rules give an agenda decision to an entity only after an analysis of the relation between the particular entity and the particular issue raised. And so these rules must be concerned with entity competence on a more specific level than the other rules.

Id. at 92.

[70] *See id.* at 68.

[71] 369 U.S. 168 (1962). For a discussion of *Baker v. Carr*, see Abner J. Mikva, *Justice Brennan and the Political Process: Assessing the Legacy of* Baker v. Carr, 1995 U. ILL. L. REV. 683 *passim* (1995).

> personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions? This is the gist of the question of standing.[72]

A "personal stake" and "concrete adverseness" is all that is needed. There was no suggestion that standing depends on a finding of harm, injury, or injury in fact.[73]

Federal standing law has now replaced *Baker v. Carr* with an injury rule. It holds, "at an irreducible minimum,"' that a litigant must show he has suffered personally some particularized, actual, or threatened injury;[74] that the injury is fairly traceable to the allegedly illegal conduct of the defendant; and that it is likely to be redressed by a favorable decision.[75]

Injury is the critical factor in land use litigation because causality and remedy are not usually problems. Justice Scalia adopted a revised and restrictive view of injury in *Lujan v. Defenders of Wildlife.*[76] An environmental organization sued a federal agency after it decided not to enforce an environmental statute overseas. It claimed injury because "the lack of consultation [under the Endangered Species Act] with respect to certain funded activities abroad "increas[es] the rate of extinction of

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[72] *Baker*, 369 U.S. at 204 (quoting Liverpool, N.Y. & P. Steamship Co. v. Comm'rs of Emigration, 113 U.S. 33, 39 (1885)); *see* Gene R. Nichol, Jr., *Rethinking Standing*, 72 CALIF. L. REV. 68, 71 (1984) ("For over a decade, it appeared mandatory to begin standing decisions with the *Baker v. Carr* refrain."). In *Liverpool*, the Court indicated it would not pass on the constitutionality of a law "except as it is called upon to adjudge the legal rights of litigants in actual controversies." *Liverpool*, 113 U.S. at 39.

[73] "The injury which appellants assert is that this classification disfavors the voters in the counties in which they reside, placing them in a position of constitutionally unjustifiable inequality vis-a-vis voters in irrationally favored counties." *Baker*, 369 U.S. at 207–08; *see* Comm. to Elect Dan Forest v. Emps. Pol. Action Comm., 853 S.E.2d 698, 717 (N.C. 2021) (explaining case).

[74] As Justice Scalia stated in his article, "[C]oncrete injury" is the "indispensable prerequisite" to beneficiary standing. Scalia, *supra* note 25, at 895; *see* Gene R. Nichol, Jr., *Injury and the Disintegration of Article III*, 74 CALIF. L. REV. 1915, 1915–16 (1986) ("The lynchpin of these efforts [to define Article III standing] is the demand for 'distinct and palpable' injury.").

[75] *See* Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992); Nichol, *supra* note 72, at 71 (citing cases).

[76] 504 U.S. 555 (1992).

endangered and threatened species."[77] Affidavits by members stated they had traveled abroad to observe the habitat of endangered species and would do so again.

Justice Scalia denied standing.[78] Citing and quoting from earlier cases, he adopted a restrictive test that requires injury to be "concrete and particularized"[79] as well as "actual or imminent, not 'conjectural' or 'hypothetical.'"[80] Plaintiffs were not "directly" affected, and their "special interest" in the subject was not enough.[81] Neither was past exposure to illegal conduct and an intent to return to places visited before without concrete plans,[82] a holding inconsistent with earlier precedent.[83]

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[77] *Id.* at 562.

[78] Justice Scalia, for the first time, rejected the view that a statute conferring the right to sue was constitutional, and he held that the interest conferred was merely a "conferral upon *all* persons of an abstract, self-contained, noninstrumental 'right.'" *Id.* at 573. This holding, of course, does not apply to state statutes.

[79] *Id.* at 560 (citing earlier cases). In a footnote he stated, "By particularized, we mean that the injury must affect the plaintiff in a personal and individual way." *Id.* at 560 n.1.

[80] *Id.* at 560 (first quoting Whitmore v. Ark., 495 U.S. 155, 155 (1990); then quoting L.A. v. Lyons, 461 U.S. 95, 101-02 (1983)). He also stated that standing requires "at the summary judgment stage, a factual showing of perceptible harm." *Id.* at 566.

[81] *Id.* at 563. The affidavits did not show "'actual or imminent'" injury. *Id.* at 564. Plaintiffs would have to be "perceptibly affected by the unlawful action in question." *Id.* at 566. Justices Blackmun and O'Connor dissented. *See id.* at 589-606. They held that by requiring a description of concrete plans or a specification of when a return visit would occur, Justice Scalia "demands what is likely an empty formality." *Id.* at 592. Justice Scalia's decision amounted to a "slash-and-burn expedition through the law of environmental standing." *Id.* at 606.

[82] *But see* Sunstein, *What's Standing After* Lujan, *supra* note 25, at 204 (arguing that injury could have been recharacterized and based on an expectation that "endangered species would not be subject to increased threats of extinction because of federal governmental action").

[83] *See* Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 230 n.4 (1986) ("[W]hale watching and studying of their members [would] be adversely affected by continued whale harvesting . . . .").

Lujan adopted a private law injury rule of standing[84] that is easily manipulated, falsely factual, and perverse.[85] Standing, under this rule, must be able to support a private legal action. Concrete "interest" is not enough. Justice Scalia repeated in dicta his argument that third party standing is more difficult to establish, a rule never before adopted by the Court.[86]

The Court's acceptance of *Lujan* in later cases has been mixed. *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc*.,[87] with

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[84] *See* Daniel A. Farber, *Environmental Litigation After* Laidlaw, 30 ENV'T L. REP. 10516, 10517 (2000) (discussing the private law model of standing, and noting that under that model "standing must be based on an individualized, concrete harm of the kind protected by the common law. The leading modern advocate of this position is Justice Scalia.").

[85] *See, e.g*., Sunstein, *What's Standing after* Lujan, *supra* note 25, at 202–06 (asking whether the plaintiffs could have shown injury, whether the definition of injury could have been recharacterized in their favor, and "whether there is such an injury turns not merely on facts but also on whether the law has recognized certain harms as legal ones."); Comm. to Elect Dan Forest v. Emps. Pol. Action Comm., 853 S.E.2d 698, 721 (N.C. 2021) (including widespread criticism: "most harshly for its inconsistency with the original meaning of the case or controversy requirement of Article III"; test "perversely used instead to foreclose access to the judiciary under many statutory 'citizen-action' provisions"; "undermined the separation of powers by invading the power of the legislature to create rights"; "injury-in-fact test essentially imports assessment of the merits of the claim into the analysis *sub rosa*"; ensuring sufficient concrete adverseness arguably impaired).

[86] "Thus, when the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily 'substantially more difficult' to establish." Lujan v. Defenders of Wildlife, 504 U.S. 555, 562 (1992) (quoting Allen v. Wright, 468 U.S. 737, 757 (1984)).

[87] *See* Friends of the Earth, Inc. v. Laidlaw Env't Servs., Inc., 528 U.S. 167 (2000). For a review of Supreme Court standing doctrine prior to *Laidlaw*, see Hudson P. Henry, *A Shift in Citizen Suit Standing Doctrine:* Friends of the Earth, Inc. v. Laidlaw Environmental Services, 28 ECOLOGY L.Q. 233, 236 (2001) (Supreme Court standing doctrine incoherent and unpredictable). For a discussion of *Laidlaw*, see *id*.; Farber, *supra* note 84, at 10516; Robert V. Percival & Joanna B. Goger, *Escaping the Common Law's Shadow: Standing in the Light of* Laidlaw, 12 DUKE ENV'T L. & POL'Y F. 119, 141 (2001); Kristin M. Shults, Friends of the Earth v. Laidlaw Environmental Services*: A Resounding Victory for Environmentalists, Its Implications on Future Justiciability Decisions, and Resolution of Issues on Remand*, 89 GEO. L.J. 1001, 1013 (2001) ("[T]he Court was more willing in *Laidlaw* to recognize an environmental injury as judicially cognizable, was more willing to accept—at face value—affidavits alleging actual injury, and was less concerned with burdensome formalities."). The Court upheld a statutory grant of standing in *Federal Election Commission v. Akins*, 524 U.S. 11, 24 (1998) (granting standing to a group of voters to challenge decision by Commission not to require registration of political

Justice Scalia dissenting, modified *Lujan*. Environmental organizations had standing to sue a company that had discharged pollution into a river.[88] The Court held it was reasonable and not improbable that "a company's continuous and pervasive illegal discharges of pollutants into a river would cause nearby residents to curtail their recreational use of that waterway and would subject them to other economic and aesthetic harms."[89] These allegations were more than the general and conclusory allegations *Lujan* held inadequate and were "reasonable concerns" about pollution that affected their "recreational, aesthetic, and economic interests."[90] State courts do not usually cite *Laidlaw*.[91]

Justice Scalia revived *Lujan* in *Summers v. Earth Island Institute*.[92] Environmental organizations did not have standing to challenge a notice, comment, and appeal process that applied to more significant land management decisions but exempted small fire-rehabilitation and timber-

committee; statute authorized petition in court by any "party aggrieved" by a Commission order dismissing a complaint; argument that lawsuit involved only a "generalized grievance" dismissed; "where a harm is concrete, though widely shared, the Court has found 'injury in fact'"; Justice Scalia dissented). *See The Supreme Court 1997 Term, Leading Cases, Federal Jurisdiction & Procedure*, 112 HARV. L. REV. 253, 262 (1998) (arguing decision contributed to uncertainty in standing jurisprudence).

[88] The suit was filed after the company settled a suit for civil fines and asked for civil penalties. The organizations asked for declaratory and injunctive relief, civil penalties, costs, and attorney fees.

[89] *See Laidlaw*, 528 U.S. at 184.

[90] *Id.* at 167. The Court cited *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972). Though it denied standing to the Club to challenge a construction of proposed ski resort and recreation area in a national game refuge, the Court noted its acceptance of these values in an earlier case. *See* Ass'n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 154 (1970). State courts have relied on *Sierra Club* as the basis for recognizing aesthetic values as a basis for standing in zoning cases. *See infra* Part V.C.

[91] *But see* Patuxent Riverkeeper v. Md. Dep't of Env't, 29 A.3d 584, 588 (Md. 2011) (relying on *Laidlaw* and *Earth Island Institute* to find standing).

[92] *See* Summers v. Earth Island Inst., 555 U.S. 488, 492–93 (2009). The decision was 5-4, with Justice Ginsburg joining Justice Breyer's dissent. *See* Cassandra Barnum, Note, *Injury in Fact, Then and Now (and Never Again):* Summers v. Earth Island Institute *and the Need for Change in Environmental Standing Law*, 17 MO. ENV'T L. & POL'Y REV., 1, 4 (2009); Bradford Mank, *Revisiting the Lyons Den:* Summers v. Earth Island Institute*'s Misuse of* Lyons*'s "Realistic Threat" of Harm Standing Test*, 42 ARIZ. ST. L.J. 837, 838 (2010); Margaret McDonald, Summers v. Earth Island Institute*: Overhauling the Injury-in-Fact Test for Standing to Sue*, 71 LA. L. REV., 1053, 1054 (2011).

salvage projects.[93] He held again that injury in fact must be "concrete and particularized, [and that] the threat must be actual and imminent, not conjectural or hypothetical,"[94] and rejected an affidavit similar to the affidavit he rejected in *Lujan.*[95] Casually, and without explanation, he reaffirmed his downgrade of beneficiary standing.[96] The Court has cited both *Laidlaw* and *Earth Island*, commenting that the plaintiffs in *Laidlaw* "acted reasonably in refraining from using the polluted area."[97] State standing cases do not usually cite *Earth Island.*

[93] The dissenting opinion took a more critical view of the facts: "The Court holds that the Sierra Club and its members (along with other environmental organizations) do not suffer any "'concrete injury'" when the Forest Service sells timber for logging on many thousands of small (250-acre or less) woodland parcels without following legally required procedures—procedures which, if followed, could lead the Service to cancel or to modify the sales." *Summers*, 555 U.S. at 501 (Breyer, J., dissenting).

[94] *Id.* at 493. The notice, comment, and appeal process regulations did not forbid or require any action by the plaintiffs, but applied only to the federal officials. Standing could have been upheld as a claim of procedural injury, but Justice Scalia rejected it because the plaintiffs did not have a right to protect a concrete interest. *See id.* at 496–97.

[95] A member of the organization stated he had visited many national forests and planned to visit several national forests in the future that he did not name. *See id.* at 495. The affidavit also named projects in one forest that were subject to the regulations, but like the affidavit in *Lujan*, it did not state a firm intention to visit these locations. *See id.* at 496. It said only that the member "wants" to go there. This "vague desire to return" was not enough. Justice Scalia quoted the "some day" intentions language from *Lujan. See id.* Accepting an *intention* to visit as adequate for standing would eliminate the requirement of concrete, particularized injury in fact. *See id.* Sarcasm is evident in a reference to "Bensman's wanderings," and a comment that "Bensman will stumble across a project tract." *Id.* at 495–96. Scalia also rejected an assertion of past injury for reasons similar to those given in *Lujan*. *See id.* at 495.

[96] Quoting *Lujan*, Justice Scalia again held that standing is not precluded, but ordinarily is substantially more difficult to establish when the plaintiff is not the object of the regulation. *See id.* at 493.

[97] *See* Clapper v. Amnesty Int'l USA, 568 U.S. 398, 419 (2013) (per Justice Kavanaugh). The Court has also reaffirmed the "concrete and particularized" test for injury in fact. *See* Spokeo, Inc. v. Robins, 578 U.S. 330, 334 (2016). *But see* TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2204 (2021) (applying concrete harm requirement to decide standing case, relying on *Spokeo, Inc. v. Robins*, 578 U. S. 330 (2016) for concrete harm rule, and ignoring earlier more less restrictive applications of standing doctrine, such as *Laidlaw*).

IV. THIRD PARTY STANDING IN THE STATE COURTS

Third party standing rules in the states are based on statutory authority as supplemented by judicial doctrine. State courts can reject federal rules[98] because they do not have a case or controversy clause in their constitutions,[99] do not have to be enmeshed in federal technicalities and complexities,[100] and can hold that state standing rules are prudential,[101] not jurisdictional. They continue to recognize a limited role for the judiciary.[102]

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[98] *See, e.g.*, Life of the Land v. Land Use Comm'n of State of Haw., 623 P.2d 431, 439 (Haw. 1981) ("[S]tanding requirements should not be barriers to justice."); Dickey v. Iowa Ethics & Campaign Disclosure Bd., 943 N.W.2d 34, 42 (Iowa 2020) (Appel, J., dissenting) ("[S]tate court tradition tends to emphasize a preference for expeditious determination of controversies on the merits."); Jen Elec., Inc. v. County of Essex, 964 A.2d 790, 801–02 (N.J. 2009) (quoting Crescent Park Tenants Ass'n v. Reality Equities Corp. of N.Y., 275 A.2d 433, 438 (N.J. 1971)) (holding court "give[s] due weight to interests of individual justice," and "rejecting procedural frustrations in favor of 'just and expeditious determinations on the ultimate merits.'"); Snyder's Drug Stores, Inc. v. Minn. State Bd. of Pharmacy, 221 N.W.2d 162, 165–66 (Minn. 1974) (recognizing intervention by consumer organization to represent consumer beneficiary interest in price-fixing case).

[99] *See, e.g.*, Pence v. State, 652 N.E.2d 486, 488 (Ind. 1995); *Life of the Land*, 623 P.2d at 438; Roop v. City of Belfast, 915 A.2d 966, 968 (Me. 2007); Jenkins v. Swan, 675 P.2d 1145, 1149 (Utah 1983).

[100] *See* Carpenter v. Suffolk Franklin Sav. Bank, 346 N.E.2d 892, 895 (Mass. 1976) ("State courts need not become enmeshed in the Federal complexities and technicalities . . . ."); Stockmeier v. Nev. Dep't of Corr. Psych. Rev. Panel, 135 P.3d 220, 225 (Nev. 2006) (quoting 59 Am. Jur. 2d *Parties* § 30 at 441-42 (2002)).

[101] *See* Blanchard v. Show Low Plan. & Zoning Comm'n, 993 P.2d 1078, 1082 (Ariz. Ct. App. 1999); *Roop*, 915 A.2d at 968; Schulthess v. Carollo, 832 P.2d 552, 556 (Wyo. 1992).

[102] *See, e.g.*, Ala. Power Co. v. Citizens of State, 740 So. 2d 371, 381 (Ala. 1999) ("[O]ur [state] Constitution vests this Court with a limited judicial power that entails the special competence to decide discrete cases and controversies involving particular parties and specific facts."); *Life of the Land*, 623 P.2d at 438 ("[J]udicial power to resolve public disputes in a system of government where there is a separation of powers should be limited to those questions capable of judicial resolution and presented in an adversary context."); *Pence*, 652 N.E.2d at 488 ("[T]he principle of separation of powers is as much a part of the Indiana Constitution as the principle of freedom of conscience."); Kaplan v. Bowker, 131 N.E.2d 372, 374 (Mass. 1956) ("From an early day it has been an established principle in this Commonwealth that only persons who have themselves suffered, or who are in danger of suffering, legal harm can compel the courts to assume the difficult and delicate duty of passing upon the validity of the acts of a coordinate branch of the government."); Izaak Walton League of Am. Endowment, Inc. v. State, Dep't of Nat. Res., 252 N.W.2d 852, 854 (Minn. 1977) ("No controversy is presented, absent a genuine conflict in the

Despite these differences, a number of state courts, with little explanation,[103] reference the federal rules, including the injury in fact test, or hold the federal rules are persuasive, sometimes citing *Lujan*.[104] A substantial number of state courts go further and explicitly adopt *Lujan*'s

tangible interests of opposing litigants."); DaimlerChrysler Corp. v. Inman, 252 S.W.3d 299, 304 (Tex. 2008) (relying on separation of powers for standing rules).

[103] *See, e.g.*, *Dickey*, 943 N.W.2d at 42 (Appel, J., dissenting) ("Supreme Court departed from its prior trajectory by discovering new, more restrictive standing requirements to be applied in federal courts."); Comm. to Elect Dan Forest v. Emps. Pol. Action Comm., 853 S.E.2d 698, 720 (N.C. 2021) ("Supreme Court dramatically altered the law of standing . . . .").

[104] *See, e.g.*, Coral Constr., Inc. v. City & Cnty. of S.F., 10 Cal. Rptr. 3d 65, 72 (Ct. App. 2004) (citing Associated Builders & Contractors, Inc. v. San Francisco Airports Com., 981 P.2d 499 (Cal. 1999)) (holding the "plaintiff 'must be beneficially interested in the controversy; that is, he or she must have "some special interest to be served or some particular right to be preserved or protected over and above the interest held in common with the public at large"'" test is equivalent to the federal injury in fact test); HealthONE v. Rodriguez *ex rel.* Rodriguez, 50 P.3d 879, 892 (Colo. 2002) (holding that standing asks whether plaintiff was injured in fact and whether injury was to a legally protected right); *Life of the Land*, 623 P.2d at 441 (noting parallelism of state standing decisions with federal decisions;state standing decisions are at least coextensive with federal doctrine based on injury in fact, but state standing law may not follow every twist and turn of federal doctrine); Greer v. Ill. Hous. Dev. Auth., 524 N.E.2d 561, 573–75 (Ill. 1988) (holding federal standing law, which requires an injury in fact to a legally cognizable interest that must be distinct and palpable, only provides guidance; state law is more liberal because it is more willing to recognize standing for any plaintiff who shows he was "in fact aggrieved by an administrative decision"); Alons v. Iowa Dist. Ct. for Woodbury Cnty., 698 N.W.2d 858, 869 (Iowa 2005) ("We . . . consider the federal authority persuasive on the standing issue."); *In re* Custody of D.T.R., 796 N.W.2d 509, 512–13 (Minn. 2011) (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992)) (holding plaintiff must suffer some injury-in-fact by showing concrete and particularized invasion of a legally protected interest); Plan Helena, Inc. v. Helena Reg'l Airport Auth. Bd., 226 P.3d 567, 569 (Mont. 2010) (holding federal precedents are persuasive authority; Montana constitution "embodies the same limitations as are imposed on federal courts by the 'case or controversy' language of Article III," which requires definite and concrete controversy); Duncan v. State, 102 A.3d 913, 923 (N.H. 2014) (citing *Lujan*, 504 U.S. at 560–61) (holding state standing requirements are similar); Soc'y of Plastics Indus., Inc. v. Cnty. of Suffolk, 573 N.E.2d 1034, 1040–42 (N.Y. 1991) (holding "injury in fact" has become the touchstone, which state courts have refined for land use cases to include direct interest in the administrative action being challenged, "different in kind or degree from that of the public at large"); Bank of Am., NA v. Kabba, 276 P.3d 1006, 1008 (Okla. 2012) (citing state decision adopting federal rules); *see also* Allred v. Bebout, 409 P.3d 260, 269 (Wyo. 2018) (holding court occasionally finds guidance in federal law).

holding on injury in fact,[105] and a few endorse Justice Scalia's view that beneficiary standing is more difficult to establish.[106] These state courts have accidentally happened on a particular approach to standing based on the random strand of federal law, and their approach has been recited, recycled, and amplified. Several states do not follow federal law injury in fact but require similar injury.[107] Economic injury is not usually

[105] *See* Ala. Alc. Bev. Control Bd. v. Henri-Duval Winery, L.L.C., 890 So. 2d 70, 74 (Ala. 2003) (adopting three part *Lujan* test); Dover Hist. Soc. v. City of Dover Plan. Comm'n, 838 A.2d 1103, 1111 (Del. 2003) ("*Lujan* requirements . . . generally the same as the standards for determining standing to bring a case or controversy within the courts of Delaware."); State v. Philip Morris, Inc., 354 P.3d 187, 194 (Idaho 2015) (quoting and adopting *Lujan*); Commonwealth v. Sexton *ex rel.* App. Reg'l Healthcare, Inc., 566 S.W.3d 185, 188 (Ky. 2018) ("[T]he existence of a plaintiff's standing is a constitutional requirement to prosecute any action in the courts of this Commonwealth . . . .") (adopting *Lujan* test); Moore v. Middletown, 975 N.E.2d 977, 982 (Ohio 2012) (citing *Lujan*, 504 U.S. at 560–561) ("These three factors—injury, causation, and redressability—constitute 'the irreducible constitutional minimum of standing.'"); Sea Pines Ass'n for Prot. of Wildlife, Inc. v. S.C. Dep't of Nat'l Res., 550 S.E.2d 287, 291 (S.C. 2001) (enunciating stringent *Lujan* standing test as "irreducible constitutional minimum of standing"); Cable v. Union Cnty. Bd. of Cnty. Comm'rs, 769 N.W.2d 817, 825 (S.D. 2009) (quoting and explaining *Lujan* standing factors); *In re* Abbott, 601 S.W.3d 802, 808 (Tex. 2020) (adopting *Lujan* rules, holding they derive from separation of power, and holding beneficiary standing is more difficult to establish); Meyers v. JDC/Firethorne, Ltd., 548 S.W.3d 477, 484 (Tex. 2018) (quoting *Lujan* and explaining standing rules); Miller v. Wyo. Dep't of Health, 275 P.3d 1257, 1261 (Wyo. 2012) (requiring a personal stake, described as a personal interest at stake, and quoting three-part *Lujan* test); *see also* Gannon v. State, 319 P.3d 1196, 1210 (Kan. 2014) (requiring cognizable injury and quoting *Lujan* for holding that injury must be particularized so that it affects plaintiff in a personal and individual way, and adopting object versus beneficiary distinction; court occasionally cites federal rules); Pontbriand v. Sundlun, 699 A.2d 856, 862 (R.I. 1997) (quoting Justice Scalia) (describing standing as based on injury in fact and requiring "'an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) actual or imminent, not 'conjectural' or 'hypothetical.'"); City of Memphis v. Hargett, 414 S.W.3d 88, 98 (Tenn. 2013) (quoting federal "irreducible minimum") (citing *Lujan*, 504 U.S. at 560).

[106] *See* Gannon v. State, 319 P.3d 1196, 1210 (Kan. 2014); *In re* Abbott, 601 S.W.3d at 808; KS Tacoma Holdings, LLC v. Shorelines Hearings Bd., 272 P.3d 876, 886 (Wash. Ct. App. 2012) (statutory "aggrievement" standing requirement).

[107] *See* Pence v. State, 652 N.E.2d 486, 488 (Ind. 1995) (citing Frothingham v. Mellon, 262 U.S. 447 (1923)) (holding federal justiciability limits do not apply; "the party challenging law must show adequate injury or immediate danger of sustaining [an] injury."); Tax Equity All. for Mass. v. Comm'r, 672 N.E.2d 504, 509 (Mass. 1996) (legal harm required as an established principle from an early day); Nergaard v. Town of Westport Island, 973 A.2d 735, 740 (Me. 2009) (requiring particularized injury due to harm not experienced by public at large); Roberts v. BJC Health Sys., 391 S.W.3d 433, 438 (Mo.

required.[108] Courts seldom understand the significance of *Lujan* for standing law.

Lujan does not always dominate state court decisions on the right of access to courts. A number of states hold that *Lujan* is inconsistent with state constitutional history and text; that they are not bound by the federal case and controversy requirement; that they can reject federal standing

2013) (holding standing is established by showing "legally cognizable interest in the subject matter of the litigation" and "a threatened or actual injury"); Smith v. Allstate Ins. Co., 483 A.2d 344, 346 (Me. 1984) (holding standing to sue has plurality of meaning; requires personal stake, potential particularized injury, and sufficiently substantial interest); Schwartz v. Lopez, 382 P.3d 886, 894 (Nev. 2016) (requiring "special or peculiar injury different from that sustained by the general public," and noting that the primary purpose of standing "is to ensure the litigant will vigorously and effectively present his or her case against an adverse party"); State v. Carpenter, 301 N.W.2d 106, 107 (N.D. 1980) (requiring personal stake and threatened or actual injury); Park v. Northam, No. 200767, 2020 WL 5094626, at *4 (Va. Aug. 24, 2020) (requiring particularized or personalized injury); *Cf.* Barvenik v. Bd. of Aldermen of Newton, 597 N.E.2d 48, 51 n.9 (Mass. App. Ct. 1992) ("The Federal law of standing is decidedly more expansive than that of Massachusetts."). Some cases require a legal harm or legally protected interest, which no longer is a federal requirement. The Court rejected this test in *Ass'n of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 153 (1970) ("The 'legal interest' test goes to the merits. The question of standing is different."). Louisiana's standing rule is based on a statute. *See* Animal Legal Def. Fund v. State, Dep't of Wildlife & Fisheries, 140 So. 3d 8, 12 (La. Ct. App. 2013) (citing La. Code Civ. Proc. Ann. art. 681, which requires "real and actual interest;" particularized injury occurs when a judgment or order adversely and directly affects a party's property, pecuniary, or personal rights) (requiring "legally protectable and tangible interest at stake in the litigation") (emphasis omitted).

[108] *See, e.g.*, *Nergaard*, 973 A.2d 735. A court typically states that injury or harm must not be experienced by the public at large. *See id.* at 740–41. The courts do not recognize third party beneficiary standing, as many cases were citizen suits or suits by nongovernmental organizations where the court denied standing when injury was not shown. *See id.* at 740, 742; *see, e.g.*, *Pence*, 652 N.E.2d at 488 (citizen suit challenging statute as unconstitutional); *Animal Legal Def. Fund*, 140 So. 3d at 20 (holding organization that dedicated resources to protecting animals from cruelty and abuse did not have standing to challenge permit granted for display of tiger).

rules, including injury in fact;[109] or that the federal rules do not apply.[110] Some states accept *Baker v. Carr*'s functional standing rule. They hold that courts should "ensure the litigant will vigorously and effectively present his or her case against an adverse party";[111] should require that a

[109] *See* Stocks v. City of Irvine, 170 Cal. Rptr. 724, 728 (Ct. App. 1981) ("[T]he threshold issue is whether we are bound to follow the federal standing requirements. We hold that we are not."); City of Greenwood v. Petitioners for Proposed City of Centennial, 3 P.3d 427, 437 n.8 (Colo. 2000) (en banc) (considering narrowed standing requirements under *Lujan* and holding "[o]ur standing doctrine does not require these refinements"); Andross v. Town of West Hartford, 939 A.2d 1146, 1157–59 (Conn. 2008) (rejecting federal law in favor of more liberal state standards); Citizens for Prot. of N. Kohala Coastline v. Cnty. of Hawai'i, 979 P.2d 1120, 1127 (Haw. 1999) (holding reliance on *Lujan* misplaced, "as the United States Supreme Court's doctrine on the issue of standing does not bind us"); Lee v. Buth-Na-Bodhaige, Inc., 143 N.E.3d 645, 665 (Ill. App. 2019) (rejecting *Lujan*); Nefedro v. Montgomery Cnty., 996 A.2d 850, 854 n. 3 (Md. 2010) (rejecting *Lujan*'s three-prong test); Lansing Sch. Ass'n v. Lansing Bd. of Educ., 792 N.W.2d 686, 692 (Mich. 2010) (rejecting state cases relying on *Lujan*); Stockmeier v. Nev. Dep't of Corr. Psych. Rev. Panel, 135 P.3d 220, 225–26 (Nev. 2006) (examining *Lujan* and rejecting *Lujan*'s approach); Comm. to Elect Dan Forest v. Emps. Pol. Action Comm., 853 S.E.2d 698, 721 (N.C. 2021) (rejecting and criticizing *Lujan*); Kellas v. Dep't of Corr., 145 P.3d 139, 143 (Or. 2006) (holding cannot import federal justiciability law into Oregon constitution "to fabricate constitutional barriers to litigation with no support in either the text or history of Oregon's charter of government."); West v. Seattle Port Comm'n, 380 P.3d 82, 86 (Wash. App. 2016) (finding restrictive *Lujan* approach fundamentally opposed to broad Washington approach); Allred v. Bebout, 409 P.3d 260, 270 (Wyo. 2018) (no case or controversy requirement in state constitution); *see also* Heffernan v. Missoula City Council, 255 P.3d 80, 91 (Mont. 2011) (discussing but not accepting federal cases). *But see* Corozzo v. Wal-Mart Stores, Inc., 531 S.W.3d 566, 573 (Mo. Ct. App. 2017) (applying injury in fact test based on Supreme Court's *Spokeo* decision); Wash. State Hous. Fin. Comm'n v. Nat'l Homebuyers Fund, Inc., 445 P.3d 533, 537 (Wash. 2019) (adopting injury in fact test as state law under Uniform Declaratory Judgment Act).

[110] *See* Kanuk *ex rel*. Kanuk v. State, Dep't of Nat'l Res., 335 P.3d 1088, 1092 (Alaska 2014).

[111] Schwartz v. Lopez, 382 P.3d 886, 894 (Nev. 2016).

plaintiff must have a "stake" in the litigation;[112] and that a plaintiff's interest must be adverse, substantial, or concrete.[113]

V. THIRD PARTY STANDING FOR ZONING LITIGATION IN THE COURTS

A. The Standard Rules

The rules that courts apply when they consider standing to sue[114] in land use litigation are best illustrated by the rules that courts adopt for zoning litigation. State courts begin with the standard rules. They apply the limiting rule that injury common to the general public does not provide

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[112] *See Kanuk*, 335 P.3d at 1092. The Supreme Court still quotes the maxims. *See* Gill v. Whitford, 138 S. Ct. 1916, 1923 (2018); Warth v. Seldin, 422 U.S. 490, 498–99 (1975). As the Supreme Court of Utah explained,

> [a] requirement that a plaintiff have a personal stake in the outcome of a dispute is intended to confine the courts to a role consistent with the separation of powers, and to limit the jurisdiction of the courts to those disputes which are most efficiently and effectively resolved through the judicial process.

Jenkins v. Swan, 675 P.2d 1145, 1149 (Utah 1983).

[113] *See* Wm. Penn Parking Garage, Inc. v. City of Pittsburgh, 346 A.2d 269, 281 (Pa. 1975) (discussing interest which is pecuniary and substantial, though neither pecuniary nor readily translatable into pecuniary terms; interest must have substance, must be some discernible adverse effect to some interest other than abstract interest of all citizens in having others comply with the law, and must show causation of the harm to his interest by the matter of which he complains; possibility that an interest will suffice to confer standing grows less as the causal connection grows more remote; legal right not required); Gates v. City of Pittsburgh Hist. Rev. Comm'n, No. 716 C.D. 2020, 2021 WL 2343267, at *5 (Pa. Commw. Ct. June 9, 2021) (summarizing Pennsylvania law); Cupp v. Bd. of Supr's of Fairfax Cnty., 318 S.E.2d 407, 411–12 (Va. 1984) (citing federal cases) (requiring sufficient interest in the subject matter of the case so that the parties will be actual adversaries, personal stake, and concrete adverseness; standing granted to owners of plant nursery challenging county board's authority to impose requirement that owners dedicate a portion of their land and construct a roadway as preconditions to grant of special exception to expand nursery). There may be cases where special damage rules do not apply. *See* Tustin Heights Ass'n v. Bd. of Sup'rs of Orange Cnty., 339 P.2d 914, 917 (Cal. Ct. App. 1959) (granting standing to residents and property owners residing in the county in vicinity of property to which conditional permit controversy applied to challenge violation of an ordinance without showing special damage).

[114] *See* Marashlian v. Zoning Bd. of Appeals of Newburyport, 660 N.E.2d 369, 372 (Mass. 1996) (holding review of standing does not require that factfinder ultimately find a plaintiff's allegations meritorious); *see generally* Sara Bronin & Dwight Merriam, RATHKOPF'S THE LAW OF ZONING & PLANNING ch. 63 (2021).

standing,[115] which excludes standing based solely on social interest, and then adopt one of two competing Supreme Court rules. A number of states[116] adopt the functional standing rule from *Baker v. Carr*, often

[115] *See Gates*, 2021 WL 2343267, at *6 (declining to confer standing on individual historic district residents who assert only general interest in the preservation of integrity of buildings in the historic district); Bongiorno Supermarket, Inc. v. Zoning Bd. of Appeals of Samford, 833 A.2d 883, 890–91 (Conn. 2003) (finding plaintiffs' property near intersection will be more congested as result of defendants' proposal; specific personal and legal interest the plaintiffs had in the subject matter had not been specially and injuriously affected by the board's decision); Fla. Rock Props v. Keyser, 709 So. 2d 175, 177 (Fla. Dist. Ct. App. 1998) (finding plaintiff who never demonstrated any specific injury, only that county would not be as bucolic as it once was, is a citizen with an interest in the environment and nothing more); Coal. for Agric.'s Future v. Canyon Cnty. Bd. of Comm'rs, 369 P.3d 920, 924-26 (Idaho 2016) (finding failure to comply with statutory requirements in adopting the 2020 Plan); People for a Safer Soc'y v. Vill. of Niles, No. 1-16-0674, 2017 WL 1238408, at *6 (Ill. App. Ct. Mar. 30, 2017) (rejecting argument that all of the people of the village will suffer the harms of having a firearm retailer present; no factor requires or authorizes them to act as private attorneys general to vindicate general community grievances); Alesi v. Warren Cnty. Bd. of Cnty. Commr's., 24 N.E.3d 667, 675 (Ohio Ct. App. 2014) (nothing in record to suggest that residents opposing variance will suffer any grievance different than what other residents of the community might suffer); Cable v. Union Cnty. Bd. of Cnty. Comm'rs, 769 N.W.2d 817, 829 (S.D. 2009) (discussing property located one mile or less from proposed refinery site; "any injury they may suffer in terms of diminution of value of their real property or damage to their quiet rural lifestyle will be shared by all taxpayers and electors, but to a greater extent by those in closer proximity to the proposed refinery"); Va. Beach Beautification Comm'n v. Bd. of Zoning Appeals of Va. Beach, 344 S.E.2d 899, 903 (Va. 1986) (holding beautification commission did not demonstrate direct, immediate, pecuniary, and substantial interest in decision to grant variance to height and setback requirements for freestanding signs). *But see* Fritts v. City of Ashland, 348 S.W.2d 712, 714 (Ky. 1961) (holding the purpose of zoning is not to protect the value of the property of particular individuals but rather to promote the welfare of the community as a whole; entire community is damaged by haphazard zoning because it causes insecurity of property values throughout the city; standing granted to property owner four miles away from rezoned site).

[116] *See* Summit Mall Co., LLC v. Lemond, 132 S.W.3d 725, 734 (Ark. 2003) (discussing adverse effect); Keller v. City of Roseville, No. C072379, 2014 WL 1339952, at *2 (Cal. Ct. App. Apr. 4, 2014) (holding "beneficially interested" interpreted to mean "some special interest to be served or some particular right to be preserved or protected over and above the interest held in common with the public at large"); Warren Cnty. Citizens for Managed Growth, Inc. v. Bd. of Comm'rs of Bowling Green, 207 S.W.3d 7, 13 (Ky. Ct. App. 2006) (holding judicially recognizable interest in subject matter may not be remote and speculative; must be present and substantial interest in subject matter); Nergaard v. Town of Westport Island, 973 A.2d 735, 740 (Me. 2009) ("[P]articularized injury occurs when a judgment or order adversely and directly affects a party's property, pecuniary, or personal rights."); Ray v. Mayor of Balt., 59 A.3d 545, 549 (Md. 2013) (quoting Bryniarski v. Montgomery Cnty. Bd. of Appeals, 230 A.2d 289, 294 (Md. 1967))

supplemented by an aggrievement requirement.[117] This requirement, which is vague and inconsistently applied, produces conflicting results in zoning cases. Connecticut limits third party standing, holding the statutory scheme for zoning implicates a broad range of public concerns that should

("[P]ersonally and specially affected in a way different from that suffered by the public generally"); Van Renselaar v. City of Springfield, 787 N.E.2d 1148, 1150 (Mass. App. Ct. 2003) (discussing adverse impact); Miss. Manufactured Hous. Ass'n v. Bd. of Aldermen of Canton, 870 So. 2d 1189, 1192 (Miss. 2004) (requiring colorable interest in subject matter of litigation or adverse effect from defendant's conduct; more relaxed than stringent case or controversy requirements for standing in federal courts); Smith v. City of Papillion, 705 N.W.2d 584, 591 (Neb. 2005) (citing other sources) (discussing special injury); Friends of Lackawanna v. Dunmore Borough Zoning Hearing Bd., 186 A.3d 525, 535 (Pa. Commw. Ct. 2018) ("substantial, direct and immediate interest"); Escalera Ranch Owners' Ass'n, Inc. v. Schroeder, 610 S.W.3d 521, 525 (Tex. App. 2020) ("[S]tanding requires a real controversy between the parties that will be determined by the judicial relief sought."); *see also* Dalton v. City Honolulu, 462 P.2d 199, 201–02 (Haw. 1969) (discussing rezoning, declaratory judgment statute requires actual controversy, and "legal relation, status, right, or privilege in which [a party] has a concrete interest").

[117] *See* Andross v. Town of West Hartford, 939 A.2d 1146, 1155–61 (Conn. 2008) (defining classical non-statutory aggrievement to mean "specific, personal and legal interest in the subject matter of the controversy and that the defendants' conduct has specially and injuriously affected that specific personal or legal interest," and must be different from that suffered by the public at large; "the proper party to vindicate public interests may be the attorney general, the state's attorney or the town itself"; standing denied to challenge nonenforcement of neighborhood ordinance and approval of new development); Kendall v. Howard Cnty., 66 A.3d 684, 691-92 (Md. 2013) (holding aggrieved means an interest that personally and specifically affects plaintiff in a way different from the public generally; standing denied to attack a laundry list of county land use and zoning decisions); Friends of the Rappahannock v. Caroline Cnty. Bd. of Sup'rs, 743 S.E.2d 132, 137 (Va. 2013) (finding no distinction between "aggrievement" and "justiciable interest"); *see generally* Beers v. Commw. Unemployment Comp. Bd. of Rev., 633 A.2d 1158, 1161 (Pa. 1993) (citing S. Whitehall Twp. Police Serv. v. S. Whitehall Twp., 555 A.2d 793, 795 (Pa. 1989)) ("In order to be 'aggrieved' 'a party must (a) have a substantial interest in the subject-matter of the litigation; (b) the interest must be direct; and (c) the interest must be immediate and not a remote consequence.'"); Salkin, *supra* note 22, § 42:17. Model legislation proposed by the American Planning Association grants standing to parties "aggrieved" and provides that "aggrieved" means

> that a land-use decision has caused, or is expected to cause, [special] harm or injury to a person, neighborhood planning council, neighborhood or community organization, or governmental unit, [distinct from any harm or injury caused to the public generally]; and that the asserted interests of the person, council, organization, or unit are among those the local government is required to consider when it makes the land-use decision.

AM. PLANNING ASS'N, *supra* note 7, § 10-101, at 10-17 to 10-18.

be left to local government.[118] Maryland gives more priority to the judicial role, holding that third party litigants are almost prima facie aggrieved by proximity when they are adjoining, confronting, or nearby property owners.[119] States that apply the injury in fact rule[120] also reach conflicting results. They may grant[121] or reject[122] standing in zoning cases.

These standard standing rules do not govern third party standing in zoning cases, which is provided in all states by private law, property-based rules based on the law of private nuisance.[123] A private nuisance is a substantial, unreasonable, noninvasive interference with the private use

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[118] *See Andross*, 939 A.2d at 1155–161 (noting that the issues in the case properly fell "within the purview of the town's plan and zoning commission and zoning board of appeals"); Mayer v. Hist. Dist. Comm'n, 150 A.3d 333, 344 (Conn. 2017) (holding the reduction in size of historic barn did not have adverse effect on the plaintiffs' legally protected interest; discussing cases).

[119] *See Kendall*, 66 A.3d at 691–93. "A protestant is specially aggrieved when she is farther away than an adjoining, confronting, or nearby property owner, but is still close enough to the site of the rezoning action to be considered almost prima facie aggrieved, and offers 'plus factors' supporting injury." *Id.* at 692–93; *see also* Bennett v. Montgomery Cnty., No. 302, Sept. Term, 2018, 2019 WL 4187399, at *11 (Md. Ct. Spec. App. Sept. 3, 2019) (discussing standing rules; no standing to challenge sector plan).

[120] *See, e.g.*, ATC S., Inc. v. Charleston Cnty., 669 S.E.2d 337, 339–40 (S.C. 2008) (adopting concrete and particularized injury test).

[121] *See* Citizens Against Linscott/Interstate Asphalt Plant v. Bonner Cnty. Bd. of Comm'rs, 486 P.3d 515, 523 (Idaho 2021) (applying test to approve associational standing); Abata v. Pennington Cnty. Bd. of Comm'rs, 931 N.W.2d 714, 720 (S.D. 2019) (discussing citizens expressing a strong concern with how pre-existing mining operations would be regulated under the zoning ordinance; applying three-part federal test).

[122] *See* Egan v. Cnty. of Lancaster, 952 N.W.2d 664, 669 (Neb. 2020) (plaintiff lived thirteen miles from proposed operation); Sierra Club v. Clay Cnty. Bd. of Adjustment, 959 N.W.2d 615, 622 (S.D. 2021) (discussing generalized harm to air, water, and soil resources because of the proposed confined animal feeding operation).

[123] Some courts incorrectly refer to public nuisance law. *See* Skaggs-Albertson's v. ABC Liquors, Inc., 363 So. 2d 1082, 1088 (Fla. 1978) ("'[S]pecial damage' rule still has vitality in both nuisance actions and actions seeking to enforce a valid zoning ordinance."); City of Fort Myers v. Splitt, 988 So. 2d 28, 32 (Fla. Dist. Ct. App. 2008) ("'[S]pecial damages' rule is derived from 'the law of public nuisance.'"); Ray v. Mayor of Balt., 59 A.3d 545, 549-550 (Md. 2013) (discussing the special damage rule as an outgrowth of the law of public nuisance; public nuisance was an offense against the state subject to abatement on motion of the proper governmental agency; individuals could not maintain an action for a public nuisance unless they suffered special damage; "we will call upon the law of nuisance for enlightenment").

and enjoyment of land.[124] A change in land use can be a nuisance. Courts decide property-based land use standing claims[125] by applying nuisance-based rules.[126] All states apply two factors, proximity and harm, when they consider third party standing in zoning cases.

B. Proximity

Nuisance law requires proximity,[127] which is the most important factor in determining standing.[128] This is a distance requirement, as courts select a distance point beyond which they will not find the harm required for standing. Landowners within the distance point can get standing. Landowners outside the distance point cannot get standing, even though they may be as much if not more concerned about the zoning change as closer landowners.

Courts decide proximity issues ad hoc with differing results and without explicit rules. Proximity alone is not enough.[129] Distance is only

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[124] *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 86 (5th ed. 1984); Robert D. Dodson, *Rethinking Private Nuisance Law: Recognizing Aesthetic Nuisances in the New Millennium*, 10 S.C. ENV'T L.J. 1 *passim* (2002) (discussing nuisance); Louise A. Halper, *Untangling the Nuisance Knot*, 26 B.C. ENV'T AFF. L. REV. 89, 96 (1998) (discussing different types of nuisance). Nuisance law fell into disuse once zoning ordinances were enacted, as they can protect a use from a nuisance violation. *See* S. Camden Citizens in Action v. N.J. Dep't of Env't Prot., 254 F. Supp. 2d 486, 506–07 (D.N.J. 2003) (quoting RESTATEMENT (SECOND) OF TORTS § 821B cmt. f).

[125] This Article considers only the standing of resident landowners. Most courts hold that nonresident landowners have standing. *See, e.g.*, Scott v. City of Indian Wells, 492 P.2d 1137, 1140 (Cal. 1972) (denying standing would "make a fetish out of . . . invisible boundary lines and a mockery of the principles of zoning"); Abel v. Plan. & Zoning Comm'n of New Canaan, 998 A.2d 1149, 1159 (Conn. 2010) (holding statutory phrase "any person" includes New York neighbors who lived within 100 feet of the subject Connecticut property); Allen v. Coffel, 488 S.W.2d 671, 675 (Mo. App. 1972) (reviewing cases); Moore v. Middletown, 975 N.E.2d 977, 986 (Ohio 2012) (reviewing cases); *see also* Kody Teaford, *Walk the (Murky) Line: The Right of Non-Resident, Ohio Landowners to Challenge Municipal Zoning Measures*, 45 U. TOL. L. REV. 407, 423–25 (2014).

[126] No explanations for why courts adopted the nuisance-based test were located.

[127] For example, in discussing the law of nuisance a New York court held "[a]n owner will not be permitted to make an unreasonable use of his premises to the material annoyance of his neighbor." Bove v. Donner-Hanna Coke Corp., 258 N.Y.S. 229, 231 (App. Div. 1932).

[128] *See* Ray v. Mayor of Balt., 59 A.3d 545, 550 (Md. 2013).

[129] *See* Gates v. City of Pittsburgh Hist. Rev. Comm'n, No. 716 C.D. 2020, 2021 WL 2343267, at *5 (Pa. Commw. Ct. June 9, 2021) (denying standing to challenge historic district design guidelines); People for a Safer Soc'y v. Vill. of Niles, No. 1-16-0674, 2017 WL 1238408, at *6 (Ill. App. Ct. Mar. 30, 2017); *see also* Stauton v. Plan. & Zoning

one factor,[130] but courts usually give standing to landowners close to a site[131] and reject standing for landowners too far away.[132] Some courts are more lenient. They give abutting landowners a rebuttable presumption of

Comm'n, 856 A.2d 400, 404-08 (Conn. 2004) (holding property owner not adjacent to site approved for planned development is not abutting though located within zone in which zoning approval given). *But see* Chapman v. Town of Redington Beach, 282 So. 3d 979, 984–85 (Fla. Dist. Ct. App. 2019) ("[O]wner of property adjacent to or nearby land upon which there is zoning ordinance violation may, by virtue of proximity, be peculiarly affected by the violation, even if his or her injuries might at some level of generality be described as similar to those of other community members.").

[130] *See* Davisco Foods Int'l, Inc. v. Gooding Cnty., 118 P.3d 116, 118, 124 (Idaho 2006) (holding plaintiff 3.4 miles from project had standing; could smell odors); Fritts v. City of Ashland, 348 S.W.2d 712, 714 (Ky. 1961) (granting standing to property owner four miles away from rezoned site); Warren Cnty. Citizens for Managed Growth, Inc. v. Bd. of Comm'rs of Bowling Green, 207 S.W.3d 7, 13 (Ky. Ct. App. 2006) (granting standing to owner four miles away; residents of city will be directly affected by the development).

[131] *See* Concerned Citizens of Murphys v. Jackson, 140 Cal. Rptr. 531, 534 (Ct. App. 1977) ("[I]ndividual plaintiffs are property owners within general community which might be affected by proposed use of property . . . one plaintiff own[ed] property within 300 feet of subject property and was given notice of hearing."); Luter v. Oakhurst Assoc., 529 So. 2d 889, 892 (Miss. 1988) (proximity of homeowner who lived 211 feet away from subject property and others who lived in a subdivision 530 feet away, coupled with their allegations that apartment complex would drive down their property values, held enough to confer standing); *see also* AM. PLANNING ASS'N, *supra* note 7, § 10-607(3) (granting standing as of right to abutting and confronting landowners).

[132] *See* Burks v. City of Maricopa, No. 2 CA-CV 2017-0177, 2018 WL 3455691, at *3 (Ariz. Ct. App. July 16, 2018) (denying plaintiff standing when her residence was greater than five miles away from a propsed racing facility; plaintiffs are not required to show "strict idiosyncrasy" of possible injury or "direct adjacency" to proposed racing facility, but plaintiffs are required to plead damage from injury peculiar to her or at least more substantial than that suffered by general public; absent from plaintiff's complaint was the distance from her property to proposed racing facility); Pichette v. City of N. Miami, 642 So. 2d 1165, 1165–66 (Fla. Dist. Ct. App. 1994) (denying appellant standing when his property was more than a mile across Biscayne Bay from the rezoned site: "no genuine issue that he would be affected by noise, traffic impact, land value diminution, or in any other respect by subject zoning ordinance . . . [since he is] separated by a 57-acre buffer area from rezoned tract of land"); *Ray,* 59 A.3d at 555–56 (denying standing to petitioners who lived 0.4 miles from planned unit development: "protestants who lived more than 1000 feet from the rezoning site have repeatedly been denied standing"; urban nature of planned unit development does not affect proximity analysis); City of Greenbelt v. Jaeger, 206 A.2d 694, 696 (Md. 1965) (denying standing to a homeowner whose house was 7.5 miles from property that was to be rezoned; only predicted that "present reclassification was but first step in planned non-residential development of adjacent acreage").

standing,[133] allow standing based on entitlement to a hearing notice,[134] require minimal harm for abutters,[135] or hold that damage to property is not essential.[136]

C. Harm

Harms recognized by nuisance law help decide the harms courts will recognize for standing in zoning cases. Nuisance law recognizes physical harm, such as noise, odors, physical invasion, dust, and safety or environmental hazards.[137] It may recognize aesthetic harm.[138] The

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[133] *See* Sun-Brite Car Wash, Inc. v. Bd. of Zoning & Appeals, 508 N.E.2d 130, 133 (N.Y. 1987) ("[P]roof of special damage or in-fact injury is not required in every instance"; "allegation of close proximity alone may give rise to an inference of damage or injury that enables a nearby owner to challenge a zoning board decision without proof of actual injury"; "much to be said for permitting judicial review at request of any citizen, resident or taxpayer, because welfare of entire community involved when enforcement of zoning law is at stake").

[134] *See* Marashlian v. Zoning Bd. of Appeals of Newburyport, 660 N.E.2d 369, 372 (Mass. 1996) ("[A]butters entitled to notice of zoning board of appeals hearings enjoy a rebuttable presumption they are 'persons aggrieved.'"); Landrum v. City of Omaha Plan. Bd., 899 N.W.2d 598, 609 (Neb. 2017) ("[E]ntitlement to notice . . . tends to show presence of special injury . . . finding of special injury was also supported by expert testimony.").

[135] *See* Roop v. City of Belfast, 915 A.2d 966, 968–69 (Me. 2007) (quoting Sproul v. Town of Boothbay Harbor, 746 A2d 368, 371 (2009)) (finding standing threshold is minimal; "[b]ecause of abutter's proximate location, a minor adverse consequence affecting the party's property, pecuniary or personal rights is all that is required for abutting landowner to have standing," even though no decrease in value of property).

[136] *See* Fritts v. City of Ashland, 348 S.W.2d 712, 714 (Ky. 1961) ("The effect of a zoning change on value of neighboring property is only one factor to be considered, and the purpose of zoning is not to protect, the value of the property of particular individuals but rather to promote the welfare of the community as a whole. The entire community is damaged by haphazard zoning because it causes insecurity of property values throughout the city.").

[137] *See* Dodson, *supra* note 124, at 1; *see, e.g.*, Schlotfelt v. Vinton Farmers' Supply Co., 109 N.W.2d 695, 696 (Iowa 1961) (discussing feed grinding, feed mixing, and fertilizer sales business; injunction "restraining defendant from operating its machinery so as to cause vibration, noise and annoyance to the occupants of plaintiff's property; and from so using its plant as to cause oat hulls, dust, or noxious odors to be emitted into the air either by normal or accidental means"); Massey v. Long, 608 S.W.2d 547, 549 (Mo. Ct. App. 1980) (holding noise from air conditioner in adjoining apartment was a nuisance).

[138] *See* Dodson, *supra* note 124. *Compare* Ness v. Albert, 665 S.W.2d 1 (Mo. Ct. App. 1983) (holding "the presence of certain 'rusted objects,' pieces of 'broken concrete,' parts of 'old sinks' and 'stoves,' and a partially burned house trailer on defendant's property" not a nuisance), *with* Parkersburg Builders Material Co. v. Barrack, 191 S.E. 368 (W. Va. 1937) (leading case recognizing aesthetic harm).

balancing of interests between a plaintiff and a defendant that nuisance law requires[139] is not done in zoning cases.

Nuisance law does not recognize all the harms that land use changes create, such as harm from density increases, and courts vary whether they recognize additional harms. Courts can recognize other types of harm, such as lighting disturbance, traffic problems,[140] and depreciation in the value of property,[141] and may consider more than one harm.[142] Other

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[139] Justice Scalia provided a good explanation of nuisance law in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1030–31 (1992) (citations omitted), where he noted that it normally requires

> analysis of, among other things, the degree of harm to public lands and resources, or adjacent private property, posed by the claimant's proposed activities . . . , the social value of the claimant's activities and their suitability to the locality in question . . . , and the relative ease with which the alleged harm can be avoided through measures taken by the claimant and the government (or adjacent private landowners) alike . . . .

[140] *See* Summit Mall Co. v. Lemond, 132 S.W.3d 725, 732–34 (Ark. 2003) (discussing property values, loss of green space, air and noise pollution, and traffic congestion); DeKalb Cnty. v. Wapensky, 315 S.E.2d 873, 875 (Ga. 1984) (finding neighboring landowners to proposed condo tower would be subject to decline in property values and noise, odor, and visual intrusions); Sanitary & Improvement Dist. No. 347 v. City of Omaha, 589 N.W.2d 160, 172 (Neb. Ct. App. 1999) (discussing traffic flow and reviewing cases); Mangum v. Raleigh Bd. of Adjustment, 669 S.E.2d 279, 283 (N.C. 2008) (finding the special use permit would have adverse effects on the property, including problems related to parking, safety, security, stormwater runoff, littering, and noise); Morra v. Grand Cnty., 230 P.3d 1022, 1028 (Utah 2010) ("Here, the Citizens have alleged that the amended development will result in dangerous increases of pollution in the water delivered to their property—water they drink and use to cook and clean. This allegation of a direct and personal impact is sufficient to create the personal stake that our standing requirements demand.").

[141] *See* Toomey v. Gomeringer, 201 A.2d 842, 844 (Md. 1964) (holding the value of residential properties would be depreciated and proposed extension of commercial zoning would have an impact on surrounding residential areas); *see also* Landrum v. City of Omaha Planning Bd., 899 N.W.2d 598, 609 (Neb. 2017) ("[T]he proposed changes would cause an adverse impact on the neighboring residents' property values."); *see also* cases cited in note 139.

[142] *See* Blanchard v. Show Low Plan. & Zoning Comm'n, 993 P.2d 1078, 1082 (Ariz. Ct. App. 1999) (discussing greatly increased traffic load, noise and pollution from cars, possible increase in crime, and light pollution from parking lot lights at proposed Wal-Mart Center); Renard v. Dade Cnty., 261 So. 2d 832, 837 (Fla. 1972) (discussing proximity; character of neighborhood, including existence of common restrictive covenants and set-back requirements; type of change proposed; entitlement to receive notice); Reynolds v. Dittmer, 312 N.W.2d 75, 78 (Iowa 1981) (discussing proximity, character of

courts reject an increase in traffic or a depreciation in property values as harms generally shared.[143] Nuisance law does not recognize an increase in density as a harm, but courts grant standing when an increase in density creates specific harms that affect a plaintiff.

Aesthetic harm can be objectionable, such as a home whose design is incompatible with its surrounding environment.[144] Recognition of aesthetic interests is mixed. Legal acceptance of aesthetics in land use regulation had a long struggle,[145] and aesthetic nuisances were not initially recognized.[146] Some courts do not recognize aesthetic harm as a basis for

neighborhood, type of zoning change, right to notice); Ramirez v. City of Santa Fe, 852 P.2d 690, 694–95 (N.M. 1993) (threat of aesthetic harm, quality of life, and property harm); *Mangum*, 669 S.E.2d at 281 (discussing "increased traffic, increased water runoff, parking, and safety concerns, and secondary adverse effects" on petitioners' businesses).

[143] *See* Kenner v. Zoning Bd. of Appeals of Chatham, 944 N.E.2d 163, 171 (Mass. 2011) (discussing diminution in property value and traffic concerns); Sanitary & Imp. Dist. No. 347 of Douglas Cnty. v. City of Omaha, 589 N.W.2d 160, 166-172 (Neb. Ct. App. 1999) (reviewing cases from other states).

[144] *See, e.g.*, Burns v. Town of Palm Beach, 999 F.3d 1317, 1317 (11th Cir. 2021) ("[D]enial of approval, by town's architectural review commission, of building permit for replacement of traditional beachfront mansion with larger mansion using midcentury modern design held not to violate due process, equal protection, and freedom of expression.").

[145] Most courts now recognize aesthetics as a legitimate interest in land use regulation, though some require a connection with other interests. *See generally* Kenneth Pearlman et al., *Beyond the Eye of the Beholder Once Again: A New Review of Aesthetic Regulation*, 38 URB. LAW. 1119 *passim* (2006).

[146] *See* Dodson, *supra* note 124.

standing;[147] other courts do[148] but will deny standing if aesthetic harm is not proved.[149] Courts that recognize aesthetics sometimes follow a leading

[147] *See* Jillson v. Barton, 229 S.E.2d 476, 478 (Ga. Ct. App. 1975) (holding unsightliness of adjacent property alone not such inconvenience as to amount to a nuisance); Vollmer v. Bd. of Appeals of Montgomery Cnty, 2019 WL 1513799, at *4 (Md. Ct. Spec. App. Apr. 8, 2019) (holding that relocation of historic building, "interests in historic preservation, or the aesthetic pleasures and memories sparked by passing the historic building on a frequent basis, are too attenuated to be distinct from any adverse effects that might be experienced by the public at large"); Montgomery v. Bd. of Selectmen of Nantucket, 120 N.E.3d 1246, 1253 (Mass. App. Ct. 2019) (holding that [c]oncerns about the visual impact of a proposed structure on abutting property generally are insufficient to confer standing" unless "local zoning bylaw specifically provides that visual consequences should be taken into account."); Harvard Square Def. Fund, Inc. v. Plan. Bd. of Cambridge, 540 N.E.2d 182, 184–85 (Mass. App. Ct. 1989) (discussing special permits for construction of office retail buildings in Square, expression of aesthetic views and speculative opinions, diminished open space, incompatible architectural styles, belittling of historical buildings, and diminished enjoyment of "village feeling" express matters of general public concern); Brighton Residents Against Violence to Child., Inc. v. MW Props., LLC, 757 N.Y.S.2d 399, 403 (App. Div. 2003) (discussing administrative approval of construction of berm on property where abortion protests occurred, aesthetic, and safety injuries insufficient as matter of law; not established that any members suffered any injury in fact, let alone an injury different from that of the general public). *But see Kenner*, 944 N.E.2d at 169 (finding that if zoning bylaw specifically provides that zoning board of appeals should take into consideration the visual impact of a proposed structure, person whose impaired interest falls within that definition may have standing).

[148] *See* Rangeview, LLC v. City of Aurora, 381 P.3d 445, 449 (Colo. App. 2016) (finding absence from site plan of outdoor gathering space would cause economic and aesthetic harm); Life of the Land, Inc. v. Land Use Comm'n, 594 P.2d 1079, 1082 (Haw. 1979) (allowing aesthetic and environmental injury standing when aesthetic and environmental interests are "personal" and "special" or where property interest is also affected); Bader v. Iowa Metro. Sewer Co., 178 N.W.2d 305, 307 (Iowa 1970) (holding the sewer lagoon affected desirability of portion of plaintiffs' property for residential purposes from an aesthetic standpoint); Penobscot Area Hous. Dev. Corp. v. City of Brewer, 434 A.2d 14, 18 (Me. 1981) (finding aesthetic and environmental value attached to the property goes materially beyond a "general policy interest" that is inadequate to establish standing); Gerald Emmett Beard v. City of Ridgeland, 245 So. 3d 380, 393 (Miss. 2018) (holding rezoning not a minor variance and would greatly increase traffic as well as change aesthetics of the area); Ramirez v. City of Santa Fe, 852 P.2d 690, 694–95 (N.M. Ct. App. 1993) (discussing amendment to general plan, threat of aesthetic, quality of life, and property harm); Hay v. Stevens, 530 P.2d 37, 39 (Or. 1975) (finding that in an appropriate case, recovery will be permitted for an interference with visual aesthetic sensibilities; standard must necessarily be that of definite offensiveness, inconvenience or annoyance to the normal person in the community); Fundacion Arqueologica v. Depto. de la Vivienda, 109 P.R. Dec. 387 (1980) (discussing clash of the proposed design with character of historic district, threats to the use and enjoyment of an aesthetic resource may constitute an injury in fact); Myrick v. Peck Elec. Co., 164 A.3d 658, 660 (Vt. 2017)

U.S. Supreme Court case [150] holding that a loss of aesthetic and environmental values can be a basis for standing. [151] Courts also base standing on a loss of view.[152]

D. What the Standing Rules for Zoning Litigation Mean

The standing rules for zoning cases have arbitrary limits. Only property owners have standing,[153] though standing may possibly be wider in states that give standing to associations. [154] Standing is based on

(holding nuisance complaints against two solar energy companies that alleged companies' solar arrays constituted a private nuisance).

[149] *See* Andross v. Town of W. Hartford, 939 A.2d 1146, 1163 (Conn. 2008) (holding that plaintiffs' allegations fell well short of demonstrating such injury).

[150] *See* Sierra Club v. Morton, 405 U.S. 727, 734 (1972) ("Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process.").

[151] *See* City of Greenwood Vill. v. *In re* Proposed City of Centennial, 3 P.3d 427, 437 (Colo. 2000) (holding injuries need not be economic in character; harm to intangible values can be sufficient); Ramirez v. City of Santa Fe, 852 P.2d 690, 694–95 (N.M. Ct. App. 1993) (discussing amendment to general plan, aesthetic and quality of life threat, property harm); Chesapeake Bay Found., Inc. v. Commonwealth, *ex rel*. Water Control Bd., 667 S.E.2d 844, 852 (Va. Ct. App. 2008) (discussing statutory standing; modified city water protection permit for construction and operation of reservoir); *see also* Patuxent Riverkeeper v. Md. Dep't of Env't, 29 A.3d 584, 588 (Md. Ct. App. 2011) (discussing developer's non-tidal wetlands permit for construction of road; plaintiff adequately asserted demonstrable aesthetic, recreational, and economic interests; federal law applied as required by statute and relied on *Laidlaw* and *Earth Island Institute*).

[152] *See* Milani v. Irwin, 840 S.E.2d 700, 705 (Ga. Ct. App. 2020) (discussing "visual intrusion" from facing bare cut lot; uncommon to the other residents in the subdivision); Howard v. Langevin, 363 So. 2d 928, 930 (La. Ct. App. 1978) (discussing construction of six-foot-high fence); Kenner v. Zoning Bd. of Appeals, 944 N.E.2d 163, 168–71 (Mass. 2011) (explaining when loss of view can confer standing); Anderson v. Swanson, 534 A.2d 1286, 1288 (Me. 1987) (considering view combined with proximity).

[153] *See, e.g.*, Stuttering Found., Inc. v. Glynn Cnty., 801 S.E.2d 793, 798 (Ga. 2017) (requiring vested or inchoate title to real property).

[154] This Article does not consider the standing of associations. *See, e.g.*, Miss. Manufactured Hous. Ass'n v. Bd. of Aldermen of Canton, 870 So. 2d 1189, 1192 (Miss. 2004) (granting standing to mobile home industry association contesting city's adoption of zoning ordinance that restricted manufactured housing development; must allege adverse effect different from general public, show fact of representative capacity, particularly of those adversely affected; association should not be permitted to close out minority members, cutting off their views entirely, particularly where effect on some individuals would be greater than effect on majority, membership should be limited to residents and

proximity and on how a court defines harm, not on the importance of the public values at stake.

VI. STATUTORY STANDING

Statutes that authorize statutory appeals from land use decisions or from land use agencies supplement judicial standing rules, which apply when a statutory appeal is not available.[155] Statutory coverage is incomplete, and courts apply one of the standard tests when they interpret the statutes. Results vary.

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property owners). The court noted that courts also follow a similar test adopted by New York (*see* Douglaston Civic Ass'n v. Galvin, 324 N.E.2d 317, 319 (N.Y. 1974)), or adopt the federal rule. Under the federal rule, an association has standing to bring suit on behalf of its members when "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." Hunt v. Wash. State Apple Advert. Comm'n, 432 U.S. 333, 343 (1977); *see* Tri-Cnty. Concerned Citizens, Inc. v. Bd. of Cnty. Comm'rs of Harper Cnty., 95 P.3d 1012, 1017 (Kan. Ct. App. 2004) (applying federal rule to grant standing to an association seeking to challenge special use permit for sanitary landfill); All. for Metro. Stability v. Metro. Council, 671 N.W.2d 905, 913 (Minn. Ct. App. 2003) (citing Snyders Drug Stores, Inc. v. Minn. State Bd. of Pharmacy, 221 N.W.2d 162, 166 (Minn. 1974)) (granting standing for plaintiff on claim that the metropolitan planning board understated the cities' planning obligations under planning act; claim "based solely on allegations of economic injury-in-fact to [organization's] members because without [its] intervention 'no one representing the consuming public has any part in the lawsuit'"); Pres. Soc'y of Charleston v. S.C. Dep't of Health & Env't Control, 845 S.E.2d 481, 487–91 (S.C. 2020) (granting statutory standing to the plaintiff as an affected person, to require an administrative hearing for the defendant's project relocating and expanding passenger cruise facility at downtown pier terminal; *Lujan* test does not apply; claim germane to organization's purpose and does not require participation of members); Sierra Club v. Clay Cnty. Bd. of Adjustment, 959 N.W.2d 615, 622–27 (S.D. 2021) (applying federal rules, granting standing to challenge permit for confined animal feeding operation); *see also* Jay M. Zitter, Annotation, *Standing of Civic or Property Owners' Association to Challenge Zoning Board Decision (as Aggrieved Party)*, 8 A.L.R. 4th (1981). Associations often have financial resources, specialized expertise, and research resources that individual plaintiffs lack. *See* Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am. v. Brock, 477 U.S. 274, 289 (1986).

[155] *See* e-mail from Nancy Stroud, Attorney, Boca Raton, Florida, to author (May 15, 2021, 19:39 CDT) (on file with author) (noting common law standing rule applies to land use cases not covered by statute in Florida). The Washington statute displaces all other methods of access to court. *See* Wash. Rev. Code Ann. § 36.70C.030(1) ("This chapter replaces the writ of certiorari for appeal of land use decisions and shall be the exclusive means of judicial review of land use decisions.").

A. State Administrative Procedure Acts

All states have administrative procedure acts similar to the comparable federal administrative procedure act.[156] Some are limited to administrative decisions. Most exclude local governments from statutory coverage,[157]

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[156] The state legislation is similar to a model Uniform State Administrative Procedure Act adopted by the National Conference of Commissioners on Uniform State Laws, though the latest model Act has not had any adopters. *See* e-mail from Ronald Levin, William R. Orthwein Distinguished Professor of Law, Wash. Univ., to author (May 8, 2021, 11:34 CDT) (on file with author). Several states adopted earlier versions of the Act, as noted at https://www.uniformlaws.org/committees/community-home?CommunityKey=f184fb0c-5e31-4c6d-8228-7f2b0112fa42 [https://perma.cc/RUJ2-LJ4Y]. *See* Adams, *supra* note 44, at 639–46 (discussing Act); Gregory L. Ogden, *Overview of the 2010 Revised Model State Administrative Procedure Act*, 36 ADMIN. & REG. L. NEWS 3 *passim* (2011). For the latest version, see Nat'l Conf. of Comm'rs on Unif. State L., Revised Model State Administrative Procedure Act (2010), https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=3ab796d4-9636-d856-48e5-b638021eb54d&forceDialog=0 [https://perma.cc/KK2Z-C9UN]. The model act applies to contested cases. "'Contested case' means an adjudication in which an opportunity for an evidentiary hearing is required by the federal constitution, a federal statute, or the constitution or a statute of this state" that state agencies decide. *Id.* § 102(7). "'Evidentiary hearing' means a hearing for the receipt of evidence on issues on which a decision of the presiding officer may be made in a contested case." *Id.* § 102(11). Comments on the law made it clear that it excluded local governments. *See id.* cmts., at 11. The standing section has the federal "adversely affected or aggrieved" language. *Id.* § 505.

[157] *See, e.g.*, ARIZ. REV. STAT. ANN. § 41-1001(1) ("Agency does not include a political subdivision of this state or any of the administrative units of a political subdivision . . . ."); CONN. GEN. STAT. ANN. § 4-166(1) ("'Agency' means each state board, commission, department or officer authorized by law to make regulations or to determine contested cases . . . ."); FLA. STAT. ANN. § 120.52 (definition does not include municipality or legal entity created solely by a municipality); IDAHO CODE ANN. § 67-5201(2) ("'Agency' means each state board, commission, department or officer authorized by law to make rules or to determine contested cases . . . ."); IOWA CODE ANN. § 17A.2 ("'Agency' does not mean the general assembly, the judicial branch or any of its components, the office of consumer advocate, the governor, or a political subdivision of the state . . . ."); LA. STAT. ANN. § 49:951 (political subdivisions); MD. CODE ANN., State Gov't § 10-202(b) ("'Agency' means: (1) an officer or unit of the State government authorized by law to adjudicate contested cases . . . ."); N.Y. A.P.A. Law § 102(1) ("'Agency' means any department, board, bureau, commission, division, office, council, committee or officer of the state . . . ."); OR. REV. STAT. ANN. § 183.310(1) ("'Agency' means any state board, commission, department, or division thereof, or officer authorized by law to make rules or to issue orders . . . ."); NEV. REV. STAT. ANN. § 233B.031 ("'Agency' means an agency, bureau, board, commission, department, division, officer or employee of the Executive Department of the State Government authorized by law to make regulations or to determine contested cases."); OKLA. STAT. ANN. tit. 75, § 250.3(3) ("'Agency' includes but is not limited to any constitutionally or statutorily created state board, bureau, commission,

though some do not.[158] The administrative procedure act governs appeals in land use cases where local governments are included.

office, authority, public trust in which the state is a beneficiary . . . ."); TENN. CODE ANN. § 4-5-102(2) ("'Agency' means each state board, commission, committee, department, officer, or any other unit of state government authorized or required by any statute or constitutional provision to make rules or to determine contested cases . . . ."); TEX. GOV'T CODE ANN. § 2001.003(7) ("'State agency' means a state officer, board, commission, or department with statewide jurisdiction that makes rules or determines contested cases."); WASH. REV. CODE ANN. § 34.05.010(2) ("'Agency' means any state board, commission, department, institution of higher education, or officer, authorized by law to make rules or to conduct adjudicative proceedings . . . ."); W. VA. CODE ANN. § 29A-1-2(a) ("'Agency' means any state board, commission, department, office or officer authorized by law to make rules or adjudicate contested cases . . . ."); Davidson, *supra* note 45, at 605 n.191 (claiming about half of states do not apply state administrative procedure acts to local governments); Highlands Dev. Corp. v. City of Boise, 188 P.3d 900, 902 (Idaho 2008) (holding act does not grant right to review decisions made by counties or cities); Hanselman v. Killeen, 351 N.W.2d 544. 552–55 (Mich. 1984) (finding local concealed weapon licensing board a "state" board within meaning of Michigan Administrative Procedures Act and an "agency" subject to provisions of Act); Lipscomb v. Tucker Cnty. Comm'n, 475 S.E.2d 84, 88 (W. Va. 1996) (holding administrative agencies to which statute applies are state boards, commissions, departments, and offices or officers, not administrative bodies created and existing for county or other local governments).

[158] *See, e.g.*, D.C. CODE ANN. § 2-510(a) ("Any person suffering a legal wrong, or adversely affected or aggrieved, by an order or decision of the Mayor or an agency in a contested case, is entitled to a judicial review . . . ."); HAW. REV. STAT. ANN. § 91-1 ("For the purpose of this chapter: 'Agency' means each state or county board, commission, department, or officer authorized by law to make rules or to adjudicate contested cases, except those in the legislative or judicial branches."); R.I. GEN. LAWS ANN. § 42-35-1(1) ("Except as otherwise provided herein, 'agency' means . . . other political subdivisions created by the general assembly or the governor . . . ."); WYO. STAT. ANN. § 16-3-101(b) ("As used in this act: (i) 'Agency' means . . . a county, city or town or other political subdivision of the state, except the governing body of a city or town . . . .); 65 ILL. COMP. STAT. ANN. 5/11-13-13 (final administrative decisions of board of appeals subject to judicial review under Administrative Review Law); Neighbors for a Healthy Gold Fork v. Valley County, 176 P.3d 126, 131 (Idaho 2007) (holding for purposes of judicial review of Local Land Use Planning Act (LLUPA) decisions, local agency making land use decisions is treated as a government agency under Idaho Administrative Procedure Act); Reichard v. Zoning Bd. of Appeals of Park Ridge, 290 N.E.2d 349, 352 (Ill. App. 1972) (holding legislative purpose of statute was to fill void created by removing review by certiorari by providing for review of such decisions according to the provisions of the Administrative Review Act).

Both the federal[159] and state laws authorize standing for persons "aggrieved" or "aggrieved or adversely affected."[160] This test enjoys historical precedent based on New Deal legislative antecedents[161] and is a common requirement in statutes. Despite its historic antecedents, aggrievement is an incoherent, haphazardly applied, and insufficiently reasoned test for standing.[162] Judicial interpretation is limited. One court applies the three part federal standing rule that includes injury in fact.[163]

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[159] *See* 5 U.S.C.A. § 702 ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."). The Supreme Court has interpreted this test to require injury in fact. *See* Ass'n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 152 (1970) ("The first question is whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise.").

[160] *See* D.C. CODE ANN. § 2-510(a) ("Any person suffering a legal wrong, or adversely affected or aggrieved, by an order or decision of the Mayor or an agency in a contested case, is entitled to a judicial review . . . ."); HAW. REV. STAT. ANN. § 91-14(a) ("Any person aggrieved by a final decision and order in a contested case or by a preliminary ruling of the nature that deferral of review pending entry of a subsequent final decision would deprive appellant of adequate relief is entitled to judicial review . . . ."); R.I. GEN. LAWS ANN. § 42-35-15(a) ("Any person, including any small business, who has exhausted all administrative remedies available to him or her within the agency, and who is aggrieved by a final order in a contested case is entitled to judicial review under this chapter."); WYO. STAT. ANN. § 16-3-114(a) ("[A]ny person aggrieved or adversely affected in fact by a final decision of an agency in a contested case, or by other agency action or inaction, or any person affected in fact by a rule adopted by an agency, is entitled to judicial review . . . ."). *But see* 735 ILL. COMP. STAT. ANN. 5/3-101 ("'Administrative decision' or 'decision' means any decision, order or determination of any administrative agency rendered in a particular case, which affects the legal rights, duties or privileges of parties.").

[161] *See* Benton Cnty. v. Friends of Benton Cnty., 653 P.2d 1249, 1254 n.7 (Or. 1982) (citing federal legislation).

[162] *See* WASH. REV. CODE ANN. § 36.70C.060 (2021) (authorizing appeal by persons aggrieved or adversely affected, defined as requiring prejudice, interests that were required to consider, redressability, or exhaustion of remedies); *see infra* note 169.

[163] *See* D.C. Libr. Renaissance Project/W. End Libr. Advisory Grp. v. D.C. Zoning Comm'n, 73 A.3d 107, 113 (D.C. 2013) (granting standing and discussing standing cases); *see also* Union Mkt. Neighbors v. D.C. Zoning Comm'n, 197 A.3d 1063, 1068 n.3 (D.C. 2018) (granting standing to challenge extensive project); York Apartments Tenants Ass'n v. D.C. Zoning Comm'n, 856 A.2d 1079, 1084 (D.C. 2004) (rejecting standing; must show "injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical"). *See accord* Akroyd v. R.I. Dep't of Emp. Sec., Bd. of Rev., 585 A.2d 637, 639 (R.I. 1991) (interpreting aggrieved requirement for standing to require injury). One court granted beneficiary standing to an organization to challenge a rate increase based on damage to its members that would occur from climate change. *See In re* Gas Co., 465 P.3d 633, 645 (Haw. 2020)

Wyoming requires a legally cognizable interest and injury[164] and applies this test to zoning cases with mixed results.[165]

B. Other Statutes That Apply to Land Use Decisions and Agencies

Appeals from land use decisions and agencies are authorized by other statutes if a state administrative procedure act does not apply. These statutes vary considerably. A few statutes apply comprehensively, like state administrative procedure acts, and they authorize appeals from all land use decisions.[166] A few state statutes authorize appeals from a limited

(finding Public Utilities Commission's decision to approve gas utility rate increase allowed gas company to pass costs of two liquid natural gas projects to its customers).

[164] *See* HB Fam. Ltd. P'ship v. Teton Cnty. Bd. of Cnty. Comm'rs, 468 P.3d 1081, 1088 (Wyo. 2020) (discussing conditional use permit; reviewing state standing cases that require a plaintiff to have legally recognizable interest in that which will be affected by the action, and injury or potential injury by alleging a perceptible, rather than a speculative, harm; deciding landowners' concerns about increased density from greater use of the neighboring property and effect of that greater use on their property exceeded the interest of the general public); *see also* Hoke v. Moyer, 865 P.2d 624, 628 (Wyo. 1993) (finding legally recognizable interest that is or will be affected by action of zoning authority in question; definite interest exceeding general interest in community good shared in common with all citizens; granting standing to challenge decision of county board of commissioners adopting higher zoning density category for real estate adjoining landowner's property and approving real estate developer's subdivision application).

[165] Standing granted: *see* Tayback v. Teton Cnty. Bd. of Cnty. Comm'rs, 402 P.3d 984, 989 (Wyo. 2017) (discussing use of property as a construction staging site; plaintiffs provided photographic proof that staging site was in their viewshed; claimed dust and noise emanating from site interfered with enjoyment of their property); N. Laramie Range Found. v. Converse Cnty. Bd. of Cnty. Comm'rs, 290 P.3d 1063, 1074 (Wyo. 2012) (discussing wind energy project; plaintiffs owned property bordering project, which threatened its scenic views and wildlife habitat and migration, owned property "near" land leased for project, and had concerns about increased traffic and safety issues); *Hoke*, 865 P.2d at 628 (finding doubling density of adjacent property raises a number of perceptible harms for an adjacent property owner different than harm to general public, such as increased traffic and congestion). Standing denied: *see* Roe v. Bd. of Cnty. Comm'rs, 997 P.2d 1021, 1023 (Wyo. 2000) (discussing application to resubdivide subdivision; plaintiffs did not describe how they had been aggrieved).

[166] *See* N.H. REV. STAT. ANN. (2021) § 676:15 (authorizing appropriate action for violation of statute, ordinances, or land use approvals by "owner of any adjacent or neighboring property who would be specially damaged by such violation . . . ."); WASH. REV. CODE ANN. § 36.70C.030(1) (2010) ("This chapter [the Land Use Petition Act] replaces the writ of certiorari for appeal of land use decisions and shall be the exclusive means of judicial review of land use decisions . . . ."); *Id.* § 36.70C.020(2) ("'Land use decision' means a final determination by a local jurisdiction's body or officer with the highest level of authority to make the determination, including those with authority to hear

number of land use decisions.[167] Judicial interpretation usually requires a restrictive injury test or the restrictive injury in fact test as the only, or contributing, requirement.[168]

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appeals, on: (a) An application for a project permit or other governmental approval required by law before real property may be improved, developed, modified, sold, transferred, or used, but excluding . . . approvals such as area-wide rezones . . . ."); Sullyville, LLC v. Town of Carroll, No. 2019-0240, 2021 WL 1310832, at *8 (N.H. Apr. 8, 2021) (failure to allege sufficient facts demonstrating specially damaged); Schnitzer W., LLC v. City of Puyallup, 416 P.3d 1172, 1179 (Wash. 2018) (site-specific rezone reviewable). Washington has an appearance of fairness doctrine that applies to the quasi-judicial actions of local decision-making bodies. *See* WASH. REV. CODE ANN. § 42.36.010. The doctrine requires that the hearing be procedurally fair and conducted by impartial decisionmakers. *See* City of Seattle v. Kaseburg, 467 P.3d 115, 122 (Wash. Ct. App. 2018).

[167] *See* FLA. STAT. ANN. § 163.3215(1) ("[A]n aggrieved or adversely affected party [may] appeal and challenge the consistency of a development order with a comprehensive plan . . . ."); IDAHO CODE ANN. § 67-6521(1)(a)(d) (discussing appeal by affected person from approval, denial or failure to act upon an application for a subdivision, variance, special use permit and such other similar applications required or authorized pursuant to this chapter; approval of zoning district upon annexation, approval or denial of application to change zoning district applicable to specific parcels or sites; approval or denial of an application for conditional rezoning); MICH. COMP. LAWS ANN. § 125.360(1) (discussing regulation of nonconforming uses; authorizing appeals by any party aggrieved by any order, determination, or decision of any officer, agency, board, commission, zoning board of appeals, or legislative body of any local unit of government); S.D. CODIFIED LAWS § 11-2-10.1 (authorizing appeals from emergency temporary zoning ordinance, any other emergency ordinance, zoning map, or other official control); Imhof v. Walton Cty., 328 So. 3d 32, 45 (Fla. Dist. Ct. App. 2021) (granting standing under Florida statute to challenge planned unit development claimed to violate comprehensive plan; statute requires only "an adverse effect to an interest protected or furthered by the local government comprehensive plan" that exceeds "in degree the general interest in community good shared by all persons").

[168] *See* Kanuk *ex rel.* Kanuk v. State, Dep't of Nat. Res., 335 P.3d 1088, 1092 (Alaska 2014) (recognizing damage from climate change as injury; interest may be economic or intangible, such as an aesthetic or environmental interest); Larson v. State, Dep't of Corr., 284 P.3d 1, 11–12 (Alaska 2012) (quoting Trs. for Alaska v. State, Dept. of Nat. Res., 736 P.2d 324, 327 (Alaska, 1987)) (holding party must demonstrate sufficient personal stake in outcome of controversy to ensure requisite adversity; degree of injury to interest need not be great; identifiable trifle is enough; concept of standing broadly interpreted to favor "increased accessibility to judicial forums"); Ramirez v. City of Santa Fe, 852 P.2d 690, 693 (N.M. Ct. App. 1993) (requiring injury in fact or imminent threat of injury, economically or otherwise); Roten v. City of Spring Hill, No. M200802087COAR3CV, 2009 WL 2632778, at *3 (Tenn. Ct. App. Aug. 26, 2009) (requiring special injury not common to the public generally); Knight v. City of Yelm, 267 P.3d 973, 982–83 (Wash. 2011) (quoting Suquamish Indian Tribe v. Kitsap Cnty., 965 P.2d 636, 642 (1998)) ("To show an injury in fact, the plaintiff must allege specific and perceptible harm. If the plaintiff alleges a threatened rather than an existing injury, he or she 'must also show that the injury

Appeals from all or most local administrative or local land use agencies are authorized in several states,[169] with legislative bodies usually excluded. Almost all states provide for appeals from decisions by boards of adjustment or appeals.[170] Statutes are modeled on the Standard Zoning

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will be immediate, concrete and specific'"; adjacent property owners generally have standing).

[169] *See* ALASKA STAT. § 29.40.060(a) (requiring an assembly to provide by ordinance for an appeal to a court from an administrative decision of a municipal employee, board, or commission made in the enforcement, administration, or application of a land use regulation); CONN. GEN. STAT. ANN. § 8-8(b) (describing that, with exceptions, "any person aggrieved by any decision of a board, including a decision to approve or deny a site plan . . . or a special permit or special exception, . . . may take an appeal to the superior court . . . ."); IND. CODE § 36-7-4-1601(a) (detailing exclusive means for judicial review by persons aggrieved of zoning decisions as described in specified sections and "made by a board of zoning appeals, legislative body, plan commission, preservation commission, or zoning administrator . . . ."); *Id.* § 36-7-4-1601(b) (excluding legislative acts from judicial review); MASS. GEN. LAWS. ch. 40A, § 17 (allowing an appeal by any person aggrieved from decision by board of appeals or special permit granting authority); ME. REV. STAT. tit. 30-A, § 4483 (entitling any party to a review proceeding under this chapter); NEB. REV. STAT. § 14-413 (allowing an appeal to any decision of the board of appeals, or any officer, department, board or bureau of the municipality by person or persons, jointly or severally aggrieved); N.M. STAT. § 3-21-9 (authorizing appeals of an election by zoning authority or any officer, department, board or bureau of the zoning authority by person aggrieved); *Id.* at § 3-21-1(A) (classifying a county or municipality as a zoning authority); N.C. GEN. STAT. § 160D-1402(c)(2) ("Any other person who will suffer special damages as the result of the decision being appealed"; pertaining to appeals by certiorari of quasi-judicial decisions of decision-making boards); OHIO REV. CODE ANN. § 2506.01(A) ("[E]very final order, adjudication, or decision of any officer, tribunal, authority, board, bureau, commission, department, or other division of any political subdivision . . . ."); *Id.* at § 2506.01(C) ("'[F]inal order, adjudication, or decision' means an order, adjudication, or decision that determines rights, duties, privileges, benefits, or legal relationships of a person."); TENN. CODE ANN. § 27-9-101 ("Anyone who may be aggrieved by any final order or judgment of any board or commission functioning under the laws of this state . . . ."); VT. STAT. ANN. tit. 24, § 4471 (authorizing an appeal by an interested person who has participated in a municipal regulatory proceeding to Environmental Division); Embudo Canyon Neighborhood Ass'n v. City of Albuquerque, 968 P.2d 1190, 1191 (N.M. Ct. App. 1998) (zone change application). Legislative bodies may not be not included. *See* Tuber v. Perkins, 216 N.E.2d 877, 878 (Ohio 1966) (holding that a statute does not provide for appeals from legislative bodies or from resolutions of administrative bodies promulgated in a delegated legislative capacity). Third-party standing may not be limited to adjacent or contiguous property owners. *See* Meziane v. Munson Twp. Bd. of Trustees, 162 N.E.3d 103, 106 (Ohio 2020).

[170] These boards are authorized by the Standard State Zoning Enabling. *See supra* note 7, and accompanying text; *see also* Bryniarski v. Montgomery Cnty. Bd. of Appeals, 230 A.2d 289, 294 (Md. 1967), *superseded by statute,* Chesapeake Bay Found., Inc. v. DCW Dutchship Island, LLC, 97 A.3d 135 (2014) (discussing Standard Act aggrievement

Act and authorize appeals by writ of certiorari by "persons aggrieved."[171] With exceptions,[172] courts apply restrictive harm-based tests.[173]

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requirement and its adoption by states). The boards can grant variances and exceptions. *See generally id.*

[171] *See Bryniarski*, 230 A.2d. at 294. Many states adopted the Standard Act or similar language. *See* ALA. CODE § 11-52-81 (any party aggrieved); ALASKA STAT. § 29.40.060(a) (person aggrieved); ARIZ. REV. STAT. ANN. § 9-462.06 (a person aggrieved); COLO. REV. STAT. § 31-23-307(1) (any person aggrieved); DEL. CODE ANN. tit. 22, § 328(a) (any person or persons, jointly or severally aggrieved); IOWA CODE § 414.15 (applying in the context of city zoning to any person or persons, jointly or severally, aggrieved); KY. REV. STAT. ANN. § 100.347(1) (injured or aggrieved); LA. STAT. ANN. § 33:4727(E.1) (jointly or severally aggrieved); MASS. GEN. LAWS ch. 40A, § 17 (any person aggrieved); MICH. COMP. LAWS § 125.3606(1); MINN. STAT. § 462.361(1) (applying to any person aggrieved by a decision of a board of adjustment and appeals); MO. ANN. STAT. § 89.110 (any person or persons jointly or severally aggrieved); NEB. REV. STAT. § 14-413 (applying to any person or persons jointly or severely aggrieved); N.H. REV. STAT. ANN. § 677:4 (any person aggrieved); R.I. GEN. LAWS § 45-24-69(a) (an aggrieved party); S.D. CODIFIED LAWS § 11-2-61 (person or persons jointly or severally aggrieved); TEX. LOC. GOV'T CODE ANN. § 211.011(a)(1) (person aggrieved); VA. CODE ANN. § 15.2-2314 (applying to persons aggrieved); W. VA. CODE § 8A-9-1(a) (any aggrieved person); WIS. STAT. § 62.23(10) (any person or persons, jointly or severally aggrieved). Some statutes use similar terminology. *See* KAN. STAT. ANN. § 12-759(f) (applying to persons dissatisfied with an order); ME. REV. STAT. tit. 30-A, § 2691 (applying to any party); S.C. CODE ANN. § 6-29-820(A) (applying to persons with substantial interest); UTAH CODE ANN. § 10-9a-801(2)(a) (applying to persons adversely affected). Abutters may have a presumption of standing. *See* Porter v. Bd. of Appeal of Bos., 164 N.E.3d 911, 912 (Mass. App. Ct. 2021).

[172] *See* Appeal of Gadhue, 544 A.2d 1151, 1153 (Vt. 1987) (noting that a plaintiff has automatic standing from appeal provision; when an "'interested person' prosecutes an appeal from a zoning board decision, special damages need not be shown").

[173] *See ex parte* Steadham, 629 So. 2d 647, 648 (Ala. 1993) (providing testimony that "petitioners would suffer diminished property values as a proximate result of the zoning variance"); Kenton Cnty. Bd. of Adjustment v. Meitzen, 607 S.W.3d 586, 593 (Ky. 2020) (denying standing for a conditional use for nursery school in residential zone because plaintiff must claim some type of hurt or damage, or some form of suffering or infringement); *Bryniarski*, 230 A.2d at 294 (holding personal or property rights must be adversely "affected in a way different from that suffered by the public generally"); Marashlian v. Zoning Bd. of Appeals of Newburyport, 660 N.E.2d 369, 372 (1996) (finding that abutters entitled to notice of hearings enjoy the rebuttable presumption that they are "persons aggrieved," but must suffer some infringement of legal rights; standing granted, increased traffic and decreased parking availability due to the defendants' development); Brooks v. Cumberland Farms, Inc., 703 A.2d 844, 847 (Me. 1997) (holding that individual need not establish a high degree of proof of particularized injury because the project would cause property value to depreciate, and that project would destroy peacefulness of neighborhood by its late hours of operation); Olsen v. Chikaming Twp., 924 N.W.2d 889, 899 (Mich. App. 2018) (refusing standing to challenge dimensional variance granted by board of adjustment; aesthetic, ecological, and practical harms not sufficient; septic system

Statutes for land use agencies other than boards of adjustment are less common. The Standard City Planning Enabling Act, which most states follow, authorizes planning commission decisions on subdivisions[174] but does not provide for appeals.[175] A few statutes authorize appeals from

and setback problems speculative); Nautilus of Exeter, Inc. v. Town of Exeter, 656 A.2d 407, 407-08 (N.H. 1995) (finding that plaintiffs' properties located between .8 and six miles away were too remote from proposed hospital to confer standing to challenge zoning board's approval of construction); *In re* Adams, No. 141 C.D. 2019, 2020 WL 7491072, at *3 (Pa. Commw. Ct. Dec. 21, 2020) (discussing cases where standing is denied because the party must show aggrievement and party's interest must have "a causal connection between the action complained of and the injury to the person challenging it"); Corliss v. Jefferson Cnty. Bd. of Zoning Appeals, 591 S.E.2d 93, 105 (W. Va. 2003) (finding that plaintiff must "uniquely suffer injury separate and apart from that which the general citizenry might experience as a result of the same ruling"; increased traffic, water table lowering, and other growth-related effects on existing infrastructure would bring about particularized harm given specific occupational needs as farmers); *see also* S.D. CODIFIED LAWS § 11-2-1.1 (defining aggrievement as a redressable injury when there is an invasion of a legally protected interest both concrete and particularized, and actual or imminent, not conjectural or hypothetical; with causal connection to challenged action; that is likely, not speculative, to be redressed by a favorable decision; and unique or different from those injuries suffered by the public in general).

[174] *See* U.S. DEP'T OF COM., *supra* note 13, tit. II. Planning commissions can also approve site plans, for example, N.Y. TOWN LAW § 274-a(2) (providing authority to planning board), and planned unit developments, *see supra* note 13, at 40–47 (discussing planning commission authority to approve development plans).

[175] *See* U.S. DEP'T OF COM., *supra* note 13.

planning commission decisions, either with[176] or without aggrievement.[177] Several provide for appeals from historic district decisions[178] by aggrieved parties[179] and require harm to plaintiffs.[180] Appeals from legislative bodies

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[176] *See* KY. REV. STAT. § 100.347(2) (injured or aggrieved); MICH. COMP. LAWS § 125.3607(1) ("Any party aggrieved by any order, determination, or decision of any . . . commission . . . ."); MONT. CODE ANN. § 76-3-625 (Landowner with property boundary contiguous to proposed subdivision or other private landowner with property within county or municipality where subdivision is proposed (if such other landowner can show likelihood of material injury to landowner's property or its value), who is aggrieved by decision of governing body to approve, conditionally approve, or deny an application and preliminary plat for a proposed subdivision or a final subdivision plat); N.Y. TOWN LAW § 282 ("Any person or persons, jointly or severally aggrieved by any decision of the planning board concerning such plat or the changing of the zoning regulations of such land . . . ."); *see also* MASS. GEN. LAWS ch. 40A, § 17 (special permit granting authority; person aggrieved); N.M. STAT. ANN. § 3-21-25 (zoning commission in special zoning district; person aggrieved). Courts require harm. *See*, *e.g.*, Ansell v. Delta Cnty. Plan. Comm'n, 957 N.W.2d 47, 51-52 (Mich. Ct. App. 2020) (considering a planning commission conditional use permit for wind turbines; denying standing when the plaintiffs had no special proximity to proposed turbines; plaintiffs were scattered about community and apparently have concerns of general nature rather than concerns about expected consequences of turbine operation peculiar to themselves).

[177] *See* N.C. GEN. STAT. ANN. § 160D-1403 (authorizing appeals of quasi-judicial or administrative decisions approving preliminary and final subdivision plats).

[178] *See, e.g.*, Seattle, Wash. Zoning Code Ch. 24–12 (landmarks preservation); Parker v. Beacon Hill Architectural Comm'n, 536 N.E.2d 1108, 1113–14 (Mass. 1989) (upholding denial of additional floor on row house as inimical to historic appearance of building and diminishing picturesque silhouette of row houses in this location); Rocky Hill Citizens for Responsible Growth v. Plan. Bd. of the Borough of Rocky Hill, 967 A.2d 929, 944–45 (N.J. Super. Ct. App. Div. 2009) (upholding approval of age restrictive development as compatible with historic district); Sanchez v. Town of Beaufort, 710 S.E.2d 350, 356 (N.C. Ct. App. 2011) (reversing decision to limit height of dwelling to twenty-four feet because height not incongruous with rest of district); *see also* David L. Callies, *Historic Preservation Law in the United States*, 32 ENV'T L. REP. 10348, 10348 (2002).

[179] *See* ARK. CODE § 14-172-212(a)(1) (any applicant aggrieved); CONN. GEN. STAT. § 7-147i (any person or persons severally or jointly aggrieved); LA. STAT. § 25:763 (any person or persons aggrieved); MICH. COMP. LAWS § 399.211(11) (1992) (jointly or severally aggrieved); MASS. GEN. LAWS ch. 40C, § 12A (1983) (any person aggrieved); MISS. CODE. § 39-13-19 (aggrieved or damaged; certificate of appropriateness); NEV. REV. STAT. § 384.210(1) (any person aggrieved).

[180] *See* Mayer v. Historic Dist. Comm'n of Town of Groton, 160 A.3d 333, 348 (Conn. 2017) (denying standing when the planned reduction of the size of a barn had no possibility of harming plaintiffs' economic interests stemming from their water view); Montgomery v. Bd. of Selectmen of Nantucket, 120 N.E.3d 1246, 1253 (Mass. App. Ct. 2019) (granting standing for removal of a barn because of visual interest as a legitimate interest in preserving the integrity of district).

are provided by a number of statutes,[181] often with aggrievement or a similar requirement.[182] Aggrievement is based on proximity and harm.[183]

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[181] Local government is typically conducted through a governing body, such as a city council or county commission, that serves legislative, adjudicative, and executive functions, but many functions are conducted by staff or inferior committees or boards. Many but not all decisions by sub-entities can be appealed to the governing body. Standing can depend on the decision making entity.

[182] *See* ARIZ. REV. STAT. ANN. § 9-462.06(j) (discusing a decision by legislative body in certain cities on appeal from board of adjustment by person aggrieved within 300 feet of site); KY. REV. STAT. ANN. § 100.347(3) (discussing an appeal of a map amendment by injured or aggrieved parties); OHIO REV. CODE ANN. § 307.56 ("A person aggrieved by the decision of the board of county commissioners may appeal to the court of common pleas, as provided by" other statutory authority); MD. CODE ANN., LAND USE § 4-401(a) (filing a judicial review of a zoning action of a legislative body by a person aggrieved); MICH. COMP. LAWS § 125.3607(1) (any person aggrieved); MINN. STAT. ANN. § 462.361(1) ("Any person aggrieved by an ordinance, rule, regulation, decision or order of a governing body . . . ."); MISS. CODE. ANN. § 11-51-75 ("Any person aggrieved by a judgment or decision of the board of supervisors of a county, or the governing authority of a municipality . . . ."); N.H. REV. STAT. ANN. § 677:4 ("Any person aggrieved by any order or decision . . . of the local legislative body . . . ."); N.M. STAT. ANN. § 3-19-8 (appealing after review of order or determination by governing body of municipality); N.C. GEN. STAT. ANN. § 160D-1401 ("Challenges of legislative decisions of governing boards, including the validity or constitutionality of development regulations" by declaratory judgment action); N.D. CENT. CODE ANN. § 11-11-39 (discussing an appeal by any aggrieved person from "any decision of the board of county commissioners"); OKLA. STAT. ANN. tit. 11, § 43-109.1 ("[S]uit to challenge any action, decision, ruling or order of the municipal governing body under the provisions of this article . . . ."); 45 R.I. GEN. LAWS ANN. § 45-24-71 (discussing appeal of enactment or amendment of zoning ordinance by aggrieved party or legal resident, landowner, or group of residents or landowners of municipality); S.D. CODIFIED LAWS § 7-8-27 (discussing appeals from board of county commissioners by person aggrieved); *see also* NEV. REV. STAT. ANN. § 278.3195(1) (discussing appeal to governing body by persons aggrieved by decisions of board of adjustment, planning commission, hearing examiner, or any other person authorized to make administrative decisions). *But see* Copple v. City of Lincoln, 315 N.W.2d 628, 630 (Neb. 1982) (statute providing right of appeal held not to apply to legislative body).

[183] *See* A Guy Named Moe, LLC v. Chipotle Mexican Grill of Colo., LLC, 135 A.3d 492, 508 (Md. 2016) (explaining proximity and plus factors); Hagerott v. Morton Cnty. Bd. of Comm'rs, 778 N.W.2d 813, 818 (N.D. 2010) (conditional use permit for feedlot location within one mile odor setback of proposed house diminished and injuriously affected personal and individual interest in land in manner different than that suffered by the public generally); Cable v. Union Cnty. Bd. of Cnty. Comm'rs, 769 N.W.2d 817, 829 (S.D. 2009) (injury through diminution of value of real property or damage to quiet rural lifestyle will be shared by all taxpayers and electors, and to a greater extent by those in closer proximity to the proposed refinery but is not enough). *Contra* Jefferson Landfill Comm. v. Marion Cnty., 686 P.2d 310, 313 (Or. 1984) ("A person whose interest in the

decision has been recognized by the body making a quasi-judicial decision and who has appeared and asserted a position on the merits as an interested person . . . .").

Appeals from legislative bodies are limited to quasi-judicial decisions.[184] Most cases approve standing under these statutes,[185] but some do not when harm is not shown.[186]

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[184] *See* ARK. CODE ANN. § 14-56-425 (authorizing "appeals from the final administrative or quasi-judicial decision by the municipal body" and "passage of legislative rezoning decisions by the municipal governing body").

[185] *See ex parte* Steadham, 629 So. 2d 647, 648 (Ala. 1993) (finding petitioners would suffer diminished property values as a proximate result of zoning variance); Kanuk *ex rel.* Kanuk v. State, Dep't of Nat. Res., 335 P.3d 1088, 1093 (Alaska 2014) (discussing injuries specific and personal including flooding of village, increase in beetle infestation, deprivation of joy of seeing whales, recession of glaciers, loss of salmon habitat, and decline of animals that threatens native traditions); Brooks v. Cumberland Farms, Inc., 703 A.2d 844, 847 (Me. 1997) (holding that need not establish a high degree of proof of particularized injury where project would cause property value to depreciate and would destroy peacefulness of neighborhood by its late hours of operation); Bryniarski v. Montgomery Cnty. Bd. of Appeals, 230 A.2d 289, 295–96 (Md. 1967) (discussing owners of property immediately contiguous or in close proximity to subject property and traffic); Marashlian v. Zoning Bd. of Appeals of Newburyport, 660 N.E.2d 369, 372 (Mass. 1996) (discussing increased traffic and decreased parking availability due to defendants' development); Montgomery v. Bd. of Selectmen of Nantucket, 120 N.E.3d 1246, 1253 (Mass. App. Ct. 2019) (discussing removal of a barn because of visual interest as a legitimate interest in preserving integrity of district); Ramirez v. City of Santa Fe, 852 P.2d 690, 694 (N.M. 1993) (threat of aesthetic, quality of life, and property harm); Hagerott v. Morton Cnty. Bd. of Comm'rs, 778 N.W.2d 813, 818 (N.D. 2010) (conditional use permit for feedlot within one mile and odor setback of proposed house diminished and injuriously affected personal and individual interest in land in manner different than that suffered by the public generally); Meziane v. Munson Twp. Bd. of Trustees, 162 N.E.3d 103, 106 (Ohio 2020) (discussing two properties that were across the street from each other, owner testified at hearing that she had recently purchased multiple nearby properties and was trying to fix them up, that a variance thwarted the owner's desire to purchase the property for use as a farm, and that the owner's property was only one in the area to face the entire length of the other owner's property); Roten v. City of Spring Hill, No. M200802087COAR3CV, 2009 WL 2632778, at *3 (Tenn. Ct. App. Aug. 26, 2009) (finding city residents had standing to challenge city planning commission's approval of a site development plan for proposed construction of several apartment buildings as part of a greater mixed-use development when residents resided in the immediate vicinity of project and participated in planning commission's public hearings discussing development plan approval; because of proximity to project and scale of project and its economic and environmental impact on neighboring area, residents had special interest in project's development not common to public generally); Knight v. City of Yelm, 267 P.3d 973, 982–83 (Wash. 2011) (discussing a plaintiff who owns land 1,300 feet from proposed subdivisions and has senior water rights within same aquifer as subdivisions, and city's insufficient water supplies to serve proposed developments would cause a water deficit); Corliss v. Jefferson Cnty. Bd. of Zoning Appeals, 591 S.E.2d 93, 105 (W. Va. 2003) (discussing increased traffic, water table lowering, and other growth-related effects on existing infrastructure that would bring about particularized harm given specific

C. What These Statutes Mean

Statutory authority for standing, though extensive, is incomplete, erratic, and may be interpreted restrictively. Coverage is limited to selected land use agencies and decisions, the tests for standing differ, and courts interpret standing rules differently. Courts often require restrictive injury or injury in fact for standing though the statutes do not demand this interpretation. Zoning cases get heard or not heard based on uneven statutory authority and judicial interpretation.

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occupational needs as farmers); Tayback v. Teton Cnty. Bd. of Cnty. Comm'rs, 402 P.3d 984, 989 (Wyo. 2017) (discussing use of property as construction staging site; plaintiffs provided photographic proof that staging site was in their viewshed; claimed dust and noise emanating from site interfered with enjoyment of their property); N. Laramie Range Found. v. Converse Cnty. Bd. of Cnty. Comm'rs, 290 P.3d 1063, 1074 (Wyo. 2012) (plaintiffs owned property "near" land leased for wind energy project, which threatened its scenic views and wildlife habitat and migration, and were concerned about increased traffic and safety issues); Hoke v. Moyer, 865 P.2d 624, 628 (Wyo. 1993) (doubling density of adjacent property raised a number of perceptible harms for adjacent property owner different than harm to general public, such as increased traffic and congestion).

[186] *See* Mayer v. Hist. Dist. Comm'n of Town of Groton, 160 A.3d 333, 348 (Conn. 2017) (planned reduction in size of barn with no possibility of harming plaintiffs' economic interests stemming from water view); Pflugh v. Indianapolis Hist. Pres. Comm'n, 108 N.E.3d 904 (Ind. Ct. App. 2018) (homeowner who claimed aggrievement solely because he lived adjacent to proposed development site could not establish he was particularly harmed); Kenton Cnty. Bd. of Adjustment v. Meitzen, 607 S.W.3d 586, 593 (Ky. 2020) (discussing conditional use for nursery school in residential zone; determining it must claim some type of hurt or damage, or some form of suffering or infringement); Olsen v. Chikaming Twp., 924 N.W.2d 889, 899 (Mich. Ct. App. 2018) (refusing standing to challenge dimensional variance; aesthetic, ecological, and practical harms not sufficient; septic system and setback problems speculative); Nautilus of Exeter, Inc. v. Town of Exeter, 656 A.2d 407, 407-08 (N.H. 1995) (plaintiffs' properties located between .8 and six miles away were too remote from proposed hospital to confer standing to challenge zoning board's approval of construction); Cable v. Union Cnty. Bd. of Cnty. Comm'rs, 769 N.W.2d 817, 829 (S.D. 2009) (deciding injury through diminution of value of real property or damage to quiet rural lifestyle would be shared by all taxpayers and electors, and to a greater extent by those in closer proximity to the proposed refinery, but this is not enough to establish standing); Roe v. Bd. of Cnty. Comm'rs of Campbell Cnty., 997 P.2d 1021, 1023 (Wyo. 2000) (discussing application to re-subdivide subdivision that did not describe how they had been aggrieved).

VII. REFORMING THIRD PARTY STANDING IN LAND USE LITIGATION

A. Reform Alternatives

Judicial and statutory tests for standing are entrenched, resistant to change,[187] and arbitrarily limit third party access.[188] As one critic complained about the private injury standing metaphor, it "threatens to disorder legal analysis in a manner that denigrates public values."[189]

Reform is not always easy for land use litigation. Two state courts dramatically changed third party standing rules that largely left standing in land use cases untouched. The Michigan Supreme Court adopted a "functional standing test" that requires a special injury or right or a substantial interest,[190] but the Michigan Court of Appeals applies the usual

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[187] *See* Edward J. Sullivan & Carrie Richter, *Out of the Chaos: Towards A National System of Land-Use Procedures,* 34 URB. LAW. 449 *passim* (2002) (discussing proposals to reform the land use system). For a lonely example, see Conservation L. Found., Inc. v. Town of Lincolnville, No. AP-00-3, 2001 WL 1736584, at **4–6 (Me. Super. Ct. Feb. 28, 2001) (granting standing to a resident of the community but not an abutter who had an interest in a proposed subdivision based on his strong aesthetic and environmental interest in the area, his attempts to protect views associated with the site and to enhance those benefits, and his attempts to acquire the property so that it could be dedicated to public use). *But see* Penobscot Area Hous. Dev. Corp. v. City of Brewer, 434 A.2d 14, 18 (Me. 1981) (discussing legitimate concerns with statewide success of community group homes that do not give rise to particularized injury).

[188] *See* Susan Bandes, *The Idea of the Case*, 42 STAN. L. REV. 227, 289–90 (1990) (stating that courts should hear cases so as to "see the widest ramifications of its decisions as it engages in public norm creation").

[189] Jonathan Poisner, *Comment, Environmental Values and Judicial Review After* Lujan*: Two Critiques of the Separation of Powers Theory of Standing*, 18 ECOLOGY L. Q. 335, 398 (1991); *see also* Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1460 (1988) ("[S]tanding law talks about one thing without talking about the thing to which it is inextricably attached and, thus, often gets it wrong. Alternatively, it talks about one thing by talking about another and in the process garbles both."). This metaphor creates a fatal disconnect between the injury in fact requirement and environmental harm. *See* Jan G. Laitos, *Standing and Environmental Harm: The Double Paradox*, 31 VA. ENV'T. L.J. 55, 67 (2013).

[190] *See* Lansing Sch. Educ. Ass'n v. Lansing Bd. of Educ., 792 N.W.2d 686, 699 (Mich. 2010) (restoring Michigan standing jurisprudence to a limited, prudential doctrine consistent with Michigan's long-standing historical approach to standing; litigant has standing whenever there is a legal cause of action or it can meet requirements to seek declaratory judgment; where a cause of action is not provided at law, . . . litigant may have standing if the litigant has a special injury or right, or substantial interest . . . detrimentally affected in a manner different from the citizenry at large, or if the statutory scheme implies

proximity and harm tests.[191] North Carolina[192] requires direct injury for difficult legislative or executive constitutional questions.[193] The legal injury itself gives rise to standing for a cause of action at common law, under a statute, or the constitution,[194] which could include land use cases. The court approved an exception from these rules for some land use cases by approving a statute that requires special damages for statutory appeals

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that the legislature intended to confer standing . . . ."). The court held that teachers and their union had standing to sue a school board for failing to comply with its statutory duty to expel students that had allegedly physically assaulted those teachers. The teachers filed an action for an injunction and declaratory judgment.

[191] *See* Olsen v. Twp. of Chikaming, 924 N.W.2d 889, 899 (Mich. Ct. App. 2018) (holding that to show statutory aggrievement, a party must allege and prove special damages and unique harm not common to other property owners similarly situated; incidental inconveniences such as increased traffic congestion, general aesthetic and economic losses, population increases, or common environmental changes are insufficient; mere ownership of adjoining parcel of land is insufficient as is mere entitlement to notice; esthetic, ecological, practical, and other alleged harms from grant of zoning variance do not establish standing), *applied in* Connell v. Lima Twp., No. 353871, 2021 WL 833299, at *12 (Mich. Ct. App. Mar. 4, 2021) (holding adjacent property owner has standing to challenge legislative rezoning); N. Mich. Env't Action Council v. City of Traverse City, No. 332590, 2017 WL 4798638, at *2 (Mich. Ct. App. Oct. 24, 2017) (holding downtown high-rise development project would affect airflow, sunlight and view from the window of plaintiff's apartment); LaBelle Ltd. P'ship v. Cent. Mich. Univ. Bd. of Trs, No. 305626, 2012 WL 3321728, at *4 (Mich. Ct. App. Aug. 14, 2012) (holding only injury from competing hotel and convention center project is economic).

[192] *See* Comm. to Elect Dan Forest v. Emps. Pol. Action Comm., 853 S.E.2d 698 (N.C. 2021). The court upheld statutory standing for an election committee to sue another political action committee for violating a disclosure statute. It found no "concept of 'standing,' as a personal stake, aggrievement, or injury as a prerequisite for litigation brought to vindicate public rights" in English history. *Id.* at 709. The American experience was similar. The court reviewed the history of standing in the federal courts and rejected *Lujan*. *See id.* at 721. It held the federal injury in fact requirement had no place in the text or history of the North Carolina constitution, which does not have the case or controversy requirement. *See id.* at 728.

[193] Direct injury could be, but is not necessarily limited to, "deprivation of a constitutionally guaranteed personal right or an invasion of his property rights." *Id.* at 733.

[194] *See id.* The legal injury itself gives rise to standing for a cause of action at common law, a statute, or the North Carolina Constitution. *See id.* at 733. The court held the North Carolina constitution conferred standing to sue on those who suffer the infringement of a legal right because "every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law." *Id.* (citing N.C. CONST. art. I, § 18, cl. 2). Referring to statutory standing, the court held "the plaintiff has standing to vindicate the legal right so long as he is in the class of persons on whom the statute confers a cause of action." *Id.*

from quasi-judicial decisions, citing a case that applied a functional standing test.[195]

Public interest standing that avoids the traditional standing tests is an alternative in a substantial number of states.[196] Courts grant public interest standing to force elected officials to uphold and fulfill their duties,[197] to allow courts to select the "most appropriate" party to a dispute,[198] and to

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[195] *See id.* at 733 n.51 (citing N.C. GEN. STAT. ANN. § 160D-1402(c)(4)) (authorizing an appeal from quasi-judicial decisions of decision making boards by "[any other] persons who will suffer special damages as the result of the decision being appealed"). The court cited Mangum v. Raleigh Bd. of Adjustment, 669 S.E.2d 279, 281–84 (N.C. 2008) (granting standing to challenge a special use permit; personal stake and concrete adverseness is basis of standing; reduction in value of property is sufficient in zoning cases; "increased traffic, increased water runoff, parking, and safety concerns," as well as secondary adverse effects on petitioners' businesses held sufficient special damages to give standing). The case was brought under a repealed statute. *See also* Sanchez v. Town of Beaufort, 710 S.E.2d 350, 353 (N.C. App. 2011) (granting standing to challenge certificate of appropriateness for new construction because it would affect neighbor's view). The footnote also states that, "where the underlying organic statute does not expressly create a right to a hearing," a right to a hearing under the administrative procedure act is available to "'those who allege[] sufficient injury in fact to interests within the zone of those to be protected and regulated by the [underlying] statute.'" *Comm. to Elect Dan Forest*, 853 S.E.2d at 733–34 (quoting Empire Power Co. v. N.C. Dep't of Env't, Health, & Nat. Res., Div. of Env't Mgmt., 447 S.E.2d 768, 780 (N.C. 1994)).

[196] *See* State *ex rel*. Cittadine v. Ind. Dep't of Transp., 790 N.E.2d 978, 980 (Ind. 2003) (enforcement of public right or duty; citing and discussing cases); Save the Plastic Bag Coal. v. City of Manhattan Beach, 254 P.3d 1005, 1011 (Cal. 2011) (holding an association of plastic bag manufacturers and distributers had public interest standing when a city enacted ordinance banning distribution of plastic bags at point of sale); John Dimanno, Note, *Beyond Taxpayers' Suits: Public Interest Standing in the States*, 41 CONN. L. REV. 639 *passim* (2008); M. Ryan Harmanis, *States' Stances on Public Interest Standing*, 76 OHIO ST. L.J. 729, 730, 733 (2015) (including appendix listing public interest rules for each state). For a discussion of the public interest concept, see Amitai Etzioni, *The Standing of the Public Interest*, 20 BARRY L. REV. 193 *passim* (2015).

[197] *See, e.g.*, *Save the Plastic Bag Coal.*, 254 P.3d at 1011 (an association of plastic bag manufacturers and distributers had public interest standing when a city enacted an ordinance banning distribution of plastic bags at point of sale).

[198] *See, e.g.*, Oceanview Homeowners Ass'n, Inc. v. Quadrant Const. & Eng'g, 680 P.2d 793, 799 (Alaska 1984) (holding that plaintiff must be appropriate in several respects: standing may be denied if there is a plaintiff more directly affected who has or is likely to bring suit, if there is no true adversity of interest, such as a sham plaintiff, and if the plaintiff appears to be incapable, for economic or other reasons, of competently advocating the position it has asserted); Gregory v. Shurtleff, 299 P.3d 1098, 1109–110 (Utah 2013) (limiting public interest standing to claim violations of the constitutional one subject rule; appropriate party must have the interest necessary to effectively assist the court in

allow a "relaxed" showing of injury.[199] But public interest standing is rarely granted[200] and may be resisted.[201]

developing and reviewing all relevant legal and factual questions and show that the issues are unlikely to be raised if the party is denied standing; party held appropriate).

[199] *See, e.g.*, Salorio v. Glaser, 414 A.2d 943, 947 (N.J. 1980) ("We have consistently held that in cases of great public interest, any 'slight additional private interest' will be sufficient to afford standing."); Burns v. Sundlun, 617 A.2d 114, 116 (R.I. 1992) (showing the tendency of this court to confer standing liberally in matters involving substantial public interest); Rocha v. King Cnty., 460 P.3d 624, 629 (Wash. 2019) ("When we are faced with an issue of significant public interest, standing is analyzed in terms of the public interests presented, and we engage in a more liberal and less rigid analysis."); McConkey v. Van Hollen, 783 N.W.2d 855, 860 (Wis. 2010) (discussing marriage amendment to constitution banning same sex marriage; "whether as a matter of judicial policy, or because McConkey has at least a trifling interest in his voting rights, we believe the unique circumstances of this case render the merits of McConkey's claim fit for adjudication.").

[200] *See in re* Delaware Pub. Sch. Litig., 239 A.3d 451, 513 (Del. Ch. 2020) ("This doctrine is only invoked rarely and in exceptional cases."); Brown v. Columbus City Sch. Bd. of Educ., No. 08AP-1067, 2009 WL 1911904, at *5 (Ohio Ct. App. June 30, 2009); ("[W]e do not view the present case as being one of a rare and extraordinary nature."); Narragansett Indian Tribe v. State, 81 A.3d 1106, 1110 (R.I. 2014) ("On rare occasions . . . this Court will overlook the standing requirement by invoking the so-called 'substantial public interest' exception in order to decide the merits of a case of substantial public importance."); Burns v. Sundlun, 617 A.2d 114, 116 (R.I. 1992) (discussing statutory interpretation, right to vote in referendum; "On rare occasions this court has overlooked the standing requirement to determine the merits of a case of substantial public interest."); Brimmer v. Thomson, 521 P.2d 574, 578 (Wyo. 1974) (holding that the exception must be applied with caution, and its exercise must be a matter where strict standards are applied to avoid temptation to apply judge's own beliefs and philosophies to a determination of what questions are of great public importance).

[201] *See, e.g.*, Georgiacarry.org, Inc. v. Allen, 791 S.E.2d 800, 803 (Ga. 2016) (rejecting public interest standing); City of Chattanooga v. Davis, 54 S.W.3d 248, 280 (Tenn. 2001) ("[T]he courts of this state have yet to recognize a general 'public rights' exception to the standing requirement . . . ."); *In re* Hotze, No. 20-0739, 2020 WL 5919726, at *4 (Tex. Oct. 7, 2020) (quoting Lujan v. Defs. of Wildlife, 504 U.S. 555, 577 (1992)) ("'[U]ndifferentiated public interest in executive officers' compliance with the law' does not confer standing."); Allred v. Bebout, 409 P.3d 260, 268–77 (Wyo. 2018) ("[S]take in the outcome" justiciability test not met, and rejecting public interest standing).

An important factor, though not controlling, is whether an issue is of great importance,[202] which has several definitions.[203] A common theme is that important constitutional, statutory, and other governmental issues should receive serious judicial consideration.[204] Courts usually find that land use cases do not qualify. Courts have rejected public interest standing

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[202] *See, e.g.*, Godfrey v. State, 752 N.W.2d 413, 424 (Iowa 2008) (violation of single subject rule for state legislation; citing cases); Wash. Nat'l Gas Co. v. Pub. Util. Dist. No. 1 of Snohomish Cnty., 459 P.2d 633, 635 (Wash. 1969) (discussing injunction restraining county public utility district from offering inducements to encourage land developers to install underground electrical distribution systems, and to persuade householders in new housing developments to buy electrical energy and service; standing granted when "a controversy is of serious public importance and immediately affects substantial segments of the population and its outcome will have a direct bearing on the commerce, finance, labor, industry or agriculture generally"); Jolley v. State Loan & Inv. Bd., 38 P.3d 1073, 1077 (Wyo. 2002) (finding a change in public meeting schedule is not an important factor).

[203] *See, e.g.*, Oceanview Homeowners Ass'n, Inc. v. Quadrant Constr. & Eng'g, 680 P.2d 793, 799 (Alaska 1984) (determining question must be one of public significance, such as important constitutional, statutory, or common law limitation); Citizens for Amending Proposition L v. City of Pomona, 239 Cal. Rptr. 3d 750, 763–64 (Cal. App. 2018) (determining public duty must be sharp and the public need weighty; courts balance an applicant's need for relief and his beneficial interest, against public need for enforcement of the official duty; balancing is done on a sliding scale); *In re* Del. Pub. Sch. Litig., 239 A.3d 451, 538 (Del. Ch. 2020) (discussing constitutional and statutory issues of substantial public importance, whose impact on the law is real, and where ongoing violations are likely to continue and evade judicial review); *Godfrey*, 752 N.W.2d at 425 (Iowa 2008) (standing waived only when issue is of utmost importance and constitutional protections most needed); Cunningham v. Exon, 276 N.W.2d 213, 216 (Neb. 1979) (determining must be of great public interest and concern; entirely possible that no one may have standing to challenge constitutional amendment); Schwartz v. Lopez, 382 P.3d 886, 894–95 (Nev. 2016) (discussing case must involve an issue of significant public importance and challenge to legislative expenditure or appropriation that violates specific provision of Nevada Constitution; plaintiff must be an "appropriate" party, because no one else is in a better position who will likely bring an action, and plaintiff must be capable of fully advocating his position in court); State *ex rel*. Coll v. Johnson, 990 P.2d 1277, 1284 (N.M. 1999) (discussing clear threats to essential nature of state government guaranteed to New Mexico citizens under the constitution); State *ex rel.* Food & Water Watch v. State, 100 N.E.3d 391, 398 (Ohio 2018) (noting that a "court will entertain a public action only in rare and extraordinary case where challenged statute operates, directly and broadly, to divest courts of judicial power"); Hunsucker v. Fallin, 408 P.3d 599, 602 (Okla. 2017) (discussing where there are "competing policy considerations" and "lively conflict between antagonistic demands"); *Compare* ATC S., Inc. v. Charleston Cnty., 669 S.E.2d 337, 341 (S.C. 2008) (finding the key is whether resolution is needed for future guidance), *with* Brimmer v. Thomson, 521 P.2d 574, 578 (Wyo. 1974) (establishing question of great public importance rests with this court).

[204] *See, e.g.*, Sears v. Hull, 961 P.2d 1013, 1019–20 (Ariz. 1998) (citing cases).

in disputes between property owners over traditional zoning changes such as amendments,[205] permits,[206] and nonconforming use determinations.[207] They believed these zoning issues should be resolved by local governments.[208] One case that approved public interest standing, however, was a suit against a major retail development project.[209]

B. Participation in Public Hearings as a Standing Rule

Third party standing needs a rule that can avoid the arbitrary limits created by rules that rely on injury in fact and nuisance-driven

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[205] *See ATC S., Inc.*, 669 S.E.2d at 341–342 (rejecting standing to bring a claim for rezoning for cell-phone tower when the only complaint came from non-adjoining competitor landowner, and the lawsuit was clearly an effort to secure standing for a private grievance).

[206] *See* Burks v. City of Maricopa, No. 2 CA-CV 2017-0177, 2018 WL 345569, at *5–6 (Ariz. Ct. App. July 16, 2018) (permitting and construction of automobile racing facility with two 4.2 mile racetrack on 280 acres, clubhouse, storage facilities, garage condominiums, and go-kart racing track; rejecting claim for standing waiver when entire municipal system thwarted so court could review and correct local government abuses); Egan v. Cnty. of Lancaster, 952 N.W.2d 664, 670 (Neb. 2020) (claiming error in issuing special use permit; no public interest standing because public officials did not act within statutory limits).

[207] *See* Keller v. City of Roseville, No. C072379, 2014 WL 1339952, at *5 (Cal. Ct. App. Apr. 4, 2014) (holding nonconforming use determinations for competitors were correct; agency will ensure zoning laws are applied; public need for present action is weak because of redundancy).

[208] *See* Carnival Corp. v. Hist. Ansonborough Neighborhood Ass'n, 753 S.E.2d 846, 852–53 (S.C. 2014) (discussing whether zoning ordinances preempted by federal and state law, applicability of zoning ordinances to cruise ship; no issue of constitutionality or legality of government action; claims could be brought by other parties).

[209] *See* Rialto Citizens for Responsible Growth v. City of Rialto, 146 Cal. Rptr. 3d 12, 22–25 (Ct. App. 2012). Plaintiffs had public interest standing to challenge a 230,000-square-foot commercial retail center, anchored by a 24-hour Wal-Mart Supercenter with 197,639-square-feet of retail floor space. *See id.* at 21. There were also four commercial outparcels, a gas station with sixteen fueling pumps, a detention/retention basin for storm water, and 1,143 parking spaces. *See id.* The court held the city had a public duty to comply with planning, zoning, and environmental laws in considering and approving the project. *See id.* at 25. The plaintiff was a "nonprofit public benefit corporation formed for the purpose of promoting 'social welfare through advocacy for and education regarding responsible and equitable environmental development.'" *Id.* at 24; *see also* Lischio v. Town of N. Kingstown, No. CIV.A. WC 00-0372, 2003 WL 21018092, at *7 (R.I. Super. Ct. Apr. 25, 2003) (dictum; finding public interest standing available where zoning amendment could affect general character of residential subdivision and fair market values of area residents' homes). Historic preservation issues could also provide a justification for public interest standing. *See supra* note 3.

requirements. They can do this by granting standing to appeal for all parties who have participated in public land use hearings. Concrete adverseness required by the functional standing rule is provided. The applicant for and opponents of land use change will have appeared at the hearing and presented their case. A record will be available from which an appeal can be taken.[210]

Judicial and statutory approval of participation in public hearings as a basis for standing is mixed.[211] Courts may not require participation in order to get standing[212] and state administrative procedure acts themselves do not impose this requirement,[213] but a person who does participate in such a hearing does not automatically have standing to sue.[214] A few state statutes allow appeals by participants in hearings with restrictions, such as aggrievement or a similar requirement.[215] Vermont, for example, allows

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[210] The type of record will vary depending on whether the decision is administrative or legislative, and whether zoning decisions are treated as quasi-judicial.

[211] For model legislation, see Meck, *supra* note 7, § 10-209(1)(a) (model legislation authorizing appeal "by any party to the record hearing").

[212] *See, e.g.*, State *ex rel.* Brookside Poultry Farms, Inc. v. Jefferson Cnty. Bd. of Adjustment, 388 N.W.2d 593, 596-597 (Wis. 1986). *But see* Brooks v. Town of N. Berwick, 712 A.2d 1050, 1053 (Me. 1998) (statutory requirement).

[213] *See* e-mail from Ronald Levin, William R. Orthwein Distinguished Professor of L., Wash. Univ., to author (May 20, 2021, 16:25 CDT) (on file with author).

[214] *See* Gates v. City of Pittsburgh Hist. Rev. Comm'n, No. 716 C.D. 2020, 2021 WL 2343267, at *7 (Pa. Commw. Ct. June 9, 2021) ("[M]ere fact that Appellants attended and commented at the November 6, 2019 hearing does not alone afford them standing."); Keller v. City of Roseville, No. C072379, 2014 WL 1339952, at *4 (Cal. Ct. App. Apr. 4, 2014) ("Keller's participation in the administrative proceedings as a complaining citizen by itself does not confer standing."); *In re* Adams, No. 141 C.D. 2019, 2020 WL 7491072, at *3 (Pa. Commw. Ct. Dec. 21 2020) ("[P]arties are not necessarily aggrieved merely because they participated in the hearing . . . .").

[215] *See, e.g.*, IND. CODE § 36-7-4-1603(a)(2) (allowing appeal by "person aggrieved by the zoning decision who participated in the board hearing that led to the decision"); ME. STAT. tit. 30-A, § 4483 ("Any party to a review proceeding under this chapter may obtain review of a final judgment by appeal to the Supreme Judicial Court, sitting as the Law Court."); *see also* MASS. GEN. LAWS ch. 40A, § 17 (allowing appeal "whether or not previously a party to the proceeding"); Kenner v. Zoning Bd. of Appeals of Chatham, 944 N.E.2d 163, 169 (Mass. 2011) (reviewing cases requiring aggrievement). For interpretation of the "any party" language in the Maine statute, see Witham Family Ltd. P'ship v. Town of Bar Harbor, 30 A.3d 811, 813 (Me. 2011) (explaining "party" as used in statute authorizing appeals from Board of Appeals must meet two-part test of appearance and particularized injury); Pride's Corner Concerned Citizens Ass'n v. Westbrook Bd. of Zoning Appeals, 398 A.2d 415, 417–18 (Me. 1979) (explaining "any party" requirement

an appeal by "interested persons" who participate in the hearing that led to the decision.[216] These are persons in the immediate neighborhood of the property who can show a physical or environmental impact, and that the decision was not in accord with the policies, purposes, or terms of the plan or bylaw of the municipality.[217]

Oregon makes participation in public hearings enough for standing in the vast majority of cases.[218] The hearing requirement is embedded in a comprehensive, state-directed land use system.[219] Its principal element is a state-mandated land use program that includes state planning goals, mandatory local planning, a requirement that local land use regulation be consistent with a land use plan, and the Land Use Board of Appeals (LUBA),[220] a specialized appellate court that hears appeals in land use cases.[221] Hearings for land use projects require quasi-judicial procedures that include a hearing notice.[222] The hearing is disciplined because local governments must list criteria from the ordinance and plan in the hearing

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in older similar statute means a participant in the proceedings who is aggrieved by action of appeals board and must also suffer particularized injury from order of Board).

[216] *See* VT. STAT. ANN. tit. 24, § 4465(a) ("An interested person may appeal any decision or act taken by the administrative officer in any municipality."); *Id.* § 4471 ("An interested person who has participated in a municipal regulatory proceeding authorized under this title may appeal a decision rendered in that proceeding by an appropriate municipal panel to the Environmental Division."); Vermont alternatively authorizes a private attorney general action by "[a]ny ten persons who may be any combination of voters or real property owners." *Id.* § 4465(b)(4).

[217] *See id.* § 4465(b)(3).

[218] *See* OR. REV. STAT. § 197.830(2).

[219] *See generally* Edward J. Sullivan, *The Quiet Revolution Goes West: The Oregon Planning Program 1961-2011*, 45 J. MARSHALL L. REV. 357, 391 n.241 (2012) (discussing Oregon program).

[220] "We believe that LUBA strikes an interesting and attractive balance by giving parties who cared enough to object locally a judicial platform to put land-use decisions to the test in a forum in which the disadvantages of being under-resourced are at least somewhat muted." Hall & Turner, *supra* note 68, at 104–05; *accord* Edward J. Sullivan, *Reviewing the Reviewer: The Impact of the Land Use Board of Appeals on the Oregon Land Use Program, 1979-1999*, 36 WILLAMETTE L. REV. 441 *passim* (2000).

[221] *See* Nir Mualam, *Where Planning Meets the Law: The Rise of Appeal Tribunals for Deciding Land-use Disputes*, 29 J. PLAN. LIT. 240, 378 (2014) (discussing planning appeal tribunals in several countries).

[222] *See* OR. REV. STAT. § 197.763. For statutes requiring hearings before hearing officers, see *id.* § 227.170 (cities); *id.* § 215.412 (counties); *see also* OR. REV. STAT. ANN. § 215.503 (counties; notice to individual property owners).

notice that the hearing will consider.[223] An appeal is precluded on an issue not raised in the hearing, with an exception if sufficient statements or evidence are not provided to give "the decision maker an opportunity to respond to the issue."[224] An appeal to LUBA may be taken by a person who "[a]ppeared before the local government."[225] In certain rare cases, if the local government did not hold a hearing, or if a person was not entitled to notice, an appeal to LUBA may be filed by a person adversely affected[226] or aggrieved.[227]

A gatekeeper function to control the abusive use of hearings and litigation by project opponents must also be considered. This is not an easy

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[223] *See* OR. REV. STAT. § 197.763(3)(b) ("List the applicable criteria from the ordinance and the plan that apply to the application at issue.").

[224] *Id.* § 197.763(3)(e) ("State that failure of an issue to be raised in a hearing, in person or by letter, or failure to provide statements or evidence sufficient to afford the decision maker an opportunity to respond to the issue precludes appeal to the board based on that issue.").

[225] *Id.* § 197.830(2)(b); *accord* e-mail from Edward J. Sullivan, Att'y, Portland, Or., to author (May 8, 2021, 14:42 CDT) (on file with author) (statute governs in vast majority of cases where there has been a decision with process); *see also* OR. REV. STAT. § 197.830(4)(a) ("A person who was not provided notice of the decision as required [by statute] may appeal the decision to the board . . . ."); *Id.* § 197.830(4)(c) ("A person who receives notice of a decision made without a hearing under [statutes cited] may appeal the decision to the board under this section within 21 days of receiving actual notice of the nature of the decision, if the notice of the decision did not reasonably describe the nature of the decision . . . ."). The statutes also have an aggrievement requirement. *See id.* § 227.180(2) ("A party aggrieved by the final determination in a proceeding for a discretionary permit or zone change may have the determination reviewed under [applicable statutes]."); Jefferson Landfill Comm. v. Marion Cnty., 686 P.2d 310, 313 (Or. 1984) (footnote omitted) ("[A]ggrieved" means "[t]he person's interest in the decision was recognized by local land use decision-making body,. . . [t]he person asserted a position on the merits; and . . . [the] local land use decision-making body reached a decision contrary to the position asserted by the person.").

[226] *See* OR. REV. STAT. § 197.830(3) ("[I]f a local government makes a land use decision without providing a hearing . . . ."). This section also applies if "the local government makes a land use decision that is different from the proposal described in the notice of hearing to such a degree that the notice of the proposed action did not reasonably describe the local government's final actions." *Id.*; *see* Devin Oil Co. v. Morrow Cnty., 365 P.3d 1084, 1088–89 (Or. Ct. App. 2015) ("[W]hen the decision under review is not a use authorization, but instead is a decision made without a public hearing . . ., a person is adversely affected by the decision when the decision either applies to the person or directly affects the person's interests in an adverse way.").

[227] *See* OR. REV. STAT. § 197.830(4)(b) ("[A] person who is not entitled to notice . . . .").

problem.[228] Opposition to a land use project can have a useful function,[229] but there are problems when Not In My Back Yard (NIMBY) opponents[230] delay[231] or block land use projects at public hearings with demands based on fear and prejudice.[232] They can sue if they do not succeed at a

[228] A pre-application conference with the developer that can help resolve issues before expensive technical and engineering work is undertaken may help resolve issues with potential project opponents. *See* DANIEL R. MANDELKER, PLANNED UNIT DEVELOPMENTS, 30-31 (Plan. Advisory Serv. Rep. No. 545 2007) (discussing pre-application conferences for planned unit developments); AM. PLAN. ASS'N, *supra* note 7, at 10–16 to 10-17 (explaining that a pre-trial conference requirement could make the development review process "more predictable, fair, and efficient" without requiring enabling legislation). Neighborhood meetings and community outreach are other possibilities. *See* Daniel R. Mandelker, *New Perspectives on Planned Unit Developments*, 52 REAL PROP. TR. & EST. L.J. 229, 263–66 (2017) (discussing these options as applied to planned unit developments).

[229] *See* Rolf Pendall, *Opposition to Housing: NIMBY and Beyond*, 35 URB. AFF. REV. 112, 115 (1999) (discussing late 1990s study of opposition to housing projects in San Francisco finding variety of reasons for opposition: "[L]iterature suggests that protest can reflect racial or class antagonism, ideological commitment to home ownership, desire to protect neighborhood ambiance, and fear of decreased home value. Protest may also be an excellent source of information about the current state of neighborhood services [that] can contribute to the development approval process.").

[230] NIMBY objectors can probably get standing as abutters in many states, though participation as hearing participants could create more standing opportunities.

[231] *See* Robert W. Wassmer & Joshua A. Williams, *The Influence of Regulation on Residential Land Prices in United States Metropolitan Areas*, 23 CITYSCAPE 9, 32 ("The stringency of local political pressure, state political processes, and the likelihood or length of approval delays all exert [significantly] positive influences on . . . land price variation.")

[232] *See* KATHERINE LEVINE EINSTEIN ET AL., NEIGHBORHOOD DEFENDERS 122–24 (2020) (discussing study of neighbor opposition to housing projects in Massachusetts); Jonathan Rothwell*, Land Use Politics, Housing Costs, and Segregation in California Cities* (Sept. 2019), http://californialanduse.org/download/Land%20Use%20Politics%20Rothwell.pdf (on file with author) [https://perma.cc/N3ME-YJ77], https://ternercenter.berkeley.edu/research-and-policy/land-use-politics-housing-costs-and-segregation-in-california-cities/ [https://perma.cc/2N5A-WG8L]; ("[D]egree of political opposition to housing development predicts higher prices, longer delays for lawful projects, and a lower likelihood of zoning reform."); Vicki Been et al., *Urban Land-Use Regulation: Are Homevoters Overtaking the Growth Machine?*, 11 J. EMPIRICAL LEGAL STUD. 197, 227 (2014) (discussing extensive neighbor opposition to zoning change in New York City); Hills & Schleicher, *supra* note 66, at 90 (arguing "benefits of new development are dispersed both geographically and across many individuals," harms are concentrated in specific geographic area of development and on individuals who have great deal invested in the outcome of land use decisions, and this disparity in costs of political organization can result in excessive limitations on new housing); Anika Singh Lemar, *Overparticipation: Designing Effective Land Use Public Processes* (FORDHAM L. REV.,

hearing.[233] The lawsuit is often baseless[234] and motivated by racial intolerance and biased fear, but lawsuits are easy and relatively inexpensive to file and can delay, damage, or kill a land use project.[235]

Ex ante and *ex post* rules help remedy this problem. A NIMBY-based court decision that blocks a land use project can successfully be attacked *ex post* in court. Attack is possible through litigation if a decision was based on neighbor opposition unsupported by legitimate land use reasons.[236] There is judicial support for such a claim, but the cases are mixed.[237] Unacceptable neighbor opposition may be difficult to prove, and a legal challenge can be expensive and time-consuming even if successful. An *ex post* sanction is available if a court awards attorney fees, which are usually not available in state courts,[238] against a losing NIMBY plaintiff.

An *ex ante* gatekeeper function can prevent unsupported objections to land use projects if local governments control the hearing agenda by listing criteria from the ordinance and plan that the hearing will consider. This is a requirement in Oregon.[239] Appeals to a court in Oregon can be taken only on the issues raised at the hearing.[240]

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forthcoming) (criticizing abusive public participation); Mandelker, *supra* note 22, at 261–66 (discussing neighborhood opposition to planned unit developments).

[233] *See* EINSTEIN, *supra* note 232, at 25–28 (discussing litigation).

[234] *See id.* at 49–50 (discussing lawsuit challenging a project's design and financial commitments from the municipality violated a prior agreement).

[235] *See id.* at 26–27. Even mild projects can attract opposition. *Id.* at 1–4 (describing opposition to conversion of commercial warehouse to four residential units).

[236] *See* Munir Saadi, *Neighbor Opposition to Zoning Change*, 49 URB. LAW. 393, 393–94 (2017).

[237] *See id.* at 394–99 (discussing substantive due process and equal protection objections to zoning denials based on neighbor opposition, and cases where courts have accepted these objections). Courts sometimes rely on *City of Cleburne v. Cleburne Living Center.,* 473 U.S. 432 (1985) (striking down denial of a permit for group home for mentally disabled as equal protection violation based on neighbor objections).

[238] *See, e.g.*, Kirby v. Immoos Fire Prot., Inc., 274 P.3d 1160, 1162 (Cal. 2012) ("[P]revailing party may recover attorney's fees only when a statute or an agreement of the parties provides for fee shifting.").

[239] *See supra* Part VII.B. A local government may be able to adopt this requirement by ordinance if it has home rule or adequate legislative authority. Several states confer expanded home rule powers. *See, e.g.*, S.D. CONST., art. IX, § 2 ("A chartered governmental unit may exercise any legislative power or perform any function not denied by its charter, the Constitution or the general laws of the state.").

[240] *See supra* Part VII.B; *see, e.g.*, IND. CODE § 36-7-4-1610 (providing that a person may obtain judicial review of an issue not raised before the board to determine if notice

These requirements help, but additional control is needed because zoning change either is done legislatively without criteria, or is done under vague and ill-defined criteria. Land use agencies can easily reject projects that attract opposition. Oregon legislation remedies this problem. Zoning amendments must comply with the policies of the comprehensive plan.[241] Additionally, "local government may adopt and apply only clear and objective standards, conditions and procedures regulating the development of housing."[242] Those standards may not have the effect of "discouraging needed housing through unreasonable cost or delay."[243]

Other states do not have these mandates. Zoning amendments are a legislative act in most states and do not require standards.[244] Special exceptions authorized by a board of adjustment, often required by land use projects, are reviewed under whatever criteria a municipality decides to include in its zoning ordinance. There are no statutory directives. Courts uphold vague and undefined criteria, such as a typical requirement that special exceptions must be compatible with surrounding uses.[245]

There is another alternative. *Ex ante* control is available if a court can block a bias-based claim for standing to sue.[246] A Michigan court did just this when it blocked an association from appealing a special use permit

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was not correctly given to persons required to be notified, or if "interests of justice would be served by judicial resolution of an issue arising from a change in controlling law occurring after the zoning decision").

[241] *See* Fasano v. Bd. of Cnty. Comm'rs of Wash. Cnty., 507 P.2d 23, 26 (Or. 1973).

[242] OR. REV. STAT. § 197.307(4) ("Except as provided in subsection (6) of this section, a local government may adopt and apply only clear and objective standards, conditions and procedures regulating the development of housing, including needed housing. The standards, conditions and procedures: (a) May include, but are not limited to, one or more provisions regulating the density or height of a development, (b) May not have the effect, either in themselves or cumulatively, of discouraging needed housing through unreasonable cost or delay.").

An alternate provision applies to appearance or aesthetic requirements. *See id.* § 197.307(6); *see also* Warren v. Wash. Cnty., 439 P.3d 581, 583-84 (Or. Ct. App. 2019) (discussing legislative history of provision).

[243] OR. REV. STAT. § 197.307(4)(b).

[244] *See* Rose, *supra* note 48, at 1157.

[245] *See* Daniel R. Mandelker, *Delegation of Power and Function in Zoning Administration*, 1963 WASH. U.L.Q. 60 *passim* (discussing judicial acceptance of this and other vague standards for discretionary approvals in zoning ordinances).

[246] The availability of *ex post* sanctions, such as a lawsuit against a successful NIMBY plaintiff and an award of attorney fees against an unsuccessful NIMBY plaintiff, would encourage a court to detect bias-based standing.

given to a therapeutic farm community intended for people with mental illnesses.[247] The association claimed the community would adversely affect the safety and security of the area because some people with mental illness commit various crimes.[248] The court held the association failed to present "any evidence beyond generalized speculative fears and concerns related to people with certain mental illnesses," and that the claims were "speculative, if not outright bias-based fears"[249] and "based on nothing more than stereotypes and prejudices associated with mental illness" that are not a proper basis for aggrievement.[250]

Opposition to land use projects, such as affordable housing, is often bias-based by stereotypes, prejudice,[251] and fear.[252] Courts should reject standing when bias is the motivating factor.[253]

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[247] *See* Grandview Beach Ass'n v. Cnty. of Cheboygan, No. 350352, 2021 WL 1049882, at *1 (Mich. Ct. App. Mar. 18, 2021). This decision would also apply to a case brought by a third party plaintiff who initiates litigation. The difference is that a litigant in an appeal "must demonstrate an injury arising from either the actions of the trial court or the appellate court judgment rather than an injury arising from the underlying facts of the case." *Id.* at *7 (emphasis omitted).

[248] *See id.* at *8.

[249] *Id.*

[250] *See id.* at *9. The court noted that "the Association's claims and the circuit court's decision arise from an imprudent and speculative conclusion that people who suffer from mental illness automatically present a safety risk to the well-being of others." *Id.* It also held that "[t]he Seventh Circuit Court of Appeals has recognized in the context of reasonable accommodations for housing that prospective neighbors' public safety concerns could not 'be based on blanket stereotypes about disabled persons . . . .'" *Id.*

[251] *See* EINSTEIN, *supra* note 232, at 110 ("Black support for housing is significantly higher than other racial and ethnic groups, by a margin of more than thirty percentage points."); *see also* Daniel R. Mandelker, *Zoning Barriers to Manufactured Housing*, 48 URB. LAW. 233, 235–41 (2016) (noting that opposition to manufactured housing, which costs significantly less than traditionally built housing, is based on stereotypes and prejudice, such as concerns about safety, quality, appearance, occupants, and price appreciation).

[252] *See* EINSTEIN, *supra* note 232, at 1–4 (describing objections to housing project that resulted in delay, costly studies, and a reduction in housing units).

[253] Courts can rely on guidance for the rejection of bias-based standing claims on *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), which struck down a permit denial for a group home for the mentally disabled as a violation of equal protection because it was based on the fears of neighbors. *See* John D. Wilson, Comment, Cleburne*: An Evolutionary Step in Equal Protection Analysis*, 46 MD. L. REV. 163, 163 (1986) ("Supreme Court addressed an issue that will have a major impact on the evolution of equal protection analysis.").

VIII. CONCLUSION

Third party standing in land use litigation is arbitrarily governed by statutory and judicial rules that block judicial access to those seeking to protect public values. Reform is necessary, but not likely, as courts and legislatures resist change. Reform should give applicants for zoning change and their opponents comparable access to court when they participate in land use hearings. Standing based on hearing participation will equalize judicial access and provide the "stake" in litigation that courts require.