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Land Use By, For, and Of the People: Problems With the Application of Initiatives and Referenda to the Zoning Process

I. INTRODUCTION

Land uses inherently conflict with each other, particularly within the confines of large municipalities,¹ which must fit residential, commercial, and industrial land uses within limited areas. The basic theory of zoning is that municipalities should adopt comprehensive zoning ordinances in order to minimize conflicts between incompatible uses of land.² Because zoning ordinances map out land uses on community-wide scales, they affect the entire population of a community.³ Consequently, a major issue in zoning focuses on *who* makes the zoning decisions. Municipalities by themselves lack the authority

1. W.G. ROESLER, GENERAL POLICIES AND PRINCIPLES FOR PROTOTYPE ZONING ORDINANCES AND RELATED MEASURES 1 (1976).

2. This Comment utilizes the terms "comprehensive plan" and "zoning ordinance." A comprehensive plan, also known as a "general plan" or a "master plan," sets out land use policies and goals, as well as the general land use districts or zones for a community. ROBERT C. ELLICKSON & A. DAN TARLOCK, LAND-USE CONTROLS 36 (1981) [hereinafter LAND-USE]. A zoning ordinance implements the comprehensive plan and restricts land uses, lot sizes, building placements, structure heights and areas for particular zones. *Id.* Because state zoning enabling acts mandate that zoning ordinances be made in accordance with a comprehensive plan, the term "comprehensive zoning ordinance" will hereinafter be used to denote a zoning ordinance that has been effectuated in accordance with a comprehensive plan. *See, e.g.,* CAL. GOV'T CODE § 65000-66499.58 (West 1983 & Supp. 1991).

3. Only a "rezoning" can change a zoning ordinance. A rezoning requires passage of a new ordinance to replace the previous ordinance. Passage of a new ordinance requires planning commission hearings and debate. Rezoning, therefore, are not easy to obtain, and may consume much time. Because the rezoning process may be long and difficult, the enactment of original zoning ordinances is especially important to community residents, who want to ensure that the original ordinance is in accord with community landowners' goals. One court noted that "[u]ndeniably, zoning issues often are of great public interest and some . . . may concern the entire population of the municipality concerned." *Township of Sparta v. Spillane*, 312 A.2d 154, 156 (N.J. Super. Ct. App. Div. 1973), *cert. denied*, 317 A.2d 706 (N.J. 1974). *See generally* ROBERT M. ANDERSON, AMERICAN LAW OF ZONING (2d ed. 1976); CAL. GOV'T CODE § 65000-66499.58 (West 1983 & Supp. 1991).

to zone.⁴ In order to enact zoning ordinances, cities must rely on grants of police power authority from the state sovereign in the form of zoning enabling legislation.⁵ Once a municipality acquires power to zone, the city council enacts ordinances, relying on planning commission hearings and analyses in its decisions.⁶

A controversial question presents itself at this juncture: How much authority should community residents have in the zoning process? There is much debate on this issue.⁷ One argument asserts that because land use planning, comprehensive plans and zoning ordinances are very complex matters, zoning decisions should be made exclusively by elected representatives in the city council.⁸ These representatives have the long-term interests of the community in mind, unlike the electorate who might act out of personal interest, without the full information or technical knowledge required to make valid long-term land use decisions.⁹ Diametrically opposed to such a position are those who favor zoning initiatives and referenda or "zoning by direct electoral legislation."¹⁰ Advocates of direct legislation zoning argue that residents should be intricately involved in the zoning process because of the community-wide impact of zoning decisions.¹¹

Many states believe that community residents should have more than simple representative authority in the zoning process. These states have allowed city residents to participate directly in the zoning process via initiative and referendum.¹² In initiatives, municipal vot-

4. LAND-USE, *supra* note 2, at 39-42.

5. *Id.* at 40-41.

6. The Standard State Zoning Enabling Act provides as follows:

In order to avail itself of the powers conferred by this act, such legislative body shall appoint a commission, to be known as the zoning commission, to recommend the boundaries of the various original districts and appropriate regulations to be enforced therein. Such commission shall make a preliminary report and hold public hearings thereon before submitting its final report, and such legislative body shall not hold its public hearings or take action until it has received the final report of such commission. Where a city plan commission already exists, it may be appointed as the zoning commission.

STANDARD STATE ZONING ENABLING ACT OF 1926, U.S. DEPARTMENT OF COMMERCE, reprinted in 8 PATRICK J. ROHAN, ZONING AND LAND USE CONTROLS § 53.01[1] (1983). See *infra* notes 67-78 and accompanying text.

7. See Paul Marcotte, *Zoning By Vote*, A.B.A. J., May 1990, at 20.

8. Robert H. Freilich & Derek B. Guemmer, *Removing Artificial Barriers to Public Participation in Land-Use Policy: Effective Zoning and Planning by Initiative and Referenda*, 21 URB. LAW. 511, 516-20 (1989) [hereinafter Freilich].

9. *Id.*

10. *Id.* at 516-18. This Comment utilizes the terms "initiatives and referenda," "direct electoral legislation," and "plebiscite" interchangeably. All three terms refer to the mechanisms by which the people may enact laws separately from the legislature. For the reasons why initiatives and referenda originated and were later applied to the zoning process, see *infra* notes 121-26 and accompanying text. See also *infra* text accompanying notes 13-14 (initiative and referendum defined).

11. See Freilich, *supra* note 8, at 511-13.

12. See *infra* notes 194-95, 312 and accompanying text.

ers bypass the city council and directly enact zoning ordinances.¹³ In referenda, zoning decisions made by the city council are referred to municipal voters who may either approve or reject the ordinances.¹⁴

The application of direct electoral legislation to the zoning process generates a significant legal issue: can the direct legislative process fulfill sufficient procedural and substantive requirements so that it may be validly applied to zoning decisions? In theory, direct legislation would eliminate a variety of zoning problems, such as electoral relief from poor city council zoning decisions and land use policies in discord with the popular will. In practice, however, the application of initiatives and referenda to the zoning process creates many more legal problems and inconsistencies than it resolves.

Three consecutive problems crystallize around the application of initiatives and referenda to zoning. These problems arise from the three requirements that a zoning plebiscite must fulfill in order to be valid: (1) the legislative act requirement,¹⁵ (2) state zoning enabling act procedural requirements,¹⁶ and (3) the comprehensive plan requirement.¹⁷ In addition to these requirements are concerns generated by the permissive level of judicial review accorded to direct legislative zoning decisions.¹⁸

First, although legislatures on the national and state level generally exercise only legislative functions, local legislatures often exercise additional functions that are administrative in nature.¹⁹ Initiatives and referenda may be applied only to acts that are legislative in nature.²⁰ Thus, only zoning decisions characterized as legislative may be properly subjected to direct legislation. Consequently, administrative zoning decisions are immune from the initiative and referendum process. The state courts determine whether a zoning

13. 7 PATRICK J. ROHAN, ZONING AND LAND USE CONTROLS § 50.03[7] (1983).

14. *Id.*

15. See *infra* notes 140-280 and accompanying text.

16. See *infra* notes 281-322 and accompanying text.

17. See *infra* notes 323-404 and accompanying text.

18. See *infra* notes 402-415 and accompanying text.

19. See *Fasano v. Board of County Commrs*, 507 P.2d 23, 26 (Or. 1973), *superseded by statute as slated in* *Neuberger v. City of Portland*, 603 P.2d 771, (Or. 1979), *disapproved in part in* *Neuberger v. City of Portland*, 607 P.2d 722 (Or. 1980).

20. 2 ARDEN H. RATHKOPF, THE LAW OF ZONING AND PLANNING § 29C.03 (4th ed. 1990); *City of Eastlake v. Forest City Enters., Inc.*, 426 U.S. 668, 673 (1976); *In re Pfahler*, 88 P. 270 (Cal. 1906); *Anderson v. Smith*, 377 S.W.2d 554 (Mo. App. 1964); *Brazzell v. Zeigler*, 110 P. 1052 (Okla. 1910); *Wilson v. Manning*, 657 P.2d 251 (Utah 1982); *Kadderly v. Portland*, 74 P. 710 (Or. 1903).

decision is legislative or administrative.²¹ Although states uniformly agree that the adoption of a *comprehensive plan* is legislative in nature,²² they are split as to which types of *zoning ordinances*, if any, constitute legislative acts.²³ Certain states have held that zoning and rezoning ordinances are legislative and, therefore, proper subjects for direct legislation.²⁴ Other states have ruled that while comprehensive zoning ordinances are legislative in nature, rezonings are administrative acts and, thus, cannot be applied to a plebiscite.²⁵ Because the United States Supreme Court has ruled that state characterizations of legislative acts are binding in the zoning context, the original split among states has deepened.²⁶ The schism is rendered especially confusing by the diversity of tests used to determine whether an act is legislative or administrative.

Second, if a zoning act successfully fulfills the legislative act requirement, it must then meet state zoning enabling act procedural requirements.²⁷ Municipalities derive their zoning power from state zoning enabling acts.²⁸ The grant of power from state to municipality generally imposes certain procedural requirements and limitations which, in certain states, have been found prohibitive to direct legislative zoning.²⁹ Other states have ruled that procedural requirements and limitations in state enabling acts apply exclusively to city councils and not to the direct legislative process.³⁰ These states may be brushing with procedural due process violations because their decisions have failed to take into account the minimum procedural due process requirements of notice and opportunity to be heard. City councils are statutorily required to grant notice and a hearing to landowners whose land will be zoned.³¹ Initiatives and referenda, however, may not accord landowners with sufficient due process pro-

21. See *infra* notes 193-280 and accompanying text.

22. See *infra* notes 194-95, 312 and accompanying text.

23. See *id.*

24. Freilich, *supra* note 8, at 529. See *infra* notes 194-95, 312 and accompanying text.

25. Freilich, *supra* note 8, at 529. See *infra* notes 194-95, 312 and accompanying text.

26. *City of Eastlake v. Forest City Enters.*, 426 U.S. 668, 674 n.9 (1976).

See Freilich, *supra* note 8, at 528-29.

27. See *infra* notes 281-322 and accompanying text.

28. See, e.g., CAL. GOV'T CODE § 65800-65863.12 *et seq.* (West 1983 & Supp. 1991) and CONN. GEN. STAT. ANN. § 8-1 (West 1989) (zoning enabling legislation). For a detailed analysis of how state zoning enabling legislation has followed the provisions of the Standard State Zoning Enabling Act, see NORMAN WILLIAMS, JR., 1 AMERICAN LAND PLANNING LAW 361-70 (1974). Professor Williams concludes that 47 states have followed the provisions of the Standard State Zoning Enabling Act. See also, ROBERT R. WRIGHT & MORTON GITELMAN, LAND USE 657-58 (3d ed. 1982) (discussing state zoning enabling legislation) [hereinafter WRIGHT & GITELMAN].

29. See *infra* notes 194-95, 312 and accompanying text.

30. See *id.*

31. Notice and a hearing are required by state zoning enabling statutes. See, e.g.,

cedures. The permission to continue direct legislative zoning when plebiscites do not fulfill due process considerations is disturbing at best.

Third, if the legislative act and state enabling act requirements have been met, direct legislative zoning encounters another obstacle—the comprehensive plan.³² State zoning enabling acts require that zoning ordinances be passed “in accordance with a comprehensive plan.”³³ The comprehensive plan outlines the general land use policies and zones of a community.³⁴ It is a well settled point of law that zoning ordinances are only valid if they have been passed pursuant to considerations of the comprehensive plan.³⁵ Failure to consider the comprehensive plan when enacting site-specific zoning or rezoning is considered illegal “spot-zoning,”³⁶ a taboo of the zoning process. Because city councils consider planning commission hearings and analyses of proposed zonings, it is easy for city council zoning decisions to meet the comprehensive plan requirement. Initiatives and referenda, however, are decisions made by the electorate. It is doubtful that the general electorate of a community possesses sufficient information and understanding of the comprehensive plan with which to enact zoning ordinances that conform to the plan.³⁷ If zoning decisions made by the electorate do not conform to the plan, such decisions would in effect constitute illegal “spot-zoning.” The problem is especially difficult to resolve because of the differing levels of importance attached to comprehensive plans by states.³⁸ While certain states have ruled that comprehensive plans are binding documents, other jurisdictions have held that plans are

CAL. GOV'T CODE §§ 65853-65857 (West 1983 & Supp. 1991) (notice and hearing mandatory in city council zoning ordinance enactments).

32. STANDARD STATE ZONING ENABLING ACT OF 1926, U.S. DEPARTMENT OF COMMERCE, *reprinted in* 8 PATRICK J. ROHAN, ZONING AND LAND USE CONTROLS § 53.01[1] (1983). *See, e.g.,* OR. REV. STAT. §§ 197.015(4), 197.175(2) (1988).

33. STANDARD STATE ZONING ENABLING ACT OF 1926, U.S. DEPARTMENT OF COMMERCE, *reprinted in* 8 PATRICK J. ROHAN, ZONING AND LAND USE CONTROLS § 53.01[1] (1983).

34. *Id.*

35. *Baker v. Milwaukie*, 533 P.2d 772, 779 (Or. 1975).

36. “Spot-zoning” is the term used to define the enactment of a site-specific zoning ordinance without consideration of the comprehensive plan. Spot-zoning is illegal because it allows the possibility of corruption in city council zoning votes. *See* LAND-USE, *supra* note 2, at 241-47. *See* 1 ROBERT M. ANDERSON, AMERICAN LAW OF ZONING §§ 5.12-5.22 (3d ed. 1986).

37. *See infra* notes 405-45 and accompanying text.

38. *See infra* notes 323-404 and accompanying text.

merely advisory in nature.³⁹ Depending on which approach a state adopts, initiatives and referenda may or may not be able to fulfill the comprehensive plan requirement. Even if one may assume that the electorate is *able* to enact zoning ordinances pursuant to a comprehensive plan, it is doubtful that the electorate *will* enact zoning decisions based on the comprehensive plan itself, rather than on personal prejudices against certain land uses. For example, although an alcoholism and drug rehabilitation center may be within the policies and allowable land uses in a community's plan, the electorate might vote against a decision to zone for such a use on the basis of property value stability and a desire to keep "bad elements" out of the community.⁴⁰

Fourth in the list of issues generated by the marriage of direct legislation to zoning is the consideration of judicial review. The level of judicial review accorded to city council zoning decisions is highly deferential to the city council. Only those decisions which are "arbitrary or capricious" may be invalidated.⁴¹ Because plebiscites may be applied only to *legislative* acts, judicial review of zoning decisions made by direct *legislation* is as permissive as review of city council decisions. A permissive level of review for direct legislative zoning decisions allows the electorate to act more out of personal motivations than out of comprehensive plan and long-term community considerations. Violations of the comprehensive plan requirement are thus more likely to occur in zoning plebiscites than in city council zoning actions. However, if the level of judicial review for plebiscite zoning decisions is as permissive as the level of review for city council decisions, many zoning decisions unrelated to the comprehensive plan might pass unhindered. Moreover, even if defects of plebiscite zoning were detected, it is difficult to imagine how a court could find that a decision by the people themselves is "arbitrary or capricious."

39. LAND-USE, *supra* note 2, at 36. See Freilich, *supra* note 8, at 546-47.

40. See Donnie Radcliffe, *Nancy Reagan, Taking Her "Turn" Live; On Larry King's Show, The First Lady Makes Her TV Talk Debut*, WASH. POST, Nov. 9, 1989, at F6. Former First Lady Nancy Reagan is a strong advocate against the use of drugs and founded the "Just Say No To Drugs" project. *Id.* Nancy Reagan wanted to build a 210-bed drug rehabilitation center in Lake View Terrace, near Los Angeles, California. See Lisa Anderson, *Her Turn, Her Way*, CHI. TRIB., Nov. 16, 1989, at 1C. Neighbors of the proposed development, however, were very much against the development. The neighbors vehemently protested construction of the drug rehabilitation center. *Id.* After the protestors threatened to picket in front of the Reagans' home in Bel Air, California, Nancy Reagan abandoned the project. Consequently, the project was abandoned entirely. *Id.* This development of affairs in Lake View Terrace, California is not directly related to zoning *per se*, but serves as a good example of the strong interest that neighboring landowners have in maintaining the stability of property values, which are sometimes threatened by land use changes. Indeed, although the drug rehabilitation center might have depressed surrounding property values, it would also have benefitted the community in its fight against drugs.

41. See *infra* notes 405-15 and accompanying text.

The final controversy generated by initiative and referendum zoning is systemic rather than legal. The United States is a representative democracy. The American government's system of decision making is a balanced structure wherein the raw will of the people is refined through the debate of elected representatives into a framework of policies and decisions in accord with the public good.⁴² There exists much doubt, however, as to whether direct democratic initiatives and referenda are capable of improving the decision making system in the zoning context. It is generally admitted that direct legislation is a positive tool with which to gauge land use *policy* on a wide scale. It is easy to see how the direct legislative approach aids new cities to determine whether they should adopt pro-growth, slow-growth, or no-growth policies, and whether to concentrate on residential, commercial, or industrial land uses. However, it is more difficult to visualize how the *zoning* process is rendered more just and efficient by the direct democratic process of initiative and referendum. To be sure, there are potent arguments on each side of the debate. The direct democratic approach, concerned with corruption and low confidence in city council officials,⁴³ seeks to cure the ills of democracy via an increased infusion of democratic power into the municipal zoning process.⁴⁴ The representative approach focuses on the crucial need, in zoning, of representatives trained in the ever-growing complexity of zoning and urban planning, and representatives who, via debate, experience, and knowledge, consider the needs of a community as a whole, via a comprehensive zoning plan.⁴⁵

The purpose of this Comment is to elucidate the problems posed to the applicability of zoning to plebiscites by the legislative act requirement, state enabling act procedural requirements, and the comprehensive plan requirement. Part II of this Comment reviews the history of zoning, both from a policy and legal perspective. Part III focuses on the legislative act requirement, state zoning enabling statute procedural requirements, and the comprehensive plan requirement. Part III also discusses jurisdictional splits, recent trends, and the problem of permissive judicial review of initiative and referendum zoning ordinances. Finally, Part IV of this Comment analyzes

42. See *infra* notes 416-45 and accompanying text.

43. See *infra* notes 121-26 and accompanying text.

44. See *infra* note 122 and accompanying text.

45. See *infra* notes 416-45 and accompanying text (discussing theories of representative government).

arguments both in favor and against the utilization of direct democratic zoning plebiscites in a representative democracy.

II. THE ZONING PROCESS

Before delving into an examination of the difficulties posed by the fusion of zoning and the initiative and referendum process, it is essential to understand the basic policies behind the zoning movement, as well as a few basic precepts of zoning law.

A. History of Zoning

Zoning is the process whereby municipalities minimize the incompatibilities between different land uses.⁴⁶ A comprehensive plan sets out general land use policies and zones.⁴⁷ Zoning ordinances implement the plan and restrict land uses, structure heights and areas.⁴⁸ The concept of zoning, however, did not exist until the early 1900s.⁴⁹ Zoning grew out of a combination of two planning movements: the "garden city" movement and the "city beautiful" movement.⁵⁰

The garden city movement operated on the principle that urban concentrations were ugly and repulsive.⁵¹ The movement's planning solution to this problem was to isolate residential uses from all other land uses by substantial open spaces.⁵²

The city beautiful movement presented a more pragmatic approach by proposing that cities should be beautified as much as possible.⁵³ The city beautiful movement was based on the belief that residential land use is the best and "highest"⁵⁴ possible use of land, and that cit-

46. ROESLER, *supra* note 1, at 1; Interview with Charles I. Nelson, Esq., Professor of Land Use Planning at Pepperdine University School of Law in Malibu, Cal. (Mar. 21, 1991) [hereinafter Nelson interview]. The theory of land use incompatibilities arose from the city beautiful movement. See *infra* notes 56-60 and accompanying text.

47. LAND-USE, *supra* note 2, at 36.

48. *Id.*

49. JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 1115 (2d ed. 1988) [hereinafter PROPERTY]. For an overview of the evolution of original zoning law, see generally EDWARD BASSETT, ZONING: LAWS, ADMINISTRATION AND COURT DECISIONS DURING THE FIRST TWENTY YEARS (1936).

50. LAND-USE, *supra* note 2, at 41-42.

51. *Id.*

52. The failure of the garden city movement is attributed to the practical fact that people wanted to live in cities, not in open spaces. Cities, with their commercial and industrial land uses, provided employment opportunity and services. People preferred to live in cities where work was available, rather than in "garden" settings away from commercial and industrial opportunity. Nelson interview, *supra* note 46.

53. LAND-USE, *supra* note 2, at 42.

54. The term "highest" in this context is the basis for a confusing nomenclature. The hierarchy of land uses is based on the city beautiful movement, which posited that "low" intensity use is more favorable than "high" intensity use. Consequently, the land use hierarchy begins with single-family residential use at the "top" of the scale as the best possible use of land. In order from "best" possible use to "worst" possible use, land uses are ordered as follows: single-family medium and high density residential,

ies should therefore be planned so as to allow as much insulation from industrial uses as possible.⁵⁵ The city beautiful movement advocated the geographical arrangement of uses in order of quality of use, with single family residential use protected from heavy industrial use by graduated zones of middle and high density residential use, commercial use, and light industrial use, respectively.⁵⁶ The city beautiful precepts, which granted almost sacred reverence and protection to residential land use, are still in effect today and serve as the guiding policy of the modern zoning process.⁵⁷

Until zoning became an essential tool in municipal planning, land uses were regulated by restrictive covenants and the common law doctrine of nuisance.⁵⁸ However, as cities rapidly expanded,⁵⁹ restrictive covenants and the common law doctrine of nuisance could not efficiently regulate municipal land uses.⁶⁰ First, cities enacted ordinances restricting the heights and areas of buildings.⁶¹ Shortly thereafter, the first zoning ordinances were passed. In 1909, Los Angeles enacted a zoning ordinance that delineated seven land use

light and heavy commercial, and light and heavy industrial uses. Based on this hierarchy, scholars use the terms "upzoning" and "downzoning" to define changes in the use of land. However, scholars differ on the definitions they give these terms. Certain scholars use the term "downzoning" to refer to a change in land use from a better to a worse *type* of use. Other scholars use the term to define a change in land use from high to low *intensity*. Nelson interview, *supra* note 46. In the opinion of this author, the term "downzoning" should be used when describing a change in use from higher intensity to lower intensity because it reflects a change in use intensity, rather than a change in the optimal use hierarchy.

55. After the watershed case of *City of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), this theory of zoning became known as "Euclidean zoning," after the name of the case. LAND-USE, *supra* note 2, at 50.

56. LAND-USE, *supra* note 2, at 50.

57. Although the general precepts of the city beautiful movement still form an integral part of modern zoning theory, aesthetic policies of zoning were steadily replaced by more practical considerations of traffic circulation and street sizes in the 1950s. LAND-USE, *supra* note 2, at 42.

58. Common law nuisance law provided relief from offensive activities. See generally Richard A. Epstein, *Nuisance Law: Corrective Justice and Its Utilitarian Constraints*, 8 J. LEGAL STUD. 49 (1979); Jeff L. Lewin, *Compensated Injunctions and the Evolution of Nuisance Law*, 71 IOWA L. REV. 775 (1986). Restrictive covenants allowed neighboring landowners to contract between themselves in order to enjoin one another from undertaking certain activities or constructions. See generally Mark Urban, Comment, *An Evaluation of the Applicability of Zoning Principles to the Law of Private Land Use Restrictions*, 21 UCLA L. REV. 1655 (1974).

59. *Developments in The Law - Zoning*, 91 HARV. L. REV. 1427, 1433-34 (1978).

60. LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 678 (2d ed. 1985).

61. See Act of May 23, 1898, ch. 452, 1898 Mass. Acts 401 (repealed 1941). The city of Washington, D.C., limited the height of city structures to that of the Capitol Dome in 1899. LAND-USE, *supra* note 2, at 39.

zones.⁶² The City of New York, however, is credited with the enactment of the first true zoning ordinance⁶³ in 1916, after the state amended the city charter and allowed it to zone.⁶⁴ The New York ordinance was not adopted in response to popular outcry, but rather by small special interests that wanted to stem the popular growth of loft factories on expensive Fifth Avenue, as well as protect the city from the blockage of light by New York's growing skyline.⁶⁵ After the New York ordinance was enacted, the practice of zoning spread through the rest of the country with great speed.⁶⁶

Because cities are creations of the states, their powers were traditionally limited to those legislatively granted by the state sovereign.⁶⁷ An important constitutional zoning problem centered on whether cities could zone absent an express grant of authority by state enabling legislation.⁶⁸ In 1926, constitutional attacks based upon the lack of municipal zoning power prompted then-Secretary of Commerce Herbert Hoover to draft⁶⁹ the Standard State Zoning Enabling Act⁷⁰ (hereinafter SZEA). The SZEA provided a guideline for states seeking to empower their municipalities with zoning authority.⁷¹ The SZEA contained three important provisions: (1) a grant of zoning

62. See *Ex parte Quong Wo*, 118 P. 714 (Cal. 1911). The Los Angeles ordinance provided for one residential zone and six industrial zones. *Id.*

63. PROPERTY, *supra* note 49, at 1116.

64. S. TOLL, ZONED AMERICAN 74, 113-14, 162-63 (1969). See generally STANISLAW J. MAKIELSKI, THE POLITICS OF ZONING (1966).

65. S. Toll stated that "a tiny interest group in the city [was the motivator] . . . to which a much larger community acquiesced when the law was eventually passed in 1916." TOLL, *supra* note 64, at 164. It is interesting to note that property value was the motivating force behind even the first true zoning ordinance. See *infra* notes 411-34 and accompanying text (discussion of how the desire to maintain property value is translated into legislation).

66. PROPERTY, *supra* note 49, at 1116.

67. WRIGHT & GITELMAN, *supra* note 28, at 657.

68. LAND-USE, *supra* note 2, at 36. Some legal scholars continue to oppose the practice of zoning and criticize it on constitutional grounds. See Bernhard H. Siegan, *Non-Zoning in Houston*, 13 J.L. & ECON. 71 (1970). Houston, Texas had always opposed the enactment of a zoning ordinance. The city council finally decided to run counter to decades of nonzoning and enacted a comprehensive zoning ordinance in 1991. See HOUSTON, TEX., RESOLUTION 91-36 (1991) (accepting report of neighborhood initiative committee of planning and zoning commission); HOUSTON, TEX., ORDINANCE 91-63 (1991) (Planning and Zoning Commission Ordinance).

69. Secretary of Commerce Herbert Hoover appointed an advisory committee on zoning in 1921, which subsequently drafted the Standard State Zoning Enabling Act of 1926. BASSET, *supra* note 49, at 28-29.

70. STANDARD STATE ZONING ENABLING ACT OF 1926, U.S. DEPARTMENT OF COMMERCE, reprinted in 8 PATRICK J. ROHAN, ZONING AND LAND USE CONTROLS § 53.01[1] (1983) [hereinafter SZEA].

71. LAND-USE, *supra* note 2, at 40. The SZEA provided a set of model rules for states that wished to grant zoning power to their municipalities. Certain states have used the SZEA as a model, but have narrowly tailored their enabling acts to their specific ends. For a list of how state enabling acts have varied from the original SZEA provisions, see NORMAN WILLIAMS, JR., 1 AMERICAN LAND PLANNING LAW 361-70 (1974).

power from the state to its municipalities, (2) a state empowerment of cities for the division of land into uniform districts (zones),⁷² and (3) an underlying provision that cities would regulate land uses in accordance with a "comprehensive plan."⁷³ The states widely accepted the SZEA. By 1931, thirty-five states had granted zoning authority to their respective municipalities.⁷⁴ By 1974, the number of states grew to forty-three.⁷⁵ All fifty states have adopted the SZEA at some point in time, although many have modified their grants of zoning power.⁷⁶ State zoning enabling acts generally require that city councils grant notice and an opportunity to be heard to landowners whose land will be zoned.⁷⁷ The difficulty that zoning initiatives and referenda have in fulfilling enabling act due process requirements is one of the central problems of the direct legislative zoning process.⁷⁸

Although the SZEA provided a functional guideline for state empowerment of municipal zoning, up until 1926, the United States Supreme Court had not yet pronounced itself on the constitutionality of comprehensive plan zoning ordinances. This pronouncement arrived when the Supreme Court decided the seminal case of *Village of Euclid v. Ambler Realty Co.*⁷⁹

B. General Principles of Zoning Law

In *Village of Euclid v. Ambler Realty Co.*,⁸⁰ the Supreme Court upheld the constitutionality of comprehensive zoning ordinances for the first time. The Court ruled that "before [a comprehensive zoning] ordinance can be declared unconstitutional, [its] provisions [must be]

72. The SZEA provided that the division of land into districts or "zones," "shall be uniform for each class or kind of building throughout each district." SZEA, *supra* note 70, at § 53.01[1](2). The drafters of the SZEA fashioned this provision with great insight, as they seemed to have predicted site-specific rezoning not effectuated in accordance with a comprehensive plan.

73. SZEA, *supra* note 70, at §§ 53.011-(3).

74. ANDERSON, *supra* note 36, at § 2.21; LAND-USE, *supra* note 2, at 41.

75. WILLIAMS, *supra* note 71, at § 18.01.

76. *Id.*

77. *See, e.g.*, CAL. GOV'T CODE §§ 65853-65857 (West 1983 & Supp. 1991); N.J. STAT. ANN. § 40:55D-12-17 (West 1991).

78. *See infra* notes 281-322 and accompanying text. Compare *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) (finding that notice and opportunity to be heard are minimum process due) and *City of Eastlake v. Forest City Enters. Inc.*, 426 U.S. 668 (1976) (no due process required when act is legislative). *See also* *Associated Home Builders v. City of Livermore*, 557 P.2d 473 (Cal. 1976) (no due process is required in initiative zoning ordinance because enabling act procedural requirements only apply to city council).

79. 272 U.S. 365 (1926).

80. *Id.*

clearly arbitrary or unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.”⁸¹

1. Facts of *Village of Euclid v. Ambler Realty Co.*

In *Euclid*, the independent municipal suburb⁸² of Euclid near Cleveland, Ohio passed a comprehensive zoning ordinance.⁸³ A *comprehensive plan* sets out the land use policies and zones which will be adopted by a city.⁸⁴ A comprehensive *zoning ordinance* geographically maps out the location of zones and limits the uses of land to those provided within the zones, in conjunction with the comprehensive plan.⁸⁵ The Euclid ordinance regulated land uses and the heights and areas of structures.⁸⁶ Plaintiff Ambler Realty Company (“Ambler”) owned a parcel of land which it intended to sell for industrial development.⁸⁷ When the Euclid ordinance was passed, it restricted Ambler’s tract to residential use only.⁸⁸ Whereas the Ambler tract had a value of approximately \$10,000 per acre as industrial property, its value dropped to \$2,500 per acre once restricted to residential use.⁸⁹ Ambler sought to enjoin enforcement of the Euclid ordinance on the grounds that it deprived Ambler “of liberty and property without due process of law.”⁹⁰

2. The Reasoning and Holding of *Euclid*

In *Euclid*, the Court upheld the constitutionality of comprehensive zoning ordinances.⁹¹ The Court first determined that a comprehensive zoning ordinance could only be constitutional if it found its “justification in some aspect of the police power asserted for the public welfare.”⁹² The Court noted that blanket constitutional determina-

81. *Id.* at 395.

82. The Village of Euclid was an incorporated municipality. If it had not been its “own” city, it could not have passed such an ordinance because it would have lacked the authority to zone. *Id.* at 389.

83. *Id.* at 379-80.

84. LAND-USE, *supra* note 2, at 36.

85. *Id.*

86. *Id.* at 380-83.

87. *Id.* at 384.

88. *Id.*

89. *Id.* The Ambler tract was in the path of industrial development and therefore had much greater value as industrial use than as residential use. *Id.*

90. *Id.* at 367-79, 384. The Fourteenth Amendment to the United States Constitution provides that no state “shall . . . deprive any person of life, liberty, or *property*, without due process of law.” U.S. CONST. amend. XIV, § 1 (emphasis added).

91. *Euclid*, 272 U.S. at 387.

92. *Id.* Professor Haar, a renowned land use authority, criticizes the way that the police power has degenerated into a ubiquitous power used to justify otherwise unconstitutional government acts. Haar believes that the police power has become an easy excuse to infringe upon property owners’ rights. Charles M. Haar, *In Accordance With a Comprehensive Plan*, 68 HARV. L. REV. 1154, 1171 (1955). See *Udell v. Haas*, 235 N.E.2d 897, 901 (N.Y. 1968).

tions of zoning ordinances could not be made; rather, each ordinance should be scrutinized on a case-by-case basis.⁹³ The Court analogized height and building material ordinances with zoning ordinances.⁹⁴ The Court found little difference between the two and posited that the height-restrictive and material-restrictive ordinances upheld in the past⁹⁵ were essentially the same as comprehensive zoning ordinances which restricted different land uses to specific zones.⁹⁶ The Court reasoned that restrictions on both height and materials were passed in hopes of preventing nuisances⁹⁷ and differed only from comprehensive zoning in that comprehensive zoning ordinances restricted uses in general, rather than specific, terms.⁹⁸ Ambler argued that whereas nuisance-preventing ordinances restricted only dangerous uses, the Euclid zoning ordinance restricted all uses, whether or not offensive. The Court agreed with the distinction, but dismissed its importance as incidental.⁹⁹ The Court noted that restrictions of innocuous uses, albeit with less general impact, had been previously upheld.¹⁰⁰

In response to Ambler's argument against Euclid's exercise of general land use restrictions, the Court pointed out that the Euclid council had not *fully* restricted industrial development, but rather had as a body "presumably representing a majority of its inhabitants . . . determined . . . that the course of such development shall proceed within definitely fixed lines."¹⁰¹

Ambler argued against Euclid's exclusion of apartment houses, business houses, and retail stores from residential districts.¹⁰² The Court perceived the issue as central to the resolution of the case and upheld the exclusion of these uses by the Euclid ordinance.¹⁰³ The Court backed up its opinion by noting that a great majority of jurisdictions favored such restrictions.¹⁰⁴ The Court legitimated the re-

93. *Euclid*, 272 U.S. at 387-88.

94. *Id.* at 388.

95. *Id.* at 388. See *Cusack v. City of Chicago*, 242 U.S. 526 (1917); *Reinman v. City of Little Rock*, 237 U.S. 171 (1915); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915); *Welch v. Swasey*, 214 U.S. 91 (1909).

96. *Euclid*, 272 U.S. at 388.

97. Examples include fire, overcrowding, and the possibility of structural collapse.
Id.

98. *Id.* at 389.

99. *Id.* at 388-89.

100. *Id.*

101. *Id.* at 389.

102. *Id.* at 390.

103. *Id.* at 395.

104. *Id.*

striction of apartment houses and retail establishments by arguing that such restrictions bore a "rational relation to the health and safety of the community."¹⁰⁵

Finally, the Court ruled that a comprehensive zoning ordinance will not be found unconstitutional unless it is "clearly arbitrary and unreasonable, [and bears] no substantial relation to the public health, safety, morals, or general welfare of the population."¹⁰⁶ This rule of law still controls today.¹⁰⁷

C. Miscellaneous Zoning Laws

The *Euclid* decision was central to the viability of modern day comprehensive zoning ordinances. Had the Supreme Court struck down comprehensive zoning ordinances in *Euclid*, modern zoning probably would not have evolved. The fact that a zoning ordinance has been enacted, however, does not signify that the uses in each zone will be restricted only to those permitted by the ordinance. Indeed, two situations often occur: (1) a use prohibited under the new ordinance is already in effect *before* the ordinance is enacted, or (2) a use technically invalid under the ordinance but compatible with the spirit of the comprehensive plan is proposed *after* the ordinance is enacted.

The first situation is defined as a "nonconforming use."¹⁰⁸ An example of a nonconforming use is where a new zoning ordinance restricts land to residential use, but a landowner has made use of the land as an automobile dealership for the previous five years. In such a situation, local zoning officials may or may not allow the use to continue, depending on the level of conflict it generates with the use limitations of the new ordinance and those of the general plan.¹⁰⁹ When a nonconforming use is allowed to continue, statutory restrictions generally prohibit modernization and expansion of the nonconform-

105. *Id.* at 391. Justice Sutherland, who wrote for the Court in *Euclid*, even went so far as to qualify apartment buildings as "parasite[s]," which "come very near to being nuisances." *Id.* at 394-95. Such a statement reflects the tremendous change in land use planning policy which the United States has effectuated since the beginning of zoning in the 1920s.

106. *Id.* at 395. Ultimately, the Ambler tract was zoned for industrial use. General Motors, Inc. built its famous Fisher-body plant on the property. CHARLES M. HAAR, *LAND-USE PLANNING* 204 (3d ed. 1976).

107. See *Arnel Dev. Co. v. City of Costa Mesa*, 620 P.2d 565, 570 (Cal. 1980). In 1976, the California Supreme Court stated: "We conclude . . . that when an exclusionary [zoning] ordinance is challenged under the federal due process clause, the standard of constitutional adjudication remains that set forth in *Euclid v. Ambler Co.*" *Associated Home Builders v. City of Livermore*, 557 P.2d 473, 486 (Cal. 1976).

108. *LAND-USE*, *supra* note 2, at 190.

109. Zoning experts are more tolerant of the nonconforming use today than they were in the past. *Id.*

ing use.¹¹⁰ An abandonment of the nonconforming use will usually terminate the ability to reinstate the nonconforming use.¹¹¹ Intent to abandon the use, accompanied by a period of nonuse, often serves to show abandonment of the nonconforming use.¹¹² Because tolerated nonconforming uses enjoy quasi-monopolies in their respective zones, some have criticized the toleration of nonconforming uses in anti-trust.¹¹³ However, nonconforming uses are not central to the application of zoning to initiatives and referenda since they deal with the continuation or cessation of *pre-existing* activities as opposed to *new* activities enacted by plebiscite.

In the second situation, a landowner proposes a new use, which is technically prohibited by the applicable zoning ordinance, but which may be allowed under the comprehensive plan. If the new use is permitted by ordinance, it is defined as a *rezoning*.¹¹⁴ Rezoning is very controversial because they constitute a legal acknowledgment of a use previously prohibited by ordinance. As such, the proposed use may pose a potential danger, real or perceived, to surrounding property values.¹¹⁵ The controversy spawned by rezonings indicates that they play an important role in the initiative and referendum process. The people can either promulgate and enact a rezoning by initiative, or invalidate the city council's rezoning decision by referendum. Although rezonings are site-specific (and often owner-specific), legally they must be made in consideration of the comprehensive

110. See, e.g., *Village of Waterford v. O'Brien*, 337 N.Y.S.2d 112 (N.Y. App. Div. 1972) (cannot add onto non-conforming use). See generally Gilbert T. Graham, *Legislative Techniques for the Amortization of the Non-Conforming Use*, 12 WAYNE L. REV. 435 (1966).

111. WRIGHT & GITELMAN, *supra* note 28, at 758-59. See also, Robert M. Anderson, *The Nonconforming Use-A Product of Euclidean Zoning*, 10 SYRACUSE L. REV. 214 (1959) (discussing nonconforming uses generally).

112. *O'Brien*, 337 N.Y.S.2d at 112. See, e.g., *Dusdal v. City of Warren*, 196 N.W.2d 778 (Mich. 1972) (must show intent to abandon and period of nonuse).

113. See ROHAN, *supra* note 13, at §§ 52A.06[1]-52A.06[5]. See also LAND USE, *supra* note 2, at 79 (discussing zoning as restraint on competition).

114. See ROHAN, *supra* note 13, at §§ 50.04[1]-50.04[4].

115. In *Euclid*, for example, the Ambler tract was worth much more as industrial property than as residential property. Indeed, the value of the Ambler tract decreased by seventy-five percent when the land was restricted to residential use. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 384 (1926). Such a high percentage of decrease in value is the cause of great anxiety among landowners. Consequently, property value plays the preeminent role in the direct legislative zoning process. Land does not in itself have greater value because it is zoned for residential, commercial, or industrial use. Instead, it is the placement of the tract in the context of surrounding areas and developments which must be examined in order to gauge the highest fair market value of the land. In *Euclid*, the land was worth more as industrial property than as residential property because it was in the path of industrial development. *Id.*

plan.¹¹⁶ If the comprehensive plan is not considered in the rezoning decision, the decision might be invalidated as "spot-zoning."¹¹⁷ With spot-zoning concerns appear criticisms of political favoritism. Opponents of city councils may accuse council members of favoring developers, who are able to donate large sums as campaign funds, over the community at large, which relies on the comprehensive plan to protect the stability of property values.¹¹⁸

Although zoning law is replete with regulations, restrictions, and innovative procedures by which to effectively plan municipal land uses,¹¹⁹ only comprehensive plans, zoning ordinances and rezoning ordinances are germane to the legal problems posed by initiative and referendum zoning. Comprehensive plans usually do not pose problems when enacted or approved by municipal voters because they are instruments of policy rather than specific geographic restrictions on land use.¹²⁰

III. THE APPLICATION OF INITIATIVES AND REFERENDA TO THE ZONING PROCESS

A. *Initiatives and Referenda*

The system of initiative and referendum evolved as a result of the pervasive distrust of legislatures and legislative officials during the late nineteenth century.¹²¹ At the time, many states followed the Progressive political movement¹²² and amended their constitutions¹²³

116. A rezoning is itself a zoning ordinance. All zoning ordinances must be enacted in accordance with a comprehensive plan. Therefore, all rezonings must be enacted pursuant to a comprehensive plan. See, e.g., ARIZ. REV. STAT. ANN. § 9.462.01(E) (Supp. 1979); CAL. GOV'T CODE § 65860(c) (West 1983).

117. See *supra* note 36 and accompanying text.

118. Freilich, *supra* note 8, at 517.

119. Such innovative techniques include floating zones, contract zoning, cluster zoning, and Planned Unit Developments. See generally WILLIAMS, *supra* note 71, at § 28 (floating zones), § 29 (contract zoning), § 47 (cluster zoning), § 48 (Planned Unit Developments).

120. The problems with zoning initiatives and referenda are that they may not meet the legislative, procedural enabling act, and comprehensive plan requirements. These three requirements, however, do not seem to interfere with the adoption of comprehensive plans by the general electorate of a community. There is no doubt that the adoption of a sweeping policy instrument such as the plan is a legislative act. Procedural due process requirements, even if applied to zoning by direct legislation, are much easier to meet than they are for zoning and rezoning ordinances enacted by plebiscite because they involve policy. Lastly, it is logical that the comprehensive plan requirement may not possibly interfere with the enactment of a comprehensive plan. Freilich, *supra* note 8, at 546. Comprehensive plans enacted by plebiscite, therefore, do not generate too many problems in zoning. Rather, it is zoning and rezoning ordinances that are the sources of plebiscite zoning because of their conflicts with all three legislative, enabling statute, and plan requirements.

121. See *West v. City of Portage*, 221 N.W.2d 303, 304 (Mich. 1974).

122. The Progressive movement began at the turn of the twentieth century, during President William McKinley's first term of office (1897-1901). 18 ENCYCLOPEDIA

to allow for the application of initiatives and referenda to legislative decisions.¹²⁴ One court explained that, through direct legislation, "[t]he people could . . . initiate needed laws which the Legislature had not been bestirred to enact and could reject unpopular laws which the Legislature, perhaps at the instance of some special interest, had improvidently enacted."¹²⁵ An unconstitutional ordinance, however, cannot be validated simply because it has been enacted by initiative or ratified by referendum.¹²⁶

It is a well settled constitutional principle that direct legislative powers of initiative and referendum are not grants of power, but rather constitute reservations of power by the people.¹²⁷ James

BRITANNICA 983-84 (15th ed. 1980). The movement was sparked by the agrarian depression of the 1890s, which caused a sharp decline in agricultural prices and the economic depression of 1893, which resulted in a greater stratification of economic classes into rich and poor. *Id.* The movement was a reaction to what Progressives believed to be an increasingly powerful tripartite alliance between big business, industry, and political parties. *Id.* The rapid industrialization and consequent urbanization after the Civil War had negatively affected conditions in the cities. *Id.* Poor housing conditions, labor injustice, and the collapse of local and municipal governmental systems into party "machines" caused Progressives to push for dramatic political changes. *Id.* The goal of Progressivism was to dismantle the alliance of finance and politics, which Progressives believed was destroying democratic principles of government and economic opportunity for the lower economic classes. *Id.* Progressive policies consisted of laissez-faire economics, a rejection of individualism for more direct democratic power, socio-economic reform for the poor, and an enlargement of government so that the rank and file could destroy the big business-political alliance. *Id.* Political infighting among the Progressives resulted in the inability of the movement to merge into a united political force. *Id.* Instead, the Progressive "movement" was composed of three smaller movements. *Id.* The Progressive movement operated on the national, state, and local levels. *Id.* At the local level, Progressives were led by the National Municipal League, which pushed for radical direct democratic reforms in order to wrest control of municipal politics from the corrupt machines. *Id.* From Progressive ideals came forth initiatives and referenda, which could be used to bypass local legislatures and place power in the hands of the people. See Freilich, *supra* note 8, at 511-12. For an overview of the Progressive movement and its policies, see generally ARTHUR STANLEY LINK, *WOODROW WILSON AND THE PROGRESSIVE ERA* (1954) and GEORGE EDWIN MOWRY, *THE ERA OF THEODORE ROOSEVELT* (1958).

123. See, e.g., NEV. CONST. art. XIX, § 2.

124. See Freilich, *supra* note 8, at 511-12. The rallying cry of the Progressives was "[t]he cure for the ills of democracy is more democracy!" REFERENDUMS: A COMPARATIVE STUDY OF PRACTICE AND THEORY 29 (David Butler & Austin Ranney eds., 1978). Justice Black described referenda as "a classic demonstration of 'devotion to democracy.'" *James v. Valtierra*, 402 U.S. 137, 141 (1971). For a detailed discussion of what constitutes a legislative act, see *infra* notes 149-280 and accompanying text.

125. *West v. City of Portage*, 221 N.W.2d 303, 304-05 (Mich. 1974), *abrogation recognized by Albright v. City of Portage*, 470 N.W.2d 657 (Mich. Ct. App. 1991).

126. *ANDERSON*, *supra* note 36, at § 4.25. See *Poirier v. Grand Blanc Township*, 423 N.W.2d 351 (Mich. Ct. App. 1988).

127. See generally *THE FEDERALIST* NO. 39 (James Madison). See *infra* notes 169-92 and accompanying text.

Madison wrote that a republic is a government which “derives *all* its powers directly or indirectly from the great body of the people.”¹²⁸ It is crucial to distinguish between the concepts of reserved and granted powers because the concept of reserved initiative and referendum power is a prime argument in the debate over whether state enabling acts preclude the application of plebiscites to zoning.¹²⁹ States which have ruled that state zoning enabling act restrictions do not apply to zoning matters enacted by direct legislation bring the distinction into play. These states reason that since direct legislative power is reserved rather than granted by the state, state enabling acts cannot place restrictions upon this power, but only upon city councils that are creations of the state.¹³⁰ Other states oppose this view. Instead, these states argue that although popular initiative and referendum power is withheld by the people rather than delegated to it by the state, the applicability of initiative and referendum power to the zoning process can be effectively “preempted”¹³¹ by either specific state statutes¹³² or by zoning enabling statutes.¹³³ As this Comment explores problems that appear when initiatives and referenda are applied to the zoning process, only the jurisprudence of those states¹³⁴ that allow zoning by initiative and referendum will be examined.

B. Problems With the Application of Initiatives and Referenda to the Zoning Process

Three requirements must be met before direct electoral zoning decisions may be declared valid: (1) initiatives and referenda must be applied only to decisions that are legislative in nature;¹³⁵ (2) initiatives and referenda must fulfill the procedural requirements of state zoning enabling acts;¹³⁶ and (3) all zoning decisions must be made in

128. THE FEDERALIST NO. 39, at 243 (James Madison) (Modern Library ed., 1937) (emphasis added). See *infra* notes 416-45 and accompanying text.

129. See *infra* notes 281-322 and accompanying text.

130. See *Associated Home Builders v. City of Livermore*, 557 P.2d 473 (Cal. 1976).

131. RATHKOPF, *supra* note 20, at § 29C.03.

132. See, e.g., N.J. STAT. ANN. § 40:55D-62(b) (West 1967).

133. See, e.g., N.M. STAT. ANN. § 3-21-14(c) (Michie 1983), *interpreted in Westgate Families v. County Clerk of Los Alamos*, 667 P.2d 453 (N.M. 1983) (referenda cannot apply to zoning); WASH. REV. CODE ANN. § 35A.63.072 (West 1991), *interpreted in Leonard v. City of Bothell*, 557 P.2d 1306 (Wash. 1976) (only legislative bodies have zoning powers).

134. See, e.g., ARIZ. CONST. art. IV, pt. 1, §§ 1(2)-(3); CAL. CONST. art. IV, § 1; ME. CONST. art. IV, pt. 3, § 17; MICH. CONST. art. II, § 9; OHIO CONST. art. II, §§ 1(a)-(g). Some states have explicitly prohibited the application of initiatives and referenda to zoning. See N.J. STAT. ANN. § 40:55D-62(b) (1991); N.M. STAT. ANN. § 3-21-14(c) (Michie 1983). See MALCOLM E. JEWELL & SAMUEL C. PATTERSON, *THE LEGISLATIVE PROCESS IN THE UNITED STATES* 276-77 (4th ed. 1986).

135. See *infra* note 140.

136. See *infra* notes 281-322 and accompanying text.

consideration of a comprehensive plan.¹³⁷ The potential inability to fulfill these three requirements is at the heart of the controversy between states that embrace zoning initiatives and referenda and states that select a more representative route in zoning decision making. The three requirements generate complex legal problems, the most salient of which are: (1) a deep jurisdictional split on what constitutes a legislative zoning act, (2) the potential inability of initiatives and referenda to fulfill procedural requirements mandated by zoning enabling acts, (3) the lack of regard accorded to comprehensive plan considerations by direct legislative zoning decisions, and (4) the effectiveness of a highly permissive level of judicial review of direct legislative zoning decisions. In addition to the problems posed by the three zoning requirements, there are systemic political concerns which further complicate matters.¹³⁸ These concerns pit progressive direct democratic arguments against the republican theory of representative democracy in the debate over whether initiative and referendum powers genuinely aid in the production of valid and efficient zoning ordinances.¹³⁹

1. The Legislative Act Requirement

Because initiative and referendum power is a reservation of *legislative* power by the people, initiatives and referenda may be applied only to actions that are legislative in nature.¹⁴⁰ Initiatives and referenda may neither be applied to administrative nor adjudicative functions of government.¹⁴¹ Consequently, plebiscites may not be used to promulgate, approve, or reject zoning decisions that are either admin-

137. See, e.g., CAL. GOV'T CODE § 65000-66499.58 (West 1983 & Supp. 1991).

138. See *infra* notes 416-45 and accompanying text.

139. See *id.*

140. See *supra* note 19. 5 E. MCQUILLAN, MUNICIPAL CORPORATIONS § 16.55 (3d ed. 1989). Any discussion of direct legislative zoning problems must begin with a discussion of the legislative act requirement. In *Fasano v. Board of County Commissioners*, 507 P.2d 23 (Or. 1973), the Oregon Supreme Court stated: "[a]ny meaningful decision as to the proper scope of judicial review of a zoning decision must start with a characterization of the nature of that decision. The majority of jurisdictions state that a zoning ordinance is a legislative act." *Id.* at 25-26. Initiatives and referenda may only be validly applied to zoning decisions which are legislative in nature because the reserved power of the people to enact laws is legislative in nature. In *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668 (1976), the Court stated that "[i]n establishing legislative bodies, the people can reserve to themselves the power to deal directly with matters which might otherwise be assigned to the legislature." *Id.* at 672 (citing *Hunter v. Erikson*, 393 U.S. 385, 392 (1969)) (emphasis added).

141. See *supra* note 19.

istrative or judicial in nature.¹⁴² This uniformly accepted rule of law is crucial to the application of direct legislation to zoning because the distinction between legislative and administrative acts is blurred at the local level.¹⁴³ At national and state levels, legislatures generally perform only legislative functions.¹⁴⁴ At county and city levels, however, local legislatures often perform administrative and adjudicatory functions in conjunction with legislative functions.¹⁴⁵ A good example of an administrative function that is performed by local legislative bodies is the issuance of permits and licenses.

The Supreme Court originally created the legislative-administrative distinction in *Bi-Metallic Investment Co. v. State Board of Equalization*,¹⁴⁶ but has since given little guidance on how to distinguish these two types of functions. In addition, the guidelines originally given by the Court were not established in conjunction with a land use scenario, and in fact predate the modern day concept of land use planning and zoning by one decade.¹⁴⁷ Due to both a lack of high court guidance and a divergence in direct legislative policies, states have split on what constitutes a legislative function in the zoning process.¹⁴⁸ The split is generated by a variety of tests used to determine whether an action is legislative or administrative in nature, as well as by the variety of manners in which the tests are applied.¹⁴⁹ States tending to oppose widespread plebiscites have determined that only the initial comprehensive zoning ordinance is legislative, and all ordinances pursuant to the comprehensive ordinance are administrative actions.¹⁵⁰ Certain states strongly in favor of zoning by direct legislation have gone to such lengths as to shun characterization tests altogether, and have held that all zoning decisions are inherently legislative regardless of whether they involve the adoption of comprehensive plans or site-specific rezonings.¹⁵¹

The difficulties posed by determinations of what constitutes a legislative zoning function were increased by the Supreme Court in 1976, when the Court stated in *City of Eastlake v. Forest City Enter-*

142. 42 AM. JUR. 2D *Initiative and Referendum* § 11 (1969 & Supp. 1991).

143. See, e.g., *West v. City of Portage*, 221 N.W.2d 303, 305 (Mich. 1974), *abrogation recognized by* *Albright v. City of Portage*, 470 N.W.2d 657 (Mich. Ct. App. 1991).

144. See *id.*

145. See *id.* (local legislative bodies often perform administrative functions).

146. 239 U.S. 441 (1915).

147. *Bi-Metallic* was decided in 1915. *Id.* The first zoning ordinance was enacted in 1916. See *supra* note 63 and accompanying text. The constitutional validity of zoning ordinances was first upheld in 1926. See *supra* notes 79-80 and accompanying text.

148. See *infra* notes 193-280 and accompanying text.

149. The three tests used are: the policy creation test, the permanency test, and the mixture of factors test. In addition, certain states have generically labeled all zoning ordinances as legislative in nature. See *infra* notes 193-280 and accompanying text.

150. See *Forman v. Eagle Thrifty Drugs & Markets, Inc.*, 516 P.2d 1234 (Nev. 1973).

151. See *Arnel Dev. Co. v. City of Costa Mesa*, 620 P.2d 565 (Cal. 1980).

*prises*¹⁵² that state legislative characterizations of zoning acts are binding.¹⁵³ As a result, the *Eastlake* decision strengthened the preexisting jurisdictional schism concerning legislative characterizations of zoning actions.¹⁵⁴

a. *The Bi-Metallic Investment Co. v. State Board of Equalization Decision*

The legislative act characterization was borne out of the Supreme Court's decision in *Bi-Metallic Investment Co. v. State Board of Equalization*,¹⁵⁵ when the Court ruled that decisions of legislative bodies that affect "more than a few people" are exempt from procedural due process requirements.¹⁵⁶ In *Bi-Metallic*, the Colorado State Board of Equalization determined that all property in the City of Denver was undervalued, and the Board uniformly increased the tax valuation of real property by forty percent.¹⁵⁷ *Bi-Metallic*, a Denver property owner, brought suit against the board of equalization, alleging that the absence of an opportunity to be heard before the board denied *Bi-Metallic* mandatory due process.¹⁵⁸

The Court framed the issue as follows: "The question . . . is whether all individuals have a constitutional right to be heard before a matter can be decided in which all are equally concerned."¹⁵⁹ The opinion of the Court, delivered by Justice Holmes, reasoned that since the revaluation of property affected all property owners in Denver, the decision by the board was legislative and therefore did not have to comport with procedural due process requirements.¹⁶⁰ Holmes stated:

Where a rule of conduct applies to more than a few people, it is impracticable that everyone should have a direct voice in its adoption General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard.¹⁶¹

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

153. *Id.* at 674 n.9, 678-80.

154. Freilich, *supra* note 8, at 529.

155. 239 U.S. 441 (1915).

156. *Id.* at 445.

157. *Id.* at 444.

158. *Id.* at 442-43.

159. *Id.* at 445.

160. *Id.*

161. *Id.* The tax revaluation in *Bi-Metallic* affected all Denver property owners, and was therefore ruled legislative in nature. *Id.* Justice Holmes' characterization of a legislative act, however, was much broader than the facts of the case allowed. Instead of ruling that legislative acts are those which affect all individuals in a community,

Holmes suggested that although an opportunity to be heard was not mandated for decisions which "applie[d] to more than a few people," redress for those affected by legislative acts was nevertheless available.¹⁶² According to Justice Holmes, redress could be obtained by ousting from office those elected officials who made decisions against the popular will.¹⁶³

The *Bi-Metallic* decision was the first to make the legislative-administrative characterization.¹⁶⁴ Since *Bi-Metallic*, states have been divided on what constitutes a legislative zoning act as opposed to an administrative zoning act.¹⁶⁵ In *City of Eastlake v. Forest City Enterprises*,¹⁶⁶ the Supreme Court was presented with an excellent opportunity to guide states in their legislative-administrative characterizations of zoning acts, but failed to act on this opportunity. Instead, the Court reinforced, and even widened, the schism between states when it ruled in *Eastlake* that state law characterizations of legislative acts are binding.¹⁶⁷ After *Eastlake*, the states could continue their splits, secure in the knowledge that the Court would uphold their individual legislative-administrative characterizations of zoning decisions which were now "binding interpretation[s] of state

Justice Holmes stated that "where a rule of conduct applies to *more than a few people*," it is legislative in nature and therefore does not need to comport with procedural due process requirements. *Id.* (emphasis added). Justice Holmes' argument in *Bi-Metallic* interlocks rather strongly with zoning initiatives and referenda. He stated: "[t]here must be a limit to individual argument in such matters if government is to go on." *Id.* Indeed, constant individual involvement in local ordinance enactments seems to inhibit the efficiency of local law-making, especially in the zoning context, where there are many zoning ordinances for each community.

162. *Id.* at 444.

163. *Id.* at 445.

164. Freilich, *supra* note 8, at 529.

165. See, e.g., *RK Dev. Corp. v. City of Norwalk*, 242 A.2d 781 (Conn. 1968) (rezoning is administrative act); *City of Coral Gables v. Carmichael*, 256 So. 2d 404 (Fla. Dist. Ct. App. 1972) (amendment to zoning ordinance is legislative function); *Kelley v. John*, 75 N.W.2d 713 (Neb. 1956) (rezoning is administrative action), *overruled by Cople v. City of Lincoln*, 315 N.W.2d 628 (Neb. 1982) (rezoning is purely legislative); *Aldom v. Borough of Roseland*, 127 A.2d 190 (N.J. Super. Ct. App. Div. 1956) (rezoning is administrative); *Fleming v. City of Tacoma*, 502 P.2d 327 (Wash. 1972) (amendments to zoning code are adjudicatory).

The *Bi-Metallic* analysis lives on in the tests used by the states. See Freilich, *supra* note 8, at 531. However, the facts of *Bi-Metallic* did not involve a zoning ordinance, and, therefore, the decision has only limited value in the characterization of legislative and administrative acts within the zoning context.

166. 426 U.S. 668 (1976). The Court could have decided to render state legislative characterizations more uniform. The facts in *Eastlake* were clearly sufficient to input suggestions as to how states should determine the legislative or administrative character of a zoning decision. *Id.* at 668-71. For example, the Court could have agreed with Ohio's determination that a rezoning constituted a legislative act, but for different reasons.

167. *Id.* at 673-74. Actually, the Court ruled that because the power of the people is reserved, rather than delegated by the state, the landowner's due process rights were not violated by an unconstitutional delegation of state power. *Id.* at 677-79.

law[]."¹⁶⁸

b. *The Eastlake Decision*

In 1976, the Supreme Court decided *City of Eastlake v. Forest City Enterprises*, upholding the constitutionality of direct legislation as applied to the zoning process.¹⁶⁹ The Court ruled that: (1) the power of initiative and referendum is not a delegation of state power, but rather a reservation of power by the people;¹⁷⁰ (2) initiatives and referenda may be applied properly to acts determined by the *state* to be legislative in nature;¹⁷¹ and (3) a legislative zoning decision made by a plebiscite is not an improper delegation of power because initiatives and referenda are reserved powers, and therefore, a direct legislative zoning ordinance is violative of due process *only* if it is "arbitrary and capricious, bearing no relation to the police power."¹⁷²

In *Eastlake*, Forest City Enterprises ("Forest"), a real estate developer, purchased land zoned for light industrial use. Forest applied for a rezoning of its tract so that it could develop the land as multi-family use apartments.¹⁷³ Before the city council could take action on Forest's rezoning application, the electorate of the City of Eastlake passed an initiative which required that every rezoning decision by the city council be approved by fifty-five percent of Eastlake voters.¹⁷⁴ The city council subsequently approved Forest's rezoning application. When Forest later applied for permission to use part of its land for automobile parking, the planning commission refused to accept the Forest application because the original rezoning had not yet been approved by Eastlake voters.¹⁷⁵ Forest brought suit for declaratory relief against Eastlake, alleging that the fifty-five percent referendum ordinance was an "unconstitutional delegation of legislative power to the people."¹⁷⁶ Both the trial court and appellate court

168. *Id.* at 674 n.9.

169. Ironically, the landmark case of *Eastlake* involved a suburb of Cleveland, Ohio, as did the watershed decision of *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

170. *Eastlake*, 426 U.S. at 672.

171. *Id.* at 673-74 & n.9.

172. *Id.* at 676. However, a zoning referendum is not an unconstitutional delegation of state power. *Id.* at 672-73.

173. *Id.* at 670.

174. *Id.*

175. *Id.* at 671. The rezoning itself was not passed by the required 55% of Eastlake voters. *Id.*

176. *Id.*

upheld the referendum ordinance.¹⁷⁷ The Ohio Supreme Court reversed, finding that the referendum was “an improper delegation of legislative power.”¹⁷⁸ The United States Supreme Court granted certiorari.¹⁷⁹

The Court delivered a three part opinion written by Chief Justice Burger. First, the Court reiterated that initiative and referendum powers are not a delegation of power by the government, but rather a reservation of power by the people.¹⁸⁰ The Court stated:

A referendum cannot . . . be characterized as a delegation of power . . . [A]ll power derives from the people, who can delegate it to representative instruments which they create. In establishing legislative bodies, the people can reserve to themselves power to deal directly with matters which might otherwise be assigned to the legislature.¹⁸¹

Second, after the Court reiterated that initiatives and referenda may only be properly applied to legislative acts, it stated that direct legislation may be applied to actions which the *state* determines to be legislative in nature.¹⁸² Since the Ohio Supreme Court’s “binding interpretation of state law”¹⁸³ had determined that rezonings are legislative in nature,¹⁸⁴ it was appropriate to apply a referendum to a rezoning in the case at bar.

Third, the Court ruled that the referendum’s application to the rezoning did not violate due process.¹⁸⁵ The Court reasoned that since the power of initiative and referendum is a legislative power, the level of due process which it must accord is similar to that accorded to legislatures.¹⁸⁶ In a footnote, the Court stated its belief that voters are no more capricious in their referendum votes than their elected legislative representatives.¹⁸⁷ The Court added that is not so much

177. *Forest City Enters., Inc. v. City of Eastlake*, 324 N.E.2d 740, 747 (Ohio 1975), *rev’d*, 426 U.S. 668 (1976). The Ohio Supreme Court reasoned that “[a] reasonable use of property, made possible by appropriate legislative action, may not be made dependant upon the potentially arbitrary and unreasonable whims of the voting public.” *Id.* at 746.

178. *Id.* at 743.

179. *City of Eastlake v. Forest City Enters., Inc.*, 423 U.S. 890 (1975).

180. *Eastlake*, 426 U.S. at 672.

181. *Id.* (citing *Hunter v. Erikson*, 393 U.S. 385, 392 (1969)); THE FEDERALIST NO. 39 (James Madison).

182. *Id.* The Court noted that the power of referendum was specifically reserved to the people by the Ohio State Constitution. *Id.* (citing OHIO CONST. art. II, § 1f).

183. *Id.* at 674 n.9.

184. *Id.*

185. *Id.* at 676.

186. *Id.* at 675-76.

187. *Id.* at 675 n.10. The Court stated: “[T]here is no more advance assurance that a legislative body will act by conscientiously applying consistent standards than there is with respect to voters.” *Id.* This statement by the Court seems to reflect a somewhat Progressive idea that legislators’ determinations and legal enactments are no more correct and consistent than that of the people. The argument evokes a fictional belief that the will of the people is flawless, and that determinations of its potential invalidity should be made only after the people have had the chance to directly vote on an

the level of process that decides the due process issue, but rather the substantive result of the referendum.¹⁸⁸ Citing *Euclid*, the Court finally ruled that the result of a rezoning referendum may be struck down as a violation of due process only if it is "arbitrary and capricious, bearing no substantial relation to the police power."¹⁸⁹ In the Court's opinion, therefore, the "potential for arbitrariness in the process" did not violate due process unless the result of a zoning plebiscite itself could be shown to constitute a clearly arbitrary and unreasonable action.¹⁹⁰ Consequently, a landowner whose land was rezoned or refused a rezoning by referendum could seek redress by either obtaining a variance, or showing that the plebiscite constituted clearly arbitrary action.¹⁹¹

The Court in *Eastlake* made it clear that state characterizations of zoning acts as legislative or administrative are binding.¹⁹² However, because the Court provided no guidelines to aid in state characterizations of zoning decisions, it reinforced the preexisting split among states on the issue.

2. Different State Court Interpretations of What Constitutes a Legislative v. Administrative Zoning Action

States utilize a variety of tests to determine whether a city council zoning decision is legislative or administrative in nature. It is generally accepted that the adoption of comprehensive plans are legislative in nature.¹⁹³ Instead, the split among states centers on whether a zoning amendment or "rezoning" is a legislative or administrative action. Most states have ruled that rezonings are legislative in nature, and therefore are subject to plebiscites.¹⁹⁴ A minority of states, how-

issue. Courts are turning away from such Progressive beliefs and have begun ruling that the will of the people does not always fulfill the procedural and policy requirements of comprehensive plans. See, e.g., *Leshar Communications, Inc. v. City of Walnut Creek*, 802 P.2d 317 (Cal. 1990) (zoning initiative was void *ab initio* because did not comport with comprehensive plan); *Kaiser Hawaii Kai Dev. Co. v. City & County of Honolulu*, 777 P.2d 244 (Haw. 1989) (initiative and referendum incompatible with zoning because unable to produce uniform zoning in accordance with comprehensive plan).

188. *Eastlake*, 426 U.S. at 675 n.10.

189. *Id.* at 676.

190. *Id.*

191. *Id.* at 679 n.13.

192. *Id.* at 673.

193. RATHKOPF, *supra* note 20, at § 29C.03 - 29C.15.

194. See the following states and cases:

California: *Arnel Dev. Co. v. City of Costa Mesa*, 620 P.2d 565 (Cal. 1980) (all zoning matters except variances and special use permits are legislative).

ever, have ruled that rezonings are administrative and therefore not valid matters for direct legislation.¹⁹⁵ States characterize legislative and administrative acts by way of different arguments and tests. The most prevalent of these tests is the "policy creation" test.¹⁹⁶ Another test that has been applied is the "permanency test."¹⁹⁷ Some states have used a mixture of tests to characterize zoning acts.¹⁹⁸ Finally, certain states have altogether abandoned the use of characterization tests, labeling all zoning actions as legislative in nature.¹⁹⁹

a. The Policy Creation v. Policy Implementation Test

Most states have used the policy creation test to determine whether a zoning act is legislative or administrative in nature.²⁰⁰ If an action *creates* policy, the state will view it as legislative in nature,

Colorado: Margolis v. District Court, 638 P.2d 297 (Colo. 1981) (zoning and rezoning ordinances are legislative).

Florida: Florida Land Co. v. City of Winter Springs, 427 So. 2d 170 (Fla. 1983) (rezoning ordinances, like zoning ordinances, are legislative).

Maryland: Anne Arundel County v. McDonough, 354 A.2d 788 (Md. 1976) (rezoning is legislative act).

Michigan: Jacobs, Visconsi & Jacobs Co. v. City of Burton, 310 N.W.2d 438 (Mich. Ct. App. 1981) (single-tract rezoning is legislative act).

Minnesota: Denny v. City of Duluth, 202 N.W.2d 892 (Minn. 1972) (rezoning amendments are the same as zoning ordinances and are legislative).

Missouri: State *ex rel.* Hickman v. City Council, 690 S.W.2d 799 (Mo. Ct. App. 1985) (rezoning is legislative act).

Nebraska: Copple v. City of Lincoln, 315 N.W.2d 628 (Neb. 1982) (rezoning is legislative in nature).

Ohio: Peachtree Dev. Co. v. Paul, 423 N.E.2d 1087 (Ohio 1981) (rezoning approval of Planned Unit Development is legislative act).

Oklahoma: Hubbard v. Oklahoma, 58 P.2d 547 (Okla. 1936) (rezoning is legislative).

Oregon: Allison v. Washington County, 548 P.2d 188 (Or. Ct. App. 1976) (rezoning is legislative for application to direct legislation).

195. Many have disagreed with the sweeping characterization of all rezonings as legislative. See Mark A. Nitikman, Note, *Instant Planning - Land Use Regulation by Initiative in California*, 61 S. CAL. L. REV. 497 (1988); Peter G. Glenn, *State Law Limitations on the Use of Initiatives and Referenda in Connection With Zoning Amendments*, 51 S. CAL. L. REV. 265 (1978). See the following states and cases:

Idaho: Gumprecht v. City of Coeur D'Alene, 661 P.2d 1214 (Idaho 1983) (comprehensive zoning requirements incompatible with direct legislative process).

Kansas: Golden v. City of Overland Park, 584 P.2d 130 (Kan. 1978) (rezonings can be quasi-judicial instead of legislative).

Nevada: Forman v. Eagle Thrifty Drugs & Market, Inc., 516 P.2d 1234 (Nev. 1973) (rezoning was administrative).

Washington: Leonard v. Bothell, 557 P.2d 1306 (Wash. 1976) (rezoning not legislative in nature).

West Virginia: State *ex rel.* MacQueen v. City of Dunbar, 278 S.E.2d 636 (W. Va. 1981) (direct legislation disallowed for zoning ordinances but not for rezonings).

196. See *infra* notes 200-25 and accompanying text.

197. See *infra* notes 226-35 and accompanying text.

198. See *infra* notes 253-56 and accompanying text.

199. See *infra* notes 236-52 and accompanying text.

200. See West v. City of Portage, 221 N.W.2d 303 (Mich. 1974), *abrogation recognized by* Albright v. City of Portage, 470 N.W.2d 657 (Mich. Ct. App. 1991); Kelley v. John, 75 N.W.2d 713 (Neb. 1956), *overruled by* Copple v. City of Lincoln, 315 N.W.2d

whereas if it *implements* policy, the state will label it administrative.²⁰¹ Under the policy creation test, the adoption of a comprehensive plan is legislative because it involves the creation of land use policy.²⁰² The policy creation test considers the enactment of specific zoning or rezoning ordinances administrative in nature because they merely implement the policies of a plan.²⁰³

The policy creation test may be fairly described as a restatement or extension of Holmes's *Bi-Metallic* test.²⁰⁴ The *Bi-Metallic* test posits that "rules of *conduct*"²⁰⁵ that impact "more than a few people"²⁰⁶ are legislative in character, whereas actions that impact only a few people are administrative in nature.²⁰⁷ The policy creation test is basically the same as the *Bi-Metallic* test, but facilitates its application. Under the policy creation test, courts classify decisions that affect many people as policy decisions, whereas courts classify acts that affect only a few people as decisions which simply implement laws.²⁰⁸ Ostensibly, if a zoning action creates policy, it will affect many people, whereas it will affect comparably few people if it merely implements the zoning plan in specific zones.

The policy creation test seems to have undergone a subtle two-part evolution. The original policy creation test involved a determination of whether an action created or merely executed *law*.²⁰⁹ The modern version of the policy creation test is more restrictive and grants legislative status only to acts which create *policy*.²¹⁰ The original policy creation test involving zoning ordinances was first enunciated by the Nebraska Supreme Court in *Kelley v. John*.²¹¹ *Kelley* involved the

628 (Neb. 1982) (zoning amendment is purely legislative); *Forman v. Eagle Thrifty Drugs & Markets, Inc.*, 516 P.2d 1234 (Nev. 1973).

201. *See id.*

202. *Id.*

203. *Kelley*, 75 N.W.2d at 715.

204. *See supra* notes 146-63 and accompanying text.

205. *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915) (emphasis added). The term "rule of conduct" seems to suggest policy rather than simple law.

206. *Id.*

207. *See id.*

208. *See supra* note 200.

209. *Kelley v. John*, 75 N.W.2d 713, 715 (Neb. 1956), *overruled by* *Copple v. City of Lincoln*, 315 N.W.2d 628 (Neb. 1982).

210. *Forman v. Eagle Thrifty Drugs & Markets, Inc.*, 516 P.2d 1234, 1236 (Nev. 1973) (adopting the test quoted in *Denman v. Quin*, 116 S.W.2d 783, 786 (Tex. Civ. App. 1938)).

211. *Kelley* was expressly overruled in *Copple v. City of Lincoln*, 315 N.W.2d 628, 630 (Neb. 1982). Whereas *Kelley* ruled that rezonings are administrative because they do not create law, but merely implement it, *Copple* ruled that a zoning amendment is a

rezoning of a tract of land from residential to commercial use.²¹² After the city council approved the rezoning, voters petitioned for a referendum election on the rezoning. Once a referendum date was set, a landowner brought an action to enjoin the election.²¹³ After it noted that only legislative acts were proper matters for direct legislation, the Nebraska Supreme Court asserted that an ordinance which *creates law* is legislative in nature, whereas an ordinance which *executes or administers law* is administrative.²¹⁴ The court stated, "The crucial test for determining that which is legislative from that which is administrative or executive is whether the action taken was one making a *law*, or executing or administering a *law* already in existence."²¹⁵ The court posited that although the adoption of a comprehensive plan is legislative, an amendment to the plan by way of a rezoning is administrative because it executes the plan.²¹⁶ Thereafter, the court ruled that because the rezoning was administrative in nature, it was not subject to referendum.²¹⁷

The scope of the policy creation test was restricted after *Kelley*.²¹⁸ The test changed from an analysis of whether the decision created *law* to whether the decision created *policy*. Whereas legislative acts were those that previously created law, only acts that created policy were deemed legislative after *Kelley*. Ostensibly, those laws that neither created policy nor implemented laws were characterized as administrative. Such was the case in *Forman v. Eagle Thrifty Drugs and Markets, Inc.*,²¹⁹ where a drugstore corporation sought to rezone its parcel from residential to commercial use in order to build a mini shopping center.²²⁰ After the city council granted the rezoning, the city electorate promulgated an initiative which effectively "re-rezoned" the tract.²²¹ The new rezoning imposed area regulations upon commercial uses in the zone, which prevented the drugstore from

purely legislative act. *Id.* The policy creation test nevertheless remains in use. See *supra* note 210 and accompanying text.

212. *Kelley*, 75 N.W.2d at 714-15.

213. *Id.* at 715.

214. *Id.*

215. *Id.* (emphasis added). *Kelley* did not cite the Supreme Court's opinion in *Bi-Metallic*, but referred to Justice Holmes's characterization of legislative acts as those which affect a large number of people when it stated that "the changes in classification of particular pieces of property, very rarely [affect] all the electors of a municipality." *Id.* at 716.

216. *Id.* at 715.

217. *Id.* at 716.

218. See *supra* note 210.

219. 516 P.2d 1234 (Nev. 1973). See also *West v. City of Portage*, 221 N.W.2d 303, 310 (Mich. 1974) (rezoning is legislative in form but administrative in substance because it implements rather than creates policy), *abrogation recognized by Albright v. City of Portage*, 470 N.W.2d 657 (Mich. Ct. App. 1991).

220. *Forman v. Eagle Thrifty Drugs & Markets, Inc.*, 516 P.2d 1234, 1235 (Nev. 1973).

221. *Id.*

making use of its land in the manner approved by the city council.²²² The Nevada Supreme Court ruled that the initiative improperly applied to a rezoning that was an administrative, rather than a legislative, function of the city council authority.²²³ In its reasoning, the court stated:

[W]hether or not the citizens of a state wish to embark upon a *policy* of zoning . . . within fixed areas is a legislative matter subject to referendum. But when . . . such *policy* has been determined and the changing of such areas, or the granting of exceptions has been committed to the planning commission and the city council in order to secure the uniformity necessary to the accomplishment of the purposes of the comprehensive zoning ordinance, such action is administrative, and not referable.²²⁴

Use of the policy creation test as a determinant of whether a local legislature's function is legislative or administrative is widespread.²²⁵ Nevertheless, certain states utilize another test, the "permanency test," to characterize the nature of local legislatures' actions.

b. The Permanent v. Temporary Distinction Test

The "permanency test" characterizes the legislative or administrative actions of city councils based upon the resulting permanency of the action. If a zoning action has a *permanent* impact upon the community, it is characterized as legislative, whereas if its impact is *temporary*, the action is labeled administrative in nature.

State ex rel. Hickman v. City Council cogently exemplifies the permanency test.²²⁶ In *Hickman*, a married couple, the Hickmans, sought to purchase an abandoned school and develop it into a small shopping center.²²⁷ The contract for sale was contingent on a rezoning from residential to commercial use.²²⁸ When the city council de-

222. *Id.* The new ordinance, enacted by initiative, prohibited industrial and commercial land uses within 300 feet of elementary or junior high schools. *Id.* Since a grammar school was within 300 feet of the drug store tract, the initiative ordinance would have effectively prevented the drug store from erecting its intended mini-mall. *Id.*

223. *Id.* at 1237.

224. *Id.* (emphasis added). The court's final determination concerning the rezoning as an administrative act was influenced by the argument that it is necessary to curtail the use of direct legislation in certain zoning matters for the comprehensive plan to be truly uniform. *Id.* Ostensibly, the court did not believe that the general electorate of a community could fuse the policy of a comprehensive plan with more microscopic neighborhood concerns.

225. *See supra* note 200.

226. 690 S.W.2d 799 (Mo. App. 1985). *See also* *Baker v. City of Milwaukie*, 533 P.2d 772, 778 (Or. 1975) (legislative acts are permanent; administrative acts are temporary).

227. *Hickman*, 690 S.W.2d at 800.

228. *Id.*

nied the rezoning, the Hickmans circulated petitions in order to have the rezoning denial referred to the community's electorate.²²⁹ Although the Hickmans collected a sufficient number of signatures, the city refused to place the rezoning on referendum.²³⁰ The Hickmans petitioned for relief by way of mandamus. The Court of Appeals for the Western District of Missouri ruled that the rezoning ordinance was a legislative act and, therefore, an appropriate subject for referendum.²³¹ The court utilized the permanency test to determine whether an act was legislative or administrative in nature.²³² The court stated that actions which are permanent in their impact are legislative, whereas actions that are temporary in impact are administrative.²³³ On this basis, the court reasoned that decisions which set out comprehensive plans are legislative in nature because they are permanent, whereas decisions that execute or implement a plan are administrative because they are temporary in impact.²³⁴ The court concluded that since rezonings amend comprehensive zoning ordinances rather than implement the initial comprehensive plan, they are legislative in nature and, therefore, are appropriate matters for plebiscite.²³⁵

c. Blanket Labeling of all Zoning Actions as Legislative

While certain states utilize the policy creation test and others use the permanency test, some states have dispensed with the use of tests altogether. Instead, these states have uniformly labeled *all* zoning actions as legislative. This blanket classification practice must be distinguished from other courts that have found rezonings to be legislative. While certain states have ruled that rezonings are legislative acts, most have done so either on the basis of the permanency or policy creation tests.²³⁶ States such as California,²³⁷ which have generi-

229. *Id.*

230. *Id.*

231. *Id.* at 803.

232. *Id.* at 802. Although the court considered the permanency of the rezoning action, it did not consider this the sole factor, but also considered the policy aspect of the action. *Id.*

233. *Id.*

234. *Id.* at 802-03.

235. *Id.* at 803. This seems to have been one of the first instances where a court shifted from an objective characterization of zoning towards a blanket label, as used in California. See *Arnel Dev. Co. v. City of Costa Mesa*, 620 P.2d 565 (Cal. 1980) (since the zoning process is inherently legislative, all zoning acts are legislative except variances and special use permits). As in *Hickman*, courts that label all zoning acts with the blanket characterization of "legislative" almost uniformly extend the argument that since the comprehensive zoning ordinance is legislative, so too are amendments to it which result in a new comprehensive plan. See *id.*; see also *Duran v. Cassidy*, 104 Cal. Rptr. 793 (Ct. App. 1972) (passage of general plan is legislative, so amendment to plan is also legislative).

236. See *supra* notes 200-35 and accompanying text.

cally labeled all zoning acts²³⁸ as legislative, have done so without the use of tests and without considering whether the zoning action is the enactment of a comprehensive zoning ordinance or a site-specific rezoning amendment.²³⁹ Instead, these states have posited that since a plan is legislative, a rezoning amendment to a plan is also legislative.²⁴⁰

The "blanket labeling" approach is well exemplified by the California case of *Arnel Development Co. v. City of Costa Mesa*.²⁴¹ In *Arnel*, a landowner, Arnel, sought to develop a fifty acre tract for residential use as single-family homes and high density apartments.²⁴² A community group opposed the impending development and passed an initiative which rezoned the tract²⁴³ to only single-family use. The rezoning initiative effectively prevented Arnel's proposed development scheme. Arnel filed suit to invalidate the initiative. The trial court upheld the rezoning initiative, but the appellate court reversed.²⁴⁴ The California Supreme Court ruled that *all* zoning actions are legislative, and that such a blanket labeling does not violate the federal Constitution.²⁴⁵ The court concluded that the rezoning was therefore properly enacted by initiative.²⁴⁶ The court reasoned that if a zoning ordinance is legislative, then an amendment to it should also be legislative in nature.²⁴⁷ The court stated, "The amendment of a legislative act is itself a legislative act."²⁴⁸ This argument

237. See *Arnel*, 620 P.2d at 565.

238. *Id.* California has characterized all zoning acts as legislative, apart from variances and special use permits. See *San Diego Bldg. Contractors Ass'n v. City Council*, 529 P.2d 570 (Cal. 1974) (finding variances and special use permits adjudicatory in nature).

239. Professor Freilich has described this practice as a "categorical approach" toward legislative characterizations. Freilich, *supra* note 8, at 533. Freilich writes: "In contrast to an approach which examines the substantive nature of the decision, some jurisdictions rely on the nature of the governmental proceeding to determine the type of action." *Id.*

240. See *Arnel Dev. Co. v. City of Costa Mesa*, 620 P.2d 565 (Cal. 1980).

241. *Id.*

242. *Id.* at 567.

243. The initiative also rezoned an adjoining tract of land owned by South Coast Plaza, which consolidated with Arnel Development Company as a single party plaintiff for both trial and appeal. *Id.* at 566 n.2.

244. *Arnel Dev. Co. v. City of Costa Mesa*, 159 Cal. Rptr. 592 (Ct. App. 1979), *rev'd*, 620 P.2d 565 (Cal. 1980).

245. *Arnel*, 620 P.2d at 571. All zoning actions are legislative in California, except subdivision approvals, variances and special use permits, which are adjudicatory in nature. *Id.* at 569-70 (quoting *Horn v. County of Ventura*, 718 P.2d 570 (Cal. 1979)).

246. *Id.* at 571.

247. *Id.* at 569.

248. *Id.* (quoting *Johnston v. City of Claremont*, 323 P.2d 71 (Cal. 1958)).

is used by each of the states that label all zoning acts as legislative in nature.²⁴⁹

The court also based its conclusion on the Supreme Court's opinion in *Eastlake*, which upheld Ohio's "binding interpretation of state law" that a rezoning is legislative in nature.²⁵⁰ The California Supreme Court reasoned that if Ohio's determination that a rezoning is a legislative act was constitutionally valid, then California's "generic" classification of all zoning actions as legislative acts should also be valid.²⁵¹

Generic classifications are helpful because they dispense with the bothersome application of tests to determine whether an action is truly legislative in substance. Nevertheless, generic classifications are troubling because they seem to create a legal fiction. Although a rezoning might be administrative in substance, it becomes characterized as legislative for the purpose of legal expediency. Additionally, the rezoning becomes the pro-initiative policy of the state when it is summarily labeled as legislative in nature. One federal circuit court noted the problem posed by such generic labeling when it wrote, in dicta, that "it is not labels [but substance] that determines whether an action is legislative or adjudicative."²⁵² Indeed, cases which summarily label all zoning acts as legislative are devoid of any meaningful analysis on the merits of the case-specific facts. Instead, the generic label appears to be a translation of policy into case rulings which are favorable to initiatives and referenda, instead of true analyses which determine whether a particular action is legislative in substance. It seems that the most correct non-policy oriented analysis of whether a rezoning action is legislative in character comes with the use of a combination of tests, because the tests can be used to actually determine whether a zoning amendment is legislative or administrative in substance based upon the facts at bar.

249. See *supra* note 235.

250. *City of Eastlake v. Forest City Enters., Inc.*, 426 U.S. 668, 674 n.9 (1976). It is in light of this blanket labeling practice that one can clearly discern the effect of *Eastlake's* reliance on state characterizations of legislative acts. Had *Eastlake* not placed such controlling reliance upon the state legislative characterization process, it is doubtful that the California Supreme Court could have labeled *all* zoning actions as legislative acts.

251. *Arnel*, 620 P.2d at 570. The California court labeled all zoning actions as legislative, except variances, special use permits, and subdivision approvals. *Id.* at 572 & n.11. The only true difference between a variance and a rezoning is that a variance is not mapped into the plan, whereas a rezoning is mapped. A variance is like a rezoning ordinance which is not enacted, but whose power to bind remains. Perhaps the court felt that it could not push its legislative label fiction too far by also finding variances and special use permits legislative. See ANDERSON, *supra* note 36, at § 6.59.

252. *Coniston Corp. v. Village of Hoffman Estates*, 844 F.2d 461, 468 (7th Cir. 1988). Curiously, the court found that zoning of the small tract at issue in the case was legislative in nature. *Id.*

d. *Combination of Factors Analysis*

Certain states, such as Colorado, have employed a combination of tests, rather than a single test, in order to determine the nature of the local legislature's actions.²⁵³ Such a mixture of factors provides the advantage of a substantive analysis into whether an action is truly legislative. Utilizing a combination of tests seems to weed out the possibility of imposing a legal fiction, such as the blanket characterization in *Arnel*.

The Colorado Supreme Court used a combination of three tests to determine whether an amendment to a city lease was legislative or administrative. In *Witcher v. Canon City*, the Colorado Supreme Court ruled that an amendment to a city lease agreement was an administrative action by the city council.²⁵⁴ The court used a mixture of three tests to come to its conclusion: (1) whether the amendment was permanent or temporary, (2) whether the amendment created policy or simply implemented such policy, and (3) whether the original action was legislative.²⁵⁵ The court determined that the amendment was administrative because it was: (1) temporary rather than permanent, (2) implemented rather than created policy, and (3) an amendment of a previous action which was itself administrative in nature.²⁵⁶

Because each of the three factors used by the *Witcher* court indicated that the amendment was legislative, it is not clear how the court would have resolved the question if the results of the three tests had conflicted. In such a situation, one of the factors would most likely be found determinative. A determinative factor among

253. *Witcher v. Canon City*, 716 P.2d 445 (Colo. 1986).

254. *Id.* at 447-48. Although *Witcher* was not a zoning case, it may be closely analogized to the zoning amendment process of determining whether an amendment to a zoning ordinance constitutes a legislative act. Instead of an amendment to a zoning ordinance, *Witcher* involved the issue of whether an amendment of a lease may properly be referred to voters as a legislative act. In *Witcher*, Canon City leased park lands to Lon Piper, subject to construction by Piper of a suspension bridge across a neighboring gorge. *Id.* at 447. The Royal Gorge Company subsequently purchased the lease. *Id.* The city amended the lease to permit Royal Gorge to withhold five percent of the city's bridge tolls in order to improve the bridge and extend its useful life. *Id.* Canon City voters who opposed the amendment petitioned for a referendum on the issue. *Id.* at 448. The city council rejected the referendum petition on the ground that amending the lease was an administrative, rather than legislative, act, and thus could not be subject to direct legislation. *Id.* The Supreme Court of Colorado ruled that amending the lease constituted an administrative act and, therefore, was not referable to the voters. *Id.* at 457.

255. *Id.* at 449-50.

256. *Id.* at 450-51.

other lesser important factors would promote the possibility of a legal fiction in the court's reasoning because the factor in disagreement would probably be the third—namely, the legislative or administrative nature of the initial action. If the initial action were found to be legislative, then any actions pursuant to it would also be legislative, regardless of the factors of permanency and policy creation.

In sum, it appears that the characterization that all zoning acts are legislative, whether by policy creation test, permanency test or generic legislative characterization, is inherently flawed unless each zoning action is analyzed on its particular factual merits by a combination of factors, none of which should be accorded determinative status. Any classification of rezonings by a method other than a fact-specific determination propels the transformation of a land use fiction into law. The Oregon Supreme Court, in a lucid opinion delivered in 1972, prior to the *Eastlake* decision and the subsequent advent of the enormous present day jurisdictional split, pointed out the fantasy involved in a uniform classification of zoning actions as legislative acts. In *Fasano v. Board of County Commissioners*,²⁵⁷ the Oregon Supreme Court stated that it “would be ignoring reality to rigidly view all zoning decisions by local governing bodies as legislative acts to be accorded a full presumption of validity and shielded from *less than constitutional* scrutiny by the theory of separation of powers.”²⁵⁸ In *Eastlake*, dissenter Justice Stevens was joined by Justice Brennan. The two Justices opposed the majority's reliance on Ohio's determination that a rezoning constitutes a legislative act.²⁵⁹ Justice Stevens wrote, “I think it is equally clear that the popular vote is not an acceptable method of adjudicating the rights of *individual* litigants.”²⁶⁰ One authority attacks the characterization of rezonings as legislative on policy grounds and states that rezonings were never intended to be directly legislated by city residents.²⁶¹ The author writes, “Small-scale zoning decisions are hardly the type of government decisions for which direct legislation was designed.”²⁶²

Oregon has approached the legislative characterization issue with great judicial finesse by characterizing the adoption of comprehensive

257. 507 P.2d 23 (Or. 1972), *superceded by statute as stated in* *Neuberger v. City of Portland*, 603 P.2d 771 (Or. 1979), *disapproved on other grounds in* *Neuberger v. City of Portland*, 607 P.2d 722 (Or. 1980).

258. *Id.* at 26 (emphasis added). Instead of classifying the *Fasano* rezoning as legislative, the court found that the rezoning constituted a judicial exercise of the local legislative body's authority. *Id.* *Fasano* was a landmark in zoning law in the area of judicial review, which constitutes another element in the long list of problems posed by direct legislative zoning.

259. *City of Eastlake v. Forest City Enters., Inc.*, 426 U.S. 668, 692 (1976) (Stevens, J., dissenting).

260. *Id.* at 693 (emphasis added) (Stevens, J., dissenting).

261. See Glenn, *supra* note 195, at 305.

262. *Id.*

plans as legislative, but characterizing the adoption of site-specific zonings as quasi-judicial, rather than legislative or administrative. In *Fasano v. Board of County Commissioners*, the Oregon Supreme Court held that site-specific zoning ordinances are judicial in nature, and require a higher level of review than legislative acts.²⁶³ In *Fasano*, landowner defendants sought to have their land rezoned from single-family residential to planned residential use in order to develop the land as a mobile home park.²⁶⁴ Although the planning commission did not vote in favor of the rezoning, the Board of County Commissioners (the "Board") approved the rezoning. Plaintiffs, who owned neighboring land, opposed the zone change. The trial court invalidated the rezoning on the ground that the Board had not shown sufficient changes in the neighborhood to allow a rezoning.²⁶⁵ The appellate court affirmed, noting that the rezoning was inconsistent with the comprehensive plan, which designated the land as single-family residential.²⁶⁶ The Oregon Supreme Court affirmed and struck down the rezoning.²⁶⁷

The supreme court first reiterated that judicial review of zoning decisions must begin by a characterization of the nature of the particular action because local legislatures do not always function on the same level as national legislative bodies.²⁶⁸ The court then reasoned that a realistic characterization of zoning decisions cannot uniformly label all zoning acts as legislative in nature.²⁶⁹ The court asserted that while comprehensive plans are adopted by legislative authority, site-specific rezonings are instead effectuated via *judicial* authority and therefore deserve a higher level of review than legislative decisions.²⁷⁰ The court stated:

[The adoption of] general policies without regard to a specific piece of property [is] usually an exercise of legislative authority . . . [and] may only be attacked upon constitutional grounds for an arbitrary abuse of authority. On the other hand, a determination whether the permissible use of a specific piece of property should be changed is usually an exercise of *judicial* authority and its propriety is subject to an altogether different test.²⁷¹

The court determined that since the city's rezoning ordinance was

263. *Fasano*, 507 P.2d at 26-27.

264. *Id.* at 25.

265. *Id.*

266. *Fasano v. Board of County Comm'rs*, 489 P.2d 693 (Or. Ct. App. 1971), *aff'd*, 507 P.2d 23 (Or. 1973).

267. *Fasano*, 507 P.2d at 30.

268. *Id.* at 26.

269. *Id.* See *supra* notes 257-258 and accompanying text.

270. *Fasano*, 507 P.2d at 26.

271. *Id.* (emphasis added).

site-specific, it constituted a judicial act.²⁷² As such, the property owner seeking the change had the burden of proof to show that the rezoning was valid.²⁷³ The court emphasized that the burden of proof increased proportionately to the degree of land use change effectuated by the rezoning.²⁷⁴ The court announced a four-part test to determine the validity of the judicial act under scrutiny: (1) there must be a public need for the change in land use, (2) the need must be best served by the rezoning proposed, (3) an increase in the degree of change will similarly increase the burden of showing that the impact of the change was carefully considered, and (4) if a rezoning for the proposed use has already been considered with respect to other areas, the party proposing the change in use must show that the site in controversy is the best place for the rezoning.²⁷⁵ The Oregon Supreme Court concluded that the parties proposing the rezoning had not met the burden of proof, and affirmed the appellate court's judgment.²⁷⁶ Legislation enacted in the years following *Fasano* gradually added restrictions upon rezonings so as to make the safeguards afforded in *Fasano* unnecessary.²⁷⁷ The Oregon Supreme Court recognized that the four-part test set forth in *Fasano* was largely superceded by statutes as announced in *Neuberger v. City of Portland*.²⁷⁸

By characterizing site-specific rezonings as judicial rather than legislative acts, Oregon effectively maintained a high degree of control over zoning decisions.²⁷⁹ In its day, the *Fasano* decision granted a high degree of control to the state in the rezoning process by virtue of the fact that subsequent rezonings merited very strict burdens of proof, rather than the highly permissive "arbitrary or capricious" standard for legislative acts. The *Fasano* decision, however, did not invalidate direct electoral involvement in the zoning process because the Oregon Supreme Court subsequently ruled in *Allison v. Washington County* that rezonings, although considered judicial for purposes of judicial review, are considered legislative acts for the purposes of initiative and referendum.²⁸⁰

In sum, only legislative acts may properly be the subject of initia-

272. *Id.* at 29.

273. *Id.*

274. *Id.*

275. *Id.* This test was largely overruled in *Neuberger v. City of Portland*, 603 P.2d 771 (Or. 1979), where the Oregon Supreme Court stated that subsequent legislation provided adequate protections. *Id.* at 778-79. See *infra* text accompanying notes 277-278.

276. *Fasano*, 507 P.2d at 30.

277. *Neuberger*, 603 P.2d at 778-79.

278. *Id.*

279. See *infra* notes 405-410 and accompanying text.

280. 548 P.2d 188, 197 (Or. Ct. App. 1976).

tives or referenda, and states are split on whether a rezoning amendment constitutes a legislative or administrative act. Once controlling state law determines a zoning action to constitute a legislative act, however, another difficulty for direct legislative zoning appears—the potential inability of initiatives and referenda to fulfill the procedural requirements mandated by state zoning enabling acts.

3. Zoning Enabling Act Requirements

Each state that allows municipal zoning does so via a state zoning enabling act. The enabling act delegates zoning power from the state to its municipalities. Most modern enabling acts can be traced to the original SZEA of 1926.²⁸¹ The SZEA, as do most present-day enabling statutes, required that notice and an opportunity to be heard be given to landowners whose land was to be zoned.²⁸² These procedural due process requirements are mandated not only by state zoning enabling acts, but also by well established general Supreme Court due process precedent.²⁸³ However, minimum procedural due process is fulfilled whenever a legislature enacts law.²⁸⁴ Therefore, since direct legislative action is borne out of the people's reserved legisla-

281. See *supra* notes 68-78 and accompanying text.

282. SZEA, *supra* note 70, at § 4. The SZEA provided:

The legislative body of such municipality shall provide for the manner in which such regulations and restrictions and the boundaries of such districts shall be determined, established, and enforced, and from time to time amended, supplemented, or changed. However, no such regulation, restriction, or boundary shall become effective until after a public hearing in relation thereto, at which parties in interest and citizens shall have an opportunity to be heard. At least 15 days notice of the time and place of such hearing shall be published in an official paper, or a paper of general circulation, in such municipality.

Id.

283. See *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). In *Mullane*, the Court stated that “[a]n elementary and fundamental requirement of due process . . . is notice reasonably calculated . . . to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Id.* at 314. Due process requirements are not mere formalities. In *Mullane*, the Court added that “when notice is a person’s due, process which is a mere gesture is not due process.” *Id.* at 315. For a general overview of procedural due process principles, see JOHN E. NOWAK, RONALD D. ROTUNDA & J. NELSON YOUNG, CONSTITUTIONAL LAW § 13.8 (3d ed. 1986) [hereinafter NOWAK].

284. See *Bi-Metallic Investment Co. v. State Bd. of Equalization*, 239 U.S. 441 (1915) (no procedural due process for legislative acts). Although procedural due process is a constitutional requirement whenever state action exists, procedural due process is deemed to be given in full when the legislature enacts law. Constitutional scholars Nowak, Rotunda and Young write: “When a legislature passes a law which affects a general class of persons, those persons have all received procedural due process - the legislative process.” NOWAK, *supra* note 283, at 485. See also LAURENCE TRIBE, AMERI-

tive power,²⁸⁵ direct legislative zoning is deemed to fulfill minimum constitutional procedural due process requirements. In fact, the *Eastlake* majority went so far as to hold that it is not the level of process granted by the *plebiscite* itself which controls, but rather whether the substantive *result* of the plebiscite violates due process.²⁸⁶ *Eastlake* held that the result of a direct legislative zoning decision violates due process only if it is "arbitrary or capricious, bearing no relation to the police power."²⁸⁷ Thus, minimum constitutional procedural due process considerations do not enter the initiative and referendum debate until the substantive result is "arbitrary or capricious."

Nevertheless, although a state may not give less protection to its citizens than provided by the U.S. Constitution, it may provide greater protection.²⁸⁸ Many state zoning enabling acts, guided by the SZEA, statutorily mandate that municipalities grant *actual* notice and an opportunity to be heard to landowners whose land will be zoned, rather than merely satisfy minimum constitutional procedural due process, which is fulfilled whenever a legislative body makes law.²⁸⁹ Most states have fully bypassed the due process requirement issue.²⁹⁰ Certain states have effectively "preempted" the issue of whether direct legislation actually fulfills due process requirements.²⁹¹ These states have instead bypassed the procedural due process issue and ruled that the *added* due process requirements of state enabling acts are applicable only to city councils and not to the direct legislative process. Other states have failed to reach the due process issue because they have initially found that the *grant of power* to municipalities in state enabling acts is exclusive of direct legislation and instead applies only to city councils.²⁹² Consequently, these states have prohibited zoning by plebiscite.

One state which has held that due process requirements do not apply to the initiative process is California.²⁹³ In *Associated Home*

CAN CONSTITUTIONAL LAW §§ 10-7 to 10-19 (2d ed. 1988) (procedural due process generally) [hereinafter TRIBE].

285. See *Hunter v. Erickson*, 393 U.S. 385 (1969) (people's reserved power of direct legislation is legislative).

286. *City of Eastlake v. Forest City Enters.*, 426 U.S. 668, 676 (1976).

287. *Id.* (citing *City of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926)).

288. Constitutional scholars refer to this theory as the "doctrine of adequate and independent state grounds." The doctrine is, however, much more complex than this general statement implies. For an overview of the doctrine, see generally TRIBE, *supra* note 284, at §§ 3-22 to 3-24.

289. See, e.g., CAL. GOV'T CODE §§ 65853-65857 (West 1983 & Supp. 1991).

290. RATHKOPF, *supra* note 20, at § 29C.03[3].

291. *Id.*

292. *Id.* See, e.g., *Associated Home Builders v. City of Livermore*, 557 P.2d 473 (Cal. 1976) (hearing and opportunity to be heard procedural due process requirements of zoning enabling act not applicable to zoning initiatives and referenda).

293. Notably, California is also the pro-initiative and referendum zoning state

Builders v. City of Livermore,²⁹⁴ the California Supreme Court expressly overruled²⁹⁵ its past precedent of *Hurst v. City of Burlingame*²⁹⁶ and ruled that the California statutes that required notice and an opportunity to be heard before a city council may enact a zoning ordinance do not apply to zoning by initiative.²⁹⁷ In *Associated Home Builders*, the residents of the city of Livermore enacted an initiative ordinance which prohibited new building permits until municipal school overcrowding was reduced, municipal sewage treatment plants attained regional standards, and local water rationing was terminated.²⁹⁸ The building restriction affected Associated Home Builders, who brought suit to enjoin the ordinance.²⁹⁹ The trial court struck down the ordinance on the ground that it violated state zoning statutes, which required notice and a hearing by the planning commission and city council³⁰⁰ prior to passage of zoning ordinances by city councils.³⁰¹

The California Supreme Court ruled that enabling act due process requirements did not apply to zoning initiatives.³⁰² First, the court determined that the state legislature had never intended for the zoning enabling statute to apply to zoning ordinances passed by initiative, but only to those passed by city councils.³⁰³ Second, the court noted that California had amended its constitution in 1911 to reserve the power of initiative to its citizens.³⁰⁴ The constitutional amendment provided that the legislature could pass laws to *facilitate* such

which has upheld the validity of the generic classifications of all zoning acts as legislative in nature. See *supra* notes 237-251 and accompanying text. But see *Leshar Communications, Inc. v. City of Walnut Creek*, 802 P.2d 317 (Cal. 1990) (zoning initiative void *ab initio* because it did not comport with comprehensive plan). California is one of the states that seems to have turned away from its pro-plebiscite zoning policy. See *infra* notes 386-400 and accompanying text.

294. 557 P.2d 473 (Cal. 1976).

295. *Id.* at 480.

296. 277 P. 308 (Cal. 1929).

297. *Associated Home Builders*, 557 P.2d at 479-80. See *supra* note 107 and accompanying text.

298. *Associated Home Builders*, 557 P.2d at 476. The electorate believed that a causal connection existed between the amount of residential units in existence and the problems of school overcrowding, sewage blockage, and water rationing. *Id.* at 476.

299. *Id.*

300. CAL. GOV'T CODE §§ 65853-65857 (West 1983 & Supp. 1991).

301. *Associated Home Builders*, 557 P.2d at 476.

302. *Id.* at 480-81.

303. *Id.* at 479.

304. *Id.* (citing CAL. CONST. art. IV, § 25, amended and renumbered, art. 2, § 11 (1976)).

initiative power, but not to *restrict* this power.³⁰⁵ The court argued that the application of the statutory zoning law requiring notice and a hearing would work as a restriction of the people's initiative power and would therefore be invalid for state constitutional conflict reasons.³⁰⁶

The California rule, which finds statutory procedural due process requirements inapplicable to zoning initiatives, is disturbing at best. For all of its statutory and state constitutional logic, the court completely circumvented the practical aspects of the federal due process problem. Indeed, the entire reasoning of the court in *Associated Home Builders* was based on state legal principles rather than pragmatic considerations of federal due process and fairness. It is on this basis that the *Associated Home Builders* rule works as a constitutional mind twister: procedural due process is required for passage of zoning actions by a city's legislature, but not for direct legislative enactments by the people. If a zoning enabling act requires due process from a city council when it passes legislative zoning ordinances, as in *Associated Home Builders*, it is difficult to understand why such a requirement would not apply to initiatives and referenda by the electorate.³⁰⁷ After all, it is only logical that an affirmative increase in the level of process accorded to zoning matters would be imputed to zoning plebiscites.

The enabling act procedural due process requirement is rooted in pragmatic considerations of fairness.³⁰⁸ In a dissent to the majority opinion in *Eastlake*, Justice Powell warned that "the [referendum] procedure, affording no opportunity for the affected person to be heard . . . by the electorate, is fundamentally unfair."³⁰⁹ The due process requirements of notice and opportunity to be heard protect landowners from the power of legislative authority in two ways. First, the exercise of due process slows the zoning process and grants decision makers the time to reflect upon the pending decision.³¹⁰ Second, due process requirements protect the landowner and the community from arbitrary decisions made without sufficient information concerning the comprehensive plan.³¹¹

States that have declined to apply direct legislation to zoning mat-

305. CAL. CONST. art. IV, § 25.

306. *Associated Home Builders*, 557 P.2d at 479-80.

307. The United States Constitution requires procedural due process to be accorded whenever there is state action. U.S. CONST. amend. XIV, § 1. In *Reitman v. Mulkey*, 387 U.S. 369 (1967), the Supreme Court noted that the exercise of initiative and referendum power by the people constitutes state action.

308. Nelson interview, *supra* note 46.

309. *City of Eastlake v. Forest City Enters., Inc.*, 426 U.S. 668, 679 (1976) (Powell, J., dissenting).

310. Nelson interview, *supra* note 46.

311. See *infra* notes 323-404 and accompanying text.

ters have done so on the grounds that initiatives and referenda are unable to fulfill the requirements of state zoning enabling acts.³¹² These states reason that since all zoning power comes from a grant of authority by the state via a zoning enabling act, each municipality's zoning power is limited by the power and procedural requirements specified in the enabling act. Therefore, if an enabling act specifically mentions that zoning ordinances shall be passed by local representative bodies, they are interpreted as a bar to zoning by direct electoral legislation. As one authority noted, such an argument is ironic because it is based on the *Hurst* decision, which the California Supreme Court expressly overruled in *Associated Home Builders*.³¹³ In *Hurst*, the California Supreme Court reasoned that the scope of direct legislative zoning power was limited by that of legislative bod-

312. States which have prohibited the application of direct legislation to zoning due to conflicts with enabling act procedural requirements and the inability to meet comprehensive plan requirements include:

Arizona: *City of Scottsdale v. Superior Court*, 439 P.2d 290 (Ariz. 1968) (initiatives not applicable to zoning).

Hawaii: *Kaiser Hawaii Kai Dev. Co. v. City & County of Honolulu*, 777 P.2d 244 (Haw. 1989) (holding that zoning by initiative and referendum cannot meet comprehensive plan requirements).

Idaho: *Gumprecht v. City of Coeur D'Alene*, 661 P.2d 1214 (Idaho 1983) (holding that zoning may not be effectuated by direct legislation because power explicitly gave zoning authority to city council).

Missouri: *State ex rel. Powers v. Donohue*, 368 S.W.2d 432 (Mo. 1963) (initiatives not applicable to zoning).

Nevada: *Forman v. Eagle Thrifty Drugs & Markets, Inc.*, 516 P.2d 1234 (Nev. 1973) (holding that initiatives cannot be applied to zoning).

New Jersey: *Township of Sparta v. Spillane*, 312 A.2d 154 (N.J. Super. Ct. App. Div. 1973); *Smith v. Township of Livingston*, 256 A.2d 85 (N.J. Super. Ct. App. Div.), *aff'd*, 257 A.2d 698 (N.J. 1969).

New Mexico: *Westgate Families v. County Clerk of Los Alamos*, 667 P.2d 453 (N.M. 1983) (holding that grant of zoning authority is not applicable to direct legislation).

New York: *Green v. Town Bd. of Warrensburg*, 456 N.Y.S.2d 873 (N.Y. App. Div. 1982) (holding that direct legislative zoning cannot be exercised without express statutory authority), *appeal denied*, 445 N.E.2d 654 (N.Y. 1983).

Pennsylvania: *Horsham Township Council v. Mintz*, 395 A.2d 677 (Pa. Commw. Ct. 1987).

Texas: *San Pedro N., Ltd. v. San Antonio*, 562 S.W.2d 260 (Tex. Civ. App.) (direct legislation not applicable to zoning because adds requirements to zoning act), *cert. denied*, 439 U.S. 1004 (1978).

Utah: *Bird v. Sorenson*, 394 P.2d 808 (Utah 1964) (ordinance stipulating zoning commissions recommendation not subject to referendum).

Washington: *Leonard v. City of Bothell*, 557 P.2d 1306 (Wash. 1976) (zoning cannot be effectuated by direct legislation because people cannot enact zoning ordinance in accord with a comprehensive plan).

313. 557 P.2d 473, 480 (Cal. 1976).

ies.³¹⁴ Since legislative bodies were statutorily required to accord notice and hearing to affected landowners, the inability to fulfill these requirements made direct legislation inapplicable to zoning.³¹⁵ In *Gumprecht v. City of Coeur D'Alene*,³¹⁶ for example, the Idaho Supreme Court held that since the State's enabling statute required zoning ordinances to be approved by the "governing board,"³¹⁷ and rezonings to "be submitted to the zoning or planning and zoning commission, which shall evaluate the request,"³¹⁸ the legislature intended all zoning ordinances to be passed by city or county councils.³¹⁹ Similarly, in *Westgate Families v. County Clerk of Los Alamos*,³²⁰ the New Mexico Supreme Court found that because the state enabling act explicitly provided that zoning ordinances were to be passed by legislative bodies,³²¹ the grant of power was limited to representative bodies and did not apply to zoning by referendum.³²²

In sum, states have split over whether direct electoral legislation fulfills the procedural requirements of state zoning enabling acts. Certain states have ruled that state zoning enabling act requirements apply to plebiscites; that plebiscites are unable to fulfill the notice and hearing requirements; and, therefore, that the direct legislative process may not be properly applied to zoning. Other states, however, have ruled that state enabling statute procedural requirements do not apply to plebiscites, but only to city councils. These states have thus allowed the marriage of plebiscites and zoning to continue.

States that apply notice and hearing procedural requirements mandated by enabling legislation to city councils but not to zoning plebi-

314. 277 P. 308, 311 (Cal. 1929), *overruled by* *Associated Home Builders v. City of Livermore*, 557 P.2d 473 (Cal. 1976).

315. *Id.* It is more difficult for zoning initiatives to meet procedural due process requirements (where required) than referenda, because in initiatives, the legislative enactment by the people fully bypasses the local legislature. In referenda, however, a legislative enactment has already been effectuated by the city council and, presumably, has been accorded notice and an opportunity to be heard. RATHKOPF, *supra* note 20, at § 29C.02[b]. Professor Freilich points out that since *Hurst* was expressly overruled by *Associated Home Builders*, the reliance upon *Hurst* by those states which have found direct legislation inapplicable to zoning has become "suspect." Freilich, *supra* note 8, at 540. However, the courts that adopted *Hurst* were convinced by its rationale and would likely be convinced of this rationale today, notwithstanding the fact that the decision has been overruled in California, unless the courts diametrically changed their initiative and referendum policies, as California did in *Associated Home Builders*.

316. 661 P.2d 1214 (Idaho 1983).

317. IDAHO CODE § 67-6511 (1983).

318. IDAHO CODE § 67-6509 (1983).

319. *Gumprecht*, 661 P.2d at 1217. Compare IDAHO CODE §§ 67-6511, 67-6509 with CAL. GOV'T CODE §§ 65850, 65853-65857 (West 1983 & Supp. 1991) (similar provisions concerning notice and hearing).

320. 667 P.2d 453 (N.M. 1983).

321. N.M. STAT. ANN. § 3-21-14(c) (Michie 1983). The statute read: "A proposed ordinance shall be passed only by majority vote of all the members of the board of commissioners, and an existing ordinance shall be replaced by the same vote." *Id.*

322. *Westgate*, 667 P.2d at 455.

scites appear to use a double standard. The grant of zoning power comes from an enabling statute. The zoning power of city councils and the electorate originate from the same enabling statute. Why, then, should landowners have a different set of due process rights when their land is zoned by a city council than when the zoning is effectuated by community voters? Apparently, states that bypass procedural due process requirements for zoning plebiscites do so out of fear that zoning plebiscites will lack the ability to comply with hearing and notice provisions of enabling legislation. Indeed, there would be no reason to intentionally bypass expressly required notice and hearing provisions if zoning plebiscites could meet the procedural requirements.

In review, initiatives and referenda may apply only to legislative acts, and, if subject to a zoning enabling act, must fulfill its procedural requirements. The third hurdle which direct legislative zoning acts must jump is the comprehensive plan requirement.

4. Accord With A Comprehensive Plan

A paramount requirement in the zoning process is that zoning ordinances be enacted in accordance with a comprehensive plan.³²³ The SZEA, on which most present-day enabling acts are based, expressly required that municipal zoning "regulations shall be made in accordance with a comprehensive plan."³²⁴ Initiatives and referenda, however, enact legislation based on the raw will of the people.³²⁵ A logical question follows: Is the raw will of the people, unrefined by planning commission expertise or city council debate, capable of enacting zoning ordinances in accordance with so complicated a document as the comprehensive plan?

Land use *planning* must be distinguished from *zoning*. A comprehensive *plan* is a formulation of land use planning policies,³²⁶ goals, and maps, which provide use and density guidelines.³²⁷ *Zoning*, as one court concisely explained, "is the means by which the compre-

323. See, e.g., CAL. GOV'T CODE § 65000 *et seq.* (West 1983 & Supp. 1991).

324. SZEA, *supra* note 70, at § 3. See CAL. GOV'T CODE § 65000 *et seq.* (West 1983 & Supp. 1991). Forty-one states have adopted the SZEA. WILLIAMS, *supra* note 71, at § 18.05 (Supp. 1988).

325. See *supra* notes 13-14 and accompanying text.

326. See *Fasano v. Board of County Comm'rs*, 507 P.2d 23, 27 (Or. 1973) ("the basic instrument for county or municipal land use planning is the 'comprehensive plan.'"). See generally Haar, *supra* note 92.

327. LAND-USE, *supra* note 2, at 36. See CAL. GOV'T CODE § 65302(a)-(b)(ii) (West 1983 & Supp. 1991).

hensive plan is effectuated.”³²⁸ Since zoning implements the plan, it is logical that zoning ordinances must be passed “in accordance” with the comprehensive plan.³²⁹ The phrase “in accordance,” however, is unclear. It assumes a logical connection between the plan and zoning ordinance, but does not define the level of reliance that a zoning ordinance must place upon the plan. This lack of clarity is especially confusing when comprehensive plan considerations enter the arena of direct legislation. Indeed, if a plan must be rigidly adhered to, it is questionable whether the general electorate is capable of enacting ordinances in full accordance with the comprehensive plan. This is not a belittlement of the people’s spirit, but rather a pragmatic concern that the general electorate, acting alone, may lack the knowledge and information required to understand and implement an intricately detailed organizational document.³³⁰ Comprehensive plans reflect the work of many experts,³³¹ and are consequently very complex. It is doubtful that the electorate would, on its own, understand the complexities of a plan to the extent necessary to enact a series of ordinances which are uniformly in accordance with it.³³² Because enabling statutes require zoning ordinances to be in accordance with a comprehensive plan, zoning ordinances which are not in accordance with a comprehensive plan are void.³³³ Therefore, the level of reliance that must be placed upon a comprehensive plan is controlling. If a zoning ordinance must exercise a high-level of reliance on the comprehensive plan, it will be more difficult for the electorate to enact an ordinance which is in accordance with the plan because the ordinance must adhere to the details of the plan. Consequently, if the passage of zoning ordinances need only grant cursory importance to the plan, it will be easier for zoning plebiscites to meet the compre-

328. *Baker v. Milwaukie*, 533 P.2d 772, 775 (Or. 1975).

329. *Id.*

330. See THE FEDERALIST NO. 36 (Alexander Hamilton), NOS. 10, 39 (James Madison).

331. See *Udell v. Haas*, 235 N.E.2d 897 (N.Y. 1968). The court in *Udell* gave great weight to the comprehensive plan as a guiding document. *Id.* The court lauded land use planning and betrayed the complex considerations which are infused into plans. The court noted that zoning is of little value without planning. *Id.* The court stated that “zoning can be a vital tool for maintaining a civilized form of existence only if we employ the insights and the learning of the philosopher, the city planner, the economist, the sociologist, the public health expert and all the other professions concerned with urban problems.” *Id.* at 900. Professor Norman Williams, Jr. has characterized the individuals who lend their talents to city planning as “the public servant,” “the bureaucrat,” “the research specialist,” “the computer whiz-kid,” “the bureaucratic in-fighter,” “the money-maker,” and “the urban expert.” WILLIAMS, *supra* note 71, at §§ 1.38-44.

332. See *Sparta v. Spillane*, 312 A.2d 154 (N.J. Super. Ct. App. Div. 1973).

333. See *Leshar Communications, Inc. v. City of Walnut Creek*, 802 P.2d 317 (Cal. 1990) (zoning ordinance that conflicts with a general plan is void *ab initio*); *Baker v. City of Milwaukie*, 533 P.2d 772 (Or. 1975) (zoning ordinance which conflicts with comprehensive plan is void).

hensive plan requirements because only general plan policies need be considered.

States have adopted three different levels of reliance upon comprehensive plans. A minority of states have ruled that comprehensive plans are binding.³³⁴ A majority of jurisdictions have determined, in accordance with modern trends, that a comprehensive plan is merely an advisory document.³³⁵ Other states have fashioned a "middle approach" whereby great importance is attached to a plan, but the plan serves neither as a binding nor advisory document.³³⁶

a. *The "Binding" Approach*

A minority of states have read the comprehensive plan requirements strictly.³³⁷ These states have held that a comprehensive plan must be accorded "binding" status.³³⁸ Consequently, any zoning ordinance which differs from the plan is invalid. The binding approach is well exemplified by the holding of the Oregon³³⁹ Supreme Court in *Baker v. City of Milwaukie*.³⁴⁰ In *Baker*, the plaintiff owned land which was restricted by zoning ordinance to a density of thirty-nine units per acre and two parking spaces per person. After the land had been zoned,³⁴¹ the city adopted a comprehensive plan which restricted plaintiff's land, as well as surrounding land, to seventeen units per acre.³⁴² Thereafter, the planning commission granted a variance for the construction of a twenty-six unit per acre apartment complex next to plaintiff's land.³⁴³ In addition to the increase in allowable units, the variance also decreased the parking space requirement from two to one and one-half parking spaces per unit.³⁴⁴ The

334. See *infra* notes 337-355 and accompanying text.

335. Freilich, *supra* note 8, at 546-47. LAND-USE, *supra* note 2, at 36.

336. See *infra* notes 372-382 and accompanying text.

337. Freilich, *supra* note 8 at 547-49.

338. See *Baker v. Milwaukie*, 533 P.2d 722 (Or. 1975).

339. The state of Oregon keeps the zoning process under tight control. See *supra* notes 257-280 and *infra* notes 340-355 and accompanying text.

340. 533 P.2d 772 (Or. 1975).

341. Usually a plan is adopted before zoning ordinances are enacted. See generally Haar, *supra* note 92, at 1154. It is testimony to the court's strict holding that the court held the plan binding on ordinances enacted both before and after the comprehensive plan.

342. *Baker*, 533 P.2d at 773.

343. *Id.* at 774. The development was initially planned as a 95 unit complex. *Id.* After the variance had been granted, the builders applied for a 102 unit building permit. 102 units on the property would cause an average of 26 units per acre to be built. *Id.*

344. *Id.*

plaintiff brought suit to cancel the variance and to enjoin building permits. The Oregon Supreme Court invalidated the variance on the ground that it was not granted in accordance with the city's comprehensive plan.³⁴⁵

The court granted binding status to the comprehensive plan, and further ruled that *all* zoning ordinances must be in accordance with the comprehensive plan, both those which were enacted before and after the comprehensive plan.³⁴⁶ The court compared the comprehensive plan to a binding, but flexible, constitution, and noted that the purpose of a comprehensive zoning plan is to "bind future legislatures when they enact complementary materials."³⁴⁷ The court reasoned that since the enabling act mandated that municipal zoning be made "in accord with a well considered plan,"³⁴⁸ comprehensive plans must be accorded controlling, rather than advisory, status,³⁴⁹ to the point where a city must "conform prior conflicting zoning ordinances to it."³⁵⁰ The court concluded that due to the controlling nature of a comprehensive plan, ordinances "which [allow] . . . more intensive use than that prescribed by the plan *must* fail."³⁵¹

If a plan is accorded binding status, as in *Baker*, it is difficult to visualize how an initiative or referendum could fulfill every detail of the plan.³⁵² The purpose of the plan is to avoid piecemeal zoning and to foster a uniform and balanced land use structure throughout the community.³⁵³ If zoning is effectuated by initiative or referendum, it appears that some aspect of a binding plan will be inherently disregarded because of the electorate's lack of information and knowledge of the complex plan.³⁵⁴ Nonetheless, certain states that grant binding status to their plans allow zoning by plebiscite to continue.³⁵⁵ Initiative ordinances are more likely to conform to a plan in states that

345. *Id.* at 779.

346. *Id.*

347. *Id.* at 775 (quoting Charles M. Haar, *The Master Plan: An Impermanent Constitution*, 20 LAW & CONTEMP. PROBS. 353, 375 (1955)).

348. 1919 Or. Laws 300; OR. REV. STAT. § 227.240(1) (*repealed by* ch. 767, § 10 (1975), *replaced by* § 227.215).

349. *Baker*, 533 P.2d at 777.

350. *Id.* at 779.

351. *Id.* (emphasis added).

352. Freilich, *supra* note 8, at 550. Professors Freilich and Gruemmer write: "The rejection of direct legislation because of its failure to satisfy the comprehensive plan requirement is logical in jurisdictions which afford the plan binding status as a land-use planning instrument." *Id.*

353. *Kozesnik v. Township of Montgomery*, 131 A.2d 1, 7 (N.J. 1957).

354. See *Leshar Communications, Inc. v. City of Walnut Creek*, 802 P.2d 317 (Cal. 1990) (zoning initiative void *ab initio* because did not comport with comprehensive plan); *Kaiser Hawaii Kai Dev. Co. v. City & County of Honolulu*, 777 P.2d 244 (Haw. 1989) (initiative and referendum incompatible with zoning because unable to produce uniform zoning in accordance with comprehensive plan).

355. See *Associated Home Builders v. City of Livermore*, 557 P.2d 473 (Cal. 1976); *Allison v. Washington County*, 548 P.2d 188 (Or. Ct. App. 1976).

grant only advisory legal status to comprehensive plans, because the resulting ordinances can remain in line with the general policies of the plan while conflicting with its detailed specifics.

b. The "Advisory" Approach

Certain jurisdictions have accorded advisory, rather than binding, status to their comprehensive plans.³⁵⁶ *Kozesnik v. Township of Montgomery* provides a good example of this position.³⁵⁷ In *Kozesnik*, the town of Montgomery rezoned a mountain area from agricultural and residential use to light industrial use, pursuant to a request by the 3M corporation, which wanted to undertake mining operations on the mountain.³⁵⁸ The landowner plaintiffs challenged the rezoning on the ground that it was not in accordance with the comprehensive plan, which designated the mountain for agricultural and residential use. The court upheld the rezoning based on the argument that a plan is advisory in nature, but ultimately invalidated the rezoning on other grounds.³⁵⁹

The court reasoned that because the zoning enabling statute did not provide that a master plan must precede zoning ordinances, the plan was not a "prerequisite to zoning action."³⁶⁰ The court noted, however, that it was *favorable* for a plan to be enacted before zoning ordinances are passed.³⁶¹ The court further reasoned that since a plan is not a prerequisite to zoning, it may be set forth in the end product of a zoning ordinance itself, rather than as a separate exter-

356. These states include: California (*but see* *Leshar Communications, Inc. v. City of Walnut Creek*, 802 P.2d 317 (Cal. 1990) (holding that zoning initiative was void *ab initio* because did not comport with comprehensive plan seems to indicate California plans are binding)), Colorado, Delaware, Hawaii, Illinois, Kansas, Maryland, Michigan, Nebraska, Pennsylvania, Rhode Island, Texas, Virginia, and Wisconsin. *See* Freilich, *supra* note 8, at 547 n.241.

357. 131 A.2d 1 (N.J. 1957).

358. *Id.* 4-5. In reality, since the mountain was located between Montgomery and Hillsborough Townships, both townships were involved. *Id.*

359. *Id.* *See infra* note 365.

360. *Kozesnik*, 131 A.2d at 7. There was no external plan in *Kozesnik*. Instead, the court construed that the plan was embodied in the original ordinance itself, which zoned the mountain for agricultural and residential use. As opposed to the holding in *Baker v. City of Milwaukie*, 533 P.2d 772 (Or. 1975), which mandated that either a plan must be enacted before zoning ordinances, or pre-plan ordinances must be changed to conform to the plan, *id.* at 779, the court in *Kozesnik* allowed zoning ordinances to incorporate planning policies, all of which, when aggregated, would constitute a plan. *Kozesnik*, 131 A.2d at 8.

361. *Kozesnik*, 131 A.2d at 7.

nal document.³⁶² The court went on to describe comprehensive plans as advisory documents. It stated that the word “ ‘plan’ connotes an integrated product of a rational process and [the word] ‘comprehensive’ requires something beyond a piecemeal approach, both to be revealed by the ordinance considered in relation to the physical facts and the purposes authorized by [statute].”³⁶³ In response to the plaintiff’s allegation that the rezoning was not in accord with the plan, the court responded that a zoning ordinance may be invalidated only “if the presumption in favor of the ordinance is overcome by a clear showing that it is arbitrary or unreasonable.”³⁶⁴ Because a zoning ordinance may be invalidated only if it is arbitrary or unreasonable, regardless of whether it conflicts with the plan, the plan is merely advisory in nature. Although the court ultimately struck down the rezoning on other grounds,³⁶⁵ it held that a rezoning does not fail merely because it conflicts with the comprehensive plan.³⁶⁶

Kozesnik made review of zoning decisions more difficult because it rejected the requirement of a separate and external plan, holding instead that a plan may be embodied into a zoning ordinance. Without a separate comprehensive plan, courts that follow *Kozesnik* must look to how legislatures have decided zoning changes in the past in order to determine whether the legislative actions at bar are proper. Professors Freilich and Gruemmer point out that *Kozesnik* “opens the door to whimsical zoning, since reviewing courts are forced to look at the past actions of a legislative body to ascertain a generalized land-use policy.”³⁶⁷

Certain *advisory* jurisdictions have nevertheless invalidated the practice of direct electoral legislative zoning because of incompatibilities with comprehensive plan requirements.³⁶⁸ In *Sparta v. Spillane*,³⁶⁹ for example, the Superior Court of New Jersey reasoned that because rezonings by plebiscite would “fragment zoning without any overriding concept,” the reason for having the comprehensive plan requirement would be vitiated.³⁷⁰ The court believed that zoning referenda would create a disparate group of ordinances which were not enacted in fulfillment of comprehensive plan goals.³⁷¹

362. *Id.* at 8. The court in *Baker* mandated the existence of a separate plan. *Baker*, 533 P.2d at 779.

363. *Kozesnik*, 131 A.2d at 7.

364. *Id.* at 8 (citing *Schmidt v. Board of Adjustment*, 88 A.2d 607 (N.J. 1952)).

365. The court ruled against the rezoning because it did not afford sufficient protection to surrounding residential use. *Id.* at 17-19.

366. *Id.* at 8.

367. Freilich, *supra* note 8, at 548.

368. See *infra* notes 369-371 and accompanying text.

369. 312 A.2d 154 (N.J. Super. Ct. App. Div. 1973).

370. *Id.* at 157.

371. *Id.*

Notwithstanding cases such as *Sparta*, it is easier for plebiscite zoning to achieve comprehensive plan requirements when the plan is granted advisory status because direct legislative ordinances need meet only the overriding policy of the plan, not every plan detail.

c. The "Middle" Approach

Whereas one group of states has adopted a strict approach with regards to comprehensive plan requirements, another group has granted simple advisory status to plans. New York has ruled that a comprehensive plan is neither binding nor advisory,³⁷² and has instead attached great importance to the comprehensive plan, without forcing ordinances to conform to each and every plan requirement.

In *Udell v. Haas*, the court granted "middle level" status to a comprehensive plan.³⁷³ In *Udell*, the New York Court of Appeals viewed the comprehensive plan requirement in a different light when it struck down the rezoning of a parcel from business to residential use.³⁷⁴ The plaintiff had operated a restaurant on his land for twenty years.³⁷⁵ After cursory consideration,³⁷⁶ the city council rezoned plaintiff's land from business to residential use. Rather than view the comprehensive plan as an overriding document of detailed policy and geographical mapping, the court reasoned that "[t]he thought behind the [plan] requirement is that consideration must be given to the needs of the community as a whole."³⁷⁷ The court noted that a plan ensures that zoning will not be made by "the whims of an articulate minority or . . . majority."³⁷⁸ Because the plan embodies the community's needs, the court reasoned, zoning ordinances which are passed in consideration of the plan will be neither arbitrary nor capricious.³⁷⁹ However, the court did not fully disregard the importance of the plan as an expression of policy goals and district maps.³⁸⁰ In fact, it noted that the plan was "the essence of zoning," "not a mere technicality," and that "local zoning authorities [should] pay

372. Freilich, *supra* note 8, at 550.

373. 235 N.E.2d 897 (N.Y. 1968). See Freilich, *supra* note 8, at 550.

374. *Udell*, 235 N.E.2d at 904-05.

375. *Id.* at 899.

376. The planning board recommended the rezoning from business to residential use to the city council after simply viewing the preliminary sketch of a new development. *Id.* at 902-03.

377. *Id.* at 900.

378. *Id.* (citing *De Sena v. Gulde*, 265 N.Y.S.2d 239 (N.Y. App. Div. 1965)).

379. *Udell*, 235 N.E.2d at 901.

380. *Id.* at 900-01.

more than mock obeisance to the statutory mandate that zoning be 'in accordance with a comprehensive plan.'"³⁸¹ The court invalidated the rezoning of plaintiff's land because the city council decision had not taken into consideration the needs of the community, and therefore had failed to rezone in accordance with the comprehensive plan.³⁸²

In sum, states have adopted three different approaches to comprehensive plans. One group of states has granted binding status to the plan. These states have rendered it more difficult for initiatives to meet enabling statute requirements which mandate that zoning ordinances be passed in accordance with a comprehensive plan. Nonetheless, certain states that accord binding status to their plans have failed to rule that plebiscites are inherently incapable of fulfilling plan requirements. Another group of states has accorded plans mere advisory status and have thus made it easier for plebiscites to apply to zoning. In these states, zoning ordinances which are in conflict with the plan will fail only if they are arbitrary or unreasonable. Finally, a third group of states has accorded the plan middle level status. These states have interpreted the plan not as a controlling aggregation of policies and map details, but rather as an assurance that zoning will not be carried out to the detriment of the community's needs. The middle approach nonetheless mandates reliance upon the plan, albeit in a non-binding fashion, so as to ensure that zoning will not be undertaken as an *ad hoc* or piecemeal process. In these jurisdictions, zoning plebiscites should be capable of passing comprehensive plan scrutiny, especially since the jurisdictions place heavy reliance upon the needs of the community as a whole. Consequently, since the community expresses itself as a whole in plebiscites,³⁸³ comprehensive plan requirements should not be difficult to fulfill in a middle jurisdiction.

Although some have suggested that the advisory approach is the modern trend,³⁸⁴ it seems that states are becoming increasingly concerned about the inherent inability of initiatives to meet comprehensive plan objectives. Two recent cases have made this point clear.³⁸⁵

381. *Id.* The court stated that without the comprehensive plan, "there can be no rational allocation of land use. It is the insurance that the public welfare is being served and that zoning does not become nothing more than a Gallup poll." *Id.* at 901.

382. *Id.* at 905.

383. One assumption posits that the community expresses itself as a whole when enacting zoning ordinances by direct legislation. This is erroneous because zoning initiatives and referenda instead foster the emergence of special interest groups or "elitist factions." See *infra* notes 434-445 and accompanying text.

384. LAND-USE, *supra* note 2, at 36; Freilich, *supra* note 8, at 550.

385. *Leshar Communications, Inc. v. City of Walnut Creek*, 802 P.2d 317 (Cal. 1990); *Kaiser Hawaii Kai Dev. Co. v. City & County of Honolulu*, 777 P.2d 244 (Haw. 1989). See also *Marblehead v. City of San Clemente*, 277 Cal. Rptr. 550 (1991) (zoning initiative which directs city council to act on land use matter is invalid).

In *Leshar Communications, Inc. v. City of Walnut Creek*, the California Supreme Court, which had previously been notorious for its staunch support of zoning plebiscites,³⁸⁶ invalidated a rezoning initiative on the ground that it was inconsistent with the comprehensive plan.³⁸⁷ In *Leshar*, a growth oriented comprehensive plan³⁸⁸ was in effect when an initiative imposed a building moratorium on the entire city until traffic congestion decreased by fifteen percent. The comprehensive plan had anticipated an increase in traffic pursuant to pro-development policies but had not curtailed development because of it.³⁸⁹ The landowner plaintiffs filed suit to have the rezoning set aside on the ground that it was inconsistent with the comprehensive plan. The California Supreme Court ruled that the rezoning initiative was void *ab initio* since it was inconsistent with the city's comprehensive plan.³⁹⁰ The court stated:

A zoning ordinance that conflicts with a general plan is invalid at the time it is passed. The court does not invalidate the [rezoning] ordinance. It does no more than determine the existence of the conflict. It is the preemptive effect of the [state zoning enabling act] . . . which invalidates the ordinance.³⁹¹

After the rezoning initiative was enacted, the city attempted to amend the general plan so that it would be consistent with the rezoning initiative. The California Supreme Court decided that the attempted amendment did not work as an amendment.³⁹² In its ruling on this issue, the court interjected an important comment which seems to run against its past pro-zoning initiative³⁹³ decisions. The court stated, "[A]ssuming, but not deciding, that voters may amend a general plan by initiative, [the amendatory measure] cannot be deemed a general plan amendment."³⁹⁴ The court's statement seems to indicate that, contrary to previous California decisions which allowed plebiscites in all zoning matters except variances and special use permits,³⁹⁵ the court has executed an "about-face" on the applica-

386. See *Arnel Dev. Co. v. City of Costa Mesa*, 620 P.2d 565 (Cal. 1980) (all zoning actions are legislative for direct legislative purposes); *Associated Home Builders v. City of Costa Mesa*, 557 P.2d 473 (Cal. 1976) (enabling act procedural due process requirements not applicable to zoning initiatives and referenda).

387. *Leshar*, 802 P.2d at 322.

388. The plan in *Leshar* allowed as much development as could reasonably be accommodated by the city. *Id.* at 319.

389. *Id.*

390. *Id.* at 322.

391. *Id.* at 324-25.

392. *Id.* at 321-22.

393. See cases cited *supra* note 386.

394. *Leshar*, 802 P.2d at 324 (emphasis added).

395. See *Arnel Dev. Co. v. City of Costa Mesa*, 620 P.2d 565, 572 n.11 (Cal. 1980).

bility of initiatives to rezonings.

Similar to the California decision in *Leshner*, the Hawaii Supreme Court ruled that initiatives are inapplicable to zoning matters because initiatives inherently conflict with comprehensive plan requirements.³⁹⁶ In *Kaiser Hawaii Kai Development Co. v. City and County of Honolulu*, plaintiff landowners intended to develop a tract of land for use as apartments.³⁹⁷ The city approved their application for a special use permit.³⁹⁸ Residents who were opposed to the impending development successfully obtained an initiative on the ballot which, if passed, would rezone the plaintiffs' land from residential to preservation status.³⁹⁹ The plaintiffs sued to have the application of initiatives to zoning declared invalid. The Hawaii Supreme Court agreed with the plaintiffs and ruled that the initiative and referendum process was inapplicable to zoning matters.⁴⁰⁰

The court first noted that the enabling act mandated that zoning ordinances be passed in accordance with a general plan.⁴⁰¹ The court then reasoned that zoning by direct legislation would serve to create piecemeal zoning rather than ordinances which are in accordance with the comprehensive plan, stating that "uniformity required in the proper administration of a zoning ordinance could be wholly destroyed by referendum. A single decision by the electors by referendum could well destroy the very purpose of zoning where such decision was in conflict with the general [plan]."⁴⁰² Based on this reasoning, the court invalidated the practice of zoning by initiative and referendum.⁴⁰³

States that allow direct legislative zoning appear to bypass the issue of spot-zoning by the electorate. Whether a plan is binding or merely advisory in nature, it seems that the practice of direct legislative zoning eventually leads to zoning in discord with the comprehensive plan, or "piecemeal" zoning, as courts in both binding and advisory jurisdictions have noted.⁴⁰⁴ If initiative and referendum zoning ultimately leads to zoning which is not fully in accordance with a comprehensive plan, and if parcels of land are thereby zoned in a non-uniform, *ad hoc* fashion, then to allow direct legislative zon-

396. *Kaiser Hawaii Kai Dev. Co. v. City & County of Honolulu*, 777 P.2d 244, 250 (Haw. 1989).

397. *Id.* at 244.

398. *Id.* at 246.

399. *Id.*

400. *Id.* at 250.

401. *Id.* at 246. See HAW. REV. STAT. § 46-4(a) (Supp. 1988).

402. *Kaiser*, 777 P.2d at 247.

403. *Id.* at 250.

404. See *Baker v. Milwaukie*, 533 P.2d 772 (Or. 1975) (plan is binding); *Kozesnik v. Township of Montgomery*, 131 A.2d 1 (N.J. 1957) (plan is advisory). Yet both have described zoning without comprehensive plan considerations as undesirable "piecemeal" zoning.

ing to continue would constitute approval of "direct electoral spot-zoning" by the courts. Courts that have characterized plans as advisory in nature have made it easy for direct legislative zoning to avoid electoral spot-zoning problems because only tenuous reliance upon the plan is required in their jurisdictions. However, in jurisdictions that have ruled both that plans are binding and that direct legislative zoning is appropriate, electoral spot-zoning is perhaps the reason why jurisdictions have either increased their characterizations of plans as advisory, or have struck down incompatible ordinances or the direct legislative zoning process itself, as did the courts in *Leshner* and *Kaiser*.

In sum, it seems that although many jurisdictions have allowed the marriage of direct electoral legislation to the zoning process, a new trend exists whereby states are shifting from their previous pro-initiative stance to a more pragmatic anti-initiative stance based upon considerations that comprehensive plans, whether advisory or binding, impose real procedural inconsistencies with enabling act requirements.

Once a zoning plebiscite has fulfilled the legislative characterization, state zoning enabling act, and comprehensive plan requirements, there are no longer any impediments to its practice in communities. One additional area of law, however, must be discussed within the context of initiative and referendum zoning—judicial review.

5. Judicial Review of Zoning Initiatives and Referenda

Judicial review of zoning ordinances is of paramount importance because it speaks directly to the amount of control exercised by states over zoning decisions. The level of judicial review accorded to legislative decisions is highly permissive.⁴⁰⁵ In determining whether a legislative enactment is valid, courts generally apply the rational basis test, which upholds the validity of legislative acts if they ration-

405. Oregon has effectively bypassed the permissive judicial review problem. Oregon characterizes rezonings as legislative acts for the purpose of initiative and referendum, but considers rezonings judicial for purposes of judicial review. In doing so, Oregon is able to allow a high level of voter participation in zoning, while retaining great control in the process so as to ensure that zoning ordinances enacted by direct legislation are valid and meet all statutory requirements. See *Fasano v. Board of County Commissioners*, 507 P.2d 23 (Or. 1973) (site-specific rezonings are judicial and require higher level of judicial review than legislative acts). *But see Allison v. Washington County*, 548 P.2d 188 (Or. Ct. App. 1976) (rezonings are legislative for purposes of direct legislation).

ally relate to legitimate state ends.⁴⁰⁶ Consequently, the level of review for determining the validity of legislatively enacted zoning ordinances is similarly permissive. In *Euclid*, the Supreme Court ruled that zoning ordinances are valid unless they are “clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.”⁴⁰⁷ The level of review accorded to zoning ordinances enacted by initiative or referendum is identical to that accorded to city council zoning decisions.⁴⁰⁸ This is not to say that landowners cannot challenge the validity of zoning ordinances enacted by initiative or referendum.⁴⁰⁹ Indeed, the passage of an initiative or referendum ordinance cannot validate an unconstitutional zoning ordinance. The Supreme Court explicitly noted this in *Eastlake*. The Court stated:

If the substantive result of the referendum is arbitrary and capricious, bearing no relation to the police power, then the fact that the voters . . . wish it so would not save the restriction . . . “[t]he sovereignty of the people is itself subject to those constitutional limitations which have been duly adopted and remain unrepealed.”⁴¹⁰

The permissive level of judicial review accorded to zoning ordinances enacted by plebiscite involves problems based upon pragmatic considerations. Electors who vote in zoning initiatives or referenda are sometimes primarily motivated by property values and personal distastes for proposed uses⁴¹¹ rather than by the long-term good of the community.⁴¹² For example, an alcohol and drug rehabilitation

406. See *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955) (regulation which has rational relation to legitimate state objective is beyond constitutional scrutiny). See generally *TRIBE*, *supra* note 284, at 582-85, 1440, 1451 (rational basis test should examine means and ends of legislation). See also Hans A. Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197 (1975) (debate enough to explain legislative motive).

407. *City of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926).

408. *City of Eastlake v. Forest City Enters., Inc.*, 426 U.S. 668, 676 (1976).

409. Landowners may attack the constitutionality of zoning ordinances passed by direct legislation on the same grounds that could be used in non-plebiscite zoning. *RATHKOPF*, *supra* note 20, at § 29C.04[2]. See *Eastlake*, 426 U.S. at 668 (attacking referendum on due process grounds); *McMillan v. Goleta Water Dist.*, 792 F.2d 1453 (9th Cir. 1986) (attacking on equal protection grounds), *cert. denied*, 480 U.S. 906 (1987); *Lum Yip Kee Ltd. v. City & County of Honolulu*, 767 P.2d 815 (Haw. 1989) (attacking initiative on spot zoning grounds); *County of Kauai v. Pacific Standard Life Ins. Co.*, 653 P.2d 766 (Haw. 1982) (attacking referendum on vested rights grounds); *Poirier v. Grand Blanc Township*, 423 N.W.2d 351 (Mich. Ct. App. 1988) (attacking referendum on takings grounds).

410. *Eastlake*, 426 U.S. at 676 (quoting *Hunter v. Erickson*, 393 U.S. 385, 392 (1969)).

411. See *WILLIAMS*, *supra* note 71, at §§ 15.01-15.07. Property owners fear that a new use will devalue their property. This is especially true when the new use is controversial or personally distasteful, such as a landfill, a nuclear power plant, a drug rehabilitation center, or an adult bookstore.

412. This applies except when enacting comprehensive plans, which are policy statements of how a community should ultimately function, both aesthetically and practically. It is entirely acceptable for voters to act arbitrarily and/or capriciously in determining how their city should look and function. However, it is much more harmful to individual landowners for voters to make specific zoning decisions, which may

clinic may be proposed by a developer in a city which has a high population of addicts. Such a use would be highly beneficial to the community. Electors, however, may strike down the proposed use by initiative or referendum out of fear that surrounding property values will decline because undesirable elements will invade the area. If the landowner challenges the resulting ordinance, the ordinance will be upheld unless it is "arbitrary or capricious, bearing no relation to the police power."⁴¹³ It seems unlikely that a court would perceive the ordinance as arbitrary or capricious, because it was enacted by the people themselves. In a representative democracy, it would be systematically difficult for a court to rule that the will of the people is arbitrary or capricious, even if the resulting ordinance *were* arbitrary or capricious. Indeed, the Supreme Court has refused to accept the argument that the will of the people is more arbitrary than the product of the legislature.⁴¹⁴ An admission that the will of the people is, at times, arbitrary or capricious works against the American theory of democratic government and would entirely vitiate the applicability of direct legislation, especially to zoning. The issue therefore leads to an impasse: Either the level of judicial review accorded to direct electoral zoning enactments must become less permissive so as to allow heightened review of possibly incorrect plebiscite ordinances, or the practice of initiative and referendum zoning itself must be abandoned because it is an untenable proposition that courts will allow arbitrary or capricious initiative ordinances to remain in force. A heightened level of judicial review would allow a smooth cooperation between direct legislative zoning and judicial review of its resulting ordinances.⁴¹⁵

The concept that the raw will of the people may sometimes be arbitrary or capricious is a leading argument against initiatives and referenda generally, and especially within the zoning context. The nature of the will of the people is at the heart of a controversy which pits direct democratic concerns against the republican theory of representative government.

not be in accord with the comprehensive plan once a comprehensive plan has been adopted.

413. *Eastlake*, 426 U.S. at 676.

414. Speaking through Chief Justice Burger, who wrote the majority opinion in *Eastlake*, the Court stated that the will of the people is no more arbitrary than that of the elected members of a legislature. *Id.* at 675 n.10. Chief Justice Burger wrote: "There is no more advance assurance that a legislative body will act by conscientiously applying consistent standards than there is with respect to voters." *Id.*

415. See Freilich, *supra* note 8, at 536-37 (indicating support of *Fasano* doctrine).

IV. A SYSTEMIC SPLIT: DIRECT DEMOCRACY V. REPRESENTATIVE DEMOCRACY

Arguments in favor of initiatives and referenda are based on direct democratic principles. Arguments against the direct legislative process are based on the republican theory of representative government. Both direct democracy and the republican form of government are variations upon the democratic theme. The goal of direct democracy is to cleanse the government of its potentially corrupt legislative decision making powers by a direct translation of popular will into law.⁴¹⁶ The goal of the republican form of government is to refine the raw will of the people through the debate of popularly elected representative officials so that the end product of law is both sensible and in accord with the will of the people.

The initiative and referendum process was an outgrowth of the Progressive movement in the early twentieth century.⁴¹⁷ Progressives, dissatisfied with their elected legislative representatives, asserted that the ills of democracy could be cured only by an added infusion of popular democratic power into the system.⁴¹⁸ Progressives wished to ensure that potential disregard of the popular will by legislative officials would be either tamed or bypassed by the people's power of initiative and referendum, by which the people could exercise their reserved legislative authority to achieve efficient governance.⁴¹⁹ The Progressive's love of initiatives and referenda, however, is necessarily based on the assumption that: (1) the will of the people is without flaw, and (2) votes in initiatives and referenda are pure translations of the popular will into law. Without these two assumptions it would, at best, be difficult to achieve the desired government cleansing and efficiency of the Progressive movement.⁴²⁰ Indeed, if the will of the people were either "arbitrary or capricious," or ineffectively translated at initiative and referendum voting booths, the Progressive ideal of direct democracy would be as undesirable as the government it was attempting to cleanse. The two necessary pre-

416. See *supra* note 122 and accompanying text.

417. See *id.*; ROHAN, *supra* note 13, at § 50.03[7] n.103.

418. The fighting words of the Progressive movement were "[t]he cure for the ills of democracy is more democracy!" REFERENDUMS: A COMPARATIVE STUDY OF PRACTICE AND THEORY 29 (David Butler & Austin Ranney eds., 1978).

419. See RICHARD HOFSTADTER, THE AGE OF REFORM 225 (1955). Professor Hofstadter wrote that the Progressive movement focused on direct legislative democracy because it hoped that the direct legislative process would

deprive machine government of the advantages it had in checkmating popular control, and make government accessible to the superior disinterestedness of the average citizen. Then, with the power of the bosses broken or crippled, it would be possible to check the incursions of the interests upon the welfare of the people and realize a cleaner, more efficient government.

Id.

420. *Id.*

sumptions of direct democracy, however, are erroneous. The will of the people is not flawless. Even if it were flawless, the will of the people is not perfectly translated into laws enacted by initiative and referendum.

It is erroneous to believe, as did the Progressives, that the will of the people is flawless. Within the context of initiative and referendum zoning, it is natural that popular interests lean more heavily toward stable property values and personally pleasing land uses than toward the long-term good of the community.⁴²¹ Sometimes all three interests will be consonant. More often than not, however, they will be resonantly discordant. In direct democratic processes, such as zoning initiatives and referenda, the popular will is not filtered through the representative institution of the legislative branch and may result in laws contrary to the public good.⁴²² It is ironic that the Supreme Court has not agreed with this proposition, even though it is the keeper of the Constitution, and consequently, of the representative democratic system itself.⁴²³

The republican form of government presents a valid alternative to the inefficient direct democratic process—representative democracy. In the representative democratic process, the job of the legislature is to consider all the interests of the people and refine them through debate so that the end product of the law will be consonant with popular interests as well as with the long-term good of the community.⁴²⁴ In *The Federalist*,⁴²⁵ Founding Father James Madison⁴²⁶

421. One of the most important factors considered in city council zoning decisions is municipal tax revenue. Progressive-style arguments in favor of direct democracy sometimes assert that city councils are too much in favor of development and that they form a political-business alliance with developers. What such arguments do not take into consideration are the sometimes substantial increase in municipal revenues that are generated by property development. Municipal tax revenues from property taxes form an integral part of the long-term "public good" of the community. By obtaining increased municipal funds through property development, such funds do not have to be obtained by personal or excise tax increases. See WILLIAMS, *supra* note 71, at §§ 14.01-14.10.

422. This is because the people, without sufficient information or specialization, may not visualize the long term consequences of a zoning initiative as clearly as the planning commission.

423. See *supra* note 331.

424. See *infra* note 427 and accompanying text.

425. THE FEDERALIST is a collection of papers written by Alexander Hamilton, John Jay and James Madison in support of the newly drafted United States Constitution. THE FEDERALIST at xxii (Modern Library ed., 1937). The Federalist papers were initially published in the New York press, beginning on October 27, 1787. *Id.* The Federalist papers followed the establishment of federal forms of government in France (translated into French in 1792), Brazil (translated into Portuguese in 1840), Germany

argued for the representative democratic process, which he defined as republican in nature. In November of 1787, Madison wrote these learned words:

The two great points of difference between a [direct] democracy and a republic are: first, the delegation of the government, in the latter, to a small number of citizens elected by the rest; secondly, the greater number of citizens, and greater sphere of country, over which the latter may be extended. The effect of the first difference is . . . to refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations. Under such a regulation, it may well happen that the public voice, pronounced by the representatives of the people, will be more consonant to the public good than if pronounced by the people themselves, convened for the purpose.⁴²⁷

Madison noted that it was possible for corrupt men to dupe voters and accede to elected positions to harm the public good and that "enlightened statesmen will not always be at the helm."⁴²⁸ Such statements are similar to the Progressive argument which asserts that legislatures are replete with officials who are corrupting the public good.⁴²⁹ Of course, as noted by the Supreme Court, the remedy against corrupt or ineffective elected officials is ouster in the following election.⁴³⁰ If one balances the harms inflicted on the community by ineffective or corrupt legislative officials and those inflicted by direct legislation, it seems easier to remedy an incompetent legislature rather than to ensure that laws passed by direct legislation will be based upon sound interests. The interests of the people are static. Regardless of socio-economic mobility among *particular* individuals, popular interests will remain the same for different *groups* of people. It seems that the representative system of government serves the public good more effectively than direct democracy. This especially

(translated into German in 1864), and Argentina (translated into Spanish in 1868). *Id.* Hamilton, Jay, and Madison originally published the papers under the pseudonym "Publius." *Id.* Individual authorship of the papers was not established until the papers reached France in 1792. *Id.* Much controversy still remains concerning the individual authorship of Nos. 49-58 and Nos. 62-63. *Id.* THE FEDERALIST is especially enlightening in its analysis of popular will and its translation into law via a representative form of government. *Id.*

426. James Madison (1751-1836) was a distinguished student of history, ethics and government at Princeton University. *Id.* at xxiii. He entered politics at the very beginning of the American Revolution and served as a member of the Virginia Convention, the Virginia Assembly, and the Continental Congress. *Id.* His keen insight and knowledge of government and history earned him the reputation of "master-builder of the Constitution." *Id.* Madison's records of the Continental Congress are the most thorough of all members of the Continental Congress. *Id.* As a member of the first Congress, Madison also helped frame the Bill of Rights. *Id.* at xxiv. Madison served in the new House of Representatives, as Secretary of State, and eventually as President of the United States. *Id.*

427. THE FEDERALIST NO. 10, at 59 (James Madison) (Modern Library ed., 1937).

428. *Id.* at 57.

429. See *supra* note 122 and accompanying text.

430. See *supra* note 163 and accompanying text.

rings true within the zoning context, where comprehensive plans are so complex that direct legislation often leads to "piecemeal zoning."⁴³¹ Alexander Hamilton,⁴³² co-author of *The Federalist*, wrote that representatives of the people "will consist almost entirely of proprietors of land, of merchants, and of members of the learned professions, who will truly represent all those different interests and views."⁴³³ Members of city councils will thus be able to comprehend the comprehensive plan and interpret it more correctly when enacting zoning ordinances.⁴³⁴

Initiatives and referenda are, however, very positive instruments when used to formulate general *policy*. The adoption of a comprehensive plan by initiative or referendum is favorable to the community. The adoption of general zoning policy is indeed *best* effectuated by direct legislation, because such an adoption *may* be validly based on arbitrary or capricious dislikes of certain uses. Zoning *ordinances* pursuant to the plan, however, are best effectuated by a representative body which is able to refine the raw will of the people in consonance with the comprehensive plan.

The second necessary assumption of the pro-initiative and referendum argument is that the will of the people, even if it is flawless, will be effectively translated into votes on election day. This is also an erroneous assumption. Those who support initiatives and referenda in zoning portray the people as a united force.⁴³⁵ This is far from true in practice. When a zoning decision is made either by initiative or referendum, it is not the people who take over the decision making

431. *Kaiser Hawaii Kai Dev. Co. v. City & County of Honolulu*, 777 P.2d 244, 247 (Haw. 1989); *Kozesnik v. Township of Montgomery*, 131 A.2d 1, 7 (N.J. 1957).

432. Alexander Hamilton (1757-1804) was educated at Columbia University and entered politics through the military as military secretary to Commander-in-Chief General George Washington. *THE FEDERALIST* at xxiii (Modern Library ed., 1937). Hamilton was Regimental Commander of the American troops at the battle of Yorktown. *Id.* Although Hamilton irregularly attended the Constitutional Convention, he later gave his full efforts to the ratification of the Constitution in the state of New York and wrote half of the Federalist papers. *Id.* As a Federalist, Hamilton favored a centralized national government. *Id.* Hamilton was the first Secretary of the Treasury and built the framework of American economic policy. *Id.*

433. *THE FEDERALIST* NO. 36, at 216 (Alexander Hamilton) (Modern Library ed., 1937).

434. This is not to say that city councils *will* interpret the plan correctly, either intentionally or unintentionally, but that city councils possess the *ability* to interpret a plan more correctly than the general electorate.

435. Interview with Dr. Leo M. Snowiss, Professor of American Legislative Politics, University of California, Los Angeles, (Mar. 19, 1991) [hereinafter Snowiss interview]. Professor Snowiss has been intricately involved in the zoning process of Claremont, California.

process, but factions of "elitist" advocates and special interest groups.⁴³⁶ Advocates of plebiscite zoning have argued that these groups have enslaved representatives and that direct legislative zoning is the only remedy available to ensure that proper zoning ordinances are passed.⁴³⁷ The problem with such an argument lies in the remedies to the problems posed by special interest groups. Although it is possible to oust elected representatives from office, and thereby send a message to legislators that special interest group pandering will no longer be tolerated, it is not possible to arrest the influence that special interest groups exercise over misinformed and often uninformed voters. In a zoning initiative or referendum, advocates and special interest groups will coalesce on each side of the debate.⁴³⁸ The people are led into one faction or another by the leaders of these factions. Factions were described by Madison as great dangers to the public good. Madison wrote:

By a faction, I understand a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.⁴³⁹

Within the zoning context, these factions develop along economic, ideological, and geographic lines.⁴⁴⁰ Madison argued that representative government would temper these factions, not by eliminating their causes,⁴⁴¹ but by eliminating their power to make law, and therefore, their power of destruction.⁴⁴² The author⁴⁴³ of *The Federalist No. 51* stated:

[I]f men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over

436. *Id.* For a discussion of interest group influence and lawmaking, see generally Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985). See also Pantzer, *NIMBY: Opposing a Land Use Change*, PROB. & PROP. 30 (Jan./Feb. 1991) (describing procedures and tactics for use by neighboring landowners against rezoning measure).

437. See Freilich, *supra* note 8, at 516-19.

438. Snowiss interview, *supra* note 435.

439. THE FEDERALIST NO. 10, at 54 (James Madison) (Modern Library ed., 1937).

440. Snowiss interview, *supra* note 435. Communities are often divided into neighborhoods when faced with zoning initiatives and referenda. *Id.*

441. Madison believed that the greatest cause of factions is the unequal distribution of property. THE FEDERALIST NO. 10, at 55-56 (James Madison) (Modern Library ed., 1937). This certainly rings true in the modern zoning context, where property values and their stability are major forces in the shaping of public opinion in zoning.

442. Snowiss interview, *supra* note 435. Whereas direct legislation interposes distance between factions, representative government inherently allows a closeness between elected representatives and their constituents, who are divided, as factions are, along neighborhood lines. The closeness between elected representatives and their constituents provides an influx of information of "the public will." Snowiss interview, *supra* note 435.

443. It is not certain whether the author of THE FEDERALIST NO. 51 was Alexander Hamilton or James Madison. THE FEDERALIST NO. 51, at 335 (Alexander Hamilton or James Madison) (Modern Library ed., 1937).

men, the great difficulty lies in this: you must first enable the government to *control the governed*, and in the next place oblige it to control itself.⁴⁴⁴

One could argue that the disagreements between factions are similar to the debate in a representative body which refines the popular will of the people. Such an argument would be erroneous, however, because tensions between factions are not always based upon concern for the public good, but rather on the respective interests of the factions that are at odds.⁴⁴⁵

In sum, it appears that while initiatives and referenda serve a positive purpose in formulating comprehensive plans of zoning goals and policies, they are less efficient or desirable than representative bodies in enacting zoning ordinances pursuant to the plan for the public good of the community. Election *to* office and ouster *from* office are basic concepts of representative democracy and continue to serve as viable remedies for ineffective and potentially corrupt representatives in city councils.

V. CONCLUSION

There are three major problems facing the application of initiatives and referenda to the zoning process: (1) the legislative act requirement, (2) the inability to fulfill procedural requirements of state zoning enabling statutes, and (3) the seemingly inherent inconsistency of direct legislative zoning with comprehensive zoning requirements. Although the several states uniformly agree that the adoption of comprehensive plans may be effectuated via initiative or referendum, the states are greatly divided on whether direct legislation may be properly applied to rezonings. While certain states have characterized the adoption of rezoning ordinances as legislative acts and have thereby allowed the application of direct legislation to zoning, others have prohibited the marriage of the two by ruling that rezonings are administrative in nature. Some states have prohibited direct legislative zoning by either ruling that state zoning enabling statutes do not apply to initiative and referendum lawmaking powers, or by ruling that plebiscite zoning cannot fulfill zoning statute procedural requirements. Other states have determined that although the grant of zon-

444. *Id.* at 337-38 (emphasis added).

445. *See supra* notes 433-434 and accompanying text. Madison wrote that factions have divided men into parties, "inflamed them with mutual animosity, and rendered them much more disposed to vex and oppress each other than to co-operate for their common good." THE FEDERALIST NO. 10, at 56 (James Madison) (Modern Library ed., 1937).

ing power applies to direct legislative zoning, the added procedural due process requirements in the grant of power do not. Finally, while certain states have prohibited plebiscite zoning because such a process would lead to piecemeal zoning not in accordance with the binding comprehensive plan, other states have characterized comprehensive plans as advisory, rather than binding, and have thus allowed the application of initiatives and referenda to zoning. In sum, the states are deeply split on both whether direct legislation may be properly applied to zoning, and what the reasons and tests should be for either allowing or disallowing the marriage of the two.

Certain inconsistencies appear in the zoning process of states that allow zoning by initiative and referendum. A legal fiction is engendered in states that have ruled that rezonings constitute legislative acts. These states seem to weigh pro-initiative policies more heavily than the actual substance of a rezoning decision and, thereby, apply form over substance in their approval of direct legislative zoning.

States finding that the grant of zoning power by enabling legislation applies to both city councils and direct electoral lawmaking, but apply notice and hearing procedural due process requirements only to city councils, seem to utilize a double-standard: they apply due process requirements to city councils that can easily fulfill such requirements, but do not apply procedural requirements to direct electoral zoning, a process which would have serious difficulties in fulfilling the notice and hearing requirements. After all, why should landowners have one set of rights when their land is rezoned by a city council vote, and another set of rights when their land is rezoned by community residents?

States allowing direct legislative zoning to continue by characterizing comprehensive plans as merely advisory documents effectively bypass the issue of spot-zoning by the electorate. Since zoning not in accordance with the comprehensive plan or "piecemeal" zoning, tends to occur when zoning is performed by the electorate, a plan that is binding in nature would either completely prohibit electoral zoning, or allow direct electoral zoning, resulting in spot-zoning by the electorate. By characterizing plans as advisory, states allow "piecemeal" zoning to continue, thereby perpetuating a practice forbidden by the enabling statute.

Even if these inconsistencies could be overlooked by questionable standards and obscure rationales, the permissive level of judicial review accorded to direct legislative zoning decisions would continue to pose an obstacle to valid and effective zoning. By upholding all direct legislative zoning ordinances which are not "arbitrary or capricious" and by refusing to consider the possibility that the will of the people

may, at times, be arbitrary or capricious, courts seem to allow the unnoticed passage of arbitrary or capricious zoning ordinances.

Taken as a synergistic whole, rather than its separate legal parts, zoning by initiative and referendum is difficult to reconcile with the American system of representative democracy. Our Constitution is based on the valid assumption of the founding fathers that the unguided will of the people makes for inferior and less effective laws than the will of the people guided and refined by the debate of democratically elected, full-time legislative representatives. Why, then, do states allow the practice of initiative and referendum zoning? The will of the people in zoning is motivated more by property values and personal tastes or distastes of certain land uses than by the long-term good of the community. City council members, however, can take the community's raw will, containing these albeit valid concerns, and refine them, through debate, into zoning ordinances that take into consideration the municipal tax base and the community need of certain unappealing land uses such as landfills, power plants, prisons, and drug and alcohol rehabilitation clinics. City council members, like voters, are far from infallible. Yet in a representative democracy, elected representatives may be ousted from office for whatever unpopular decisions they have made. This seems a far more effective remedy than attempts to invalidate direct legislative zoning ordinances via a highly permissive level of judicial review.

In sum, both the small scale legal problems and large scale systemic political concerns posed by initiative and referendum zoning lead to an unavoidable conclusion: Zoning by, for, and of the people is best effectuated by representatives of the people rather than directly by the people themselves.

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