

## REFERENDUM ZONING: *CITY OF EASTLAKE V. FOREST CITY ENTERPRISES, INC.*

Municipal land use planning has long been required in the zoning process.<sup>1</sup> However, the need for regional land use planning has recently been recognized<sup>2</sup> since there are situations in which the interests and needs of suburban and urban land use planning overlap.<sup>3</sup> The prior failure to recognize the need for comprehensive planning is illustrated by the isolationist zoning practices of many suburban municipalities<sup>4</sup> which are discriminatory in effect and frustrate the achievement of orderly community development.<sup>5</sup> Recently, however, the United States Supreme Court dealt a heavy blow to comprehensive planning. In *City of Eastlake v. Forest City Enterprises, Inc.*,<sup>6</sup> the Supreme Court held that a municipality may choose to require referendum approval before any zoning change becomes effective.<sup>7</sup>

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1. See *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (exercise of the police power in the regulation of land use is constitutionally valid if it meets the double standard of reasonableness and substantial relation to general community welfare and the legislation is presumptively valid if made upon painstaking consideration).

2. See NAT'L COMM'N ON URBAN PROBLEMS, *BUILDING THE AMERICAN CITY*, H.R. DOC. NO. 91-34, 91st Cong., 1st Sess. (1969); Freilich & Ragsdale, *Timing and Sequential Controls—The Essential Basis for Effective Regional Planning*, 58 MINN. L. REV. 1009, 1024-26 (1974); Johnson, *Constitutional Law and Community Planning*, 20 LAW & CONTEMP. PROB. 199 (1955).

3. See generally *BUILDING THE AMERICAN CITY*, note 2 *supra*; see also Bertsch & Shafer, *A Regional Housing Plan: The Miami Valley Regional Planning Commission Experience*, 1 PLANNER'S NOTEBOOK (Am. Institute of Planners 1971); Craig, *The Dayton Area's "Fair Share" Housing Plan*, CITY (Jan. 1972).

4. See generally *BUILDING THE AMERICAN CITY*, note 2 *supra*.

5. Isolationist zoning practices which have a discriminatory effect are indistinguishable from exclusionary zoning practices. See Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 STAN. L. REV. 767 (1969). See also Note, *Exclusionary Zoning and Equal Protection*, 84 HARV. L. REV. 1645 (1971); Note, *Snob Zoning: Must a Man's Home Be a Castle?* 69 MICH. L. REV. 339 (1970); Note, *Snob Zoning—A Look at the Economic and Social Impact of Low Density Zoning*, 15 SYRACUSE L. REV. 507 (1964); Note, *Alternatives to Warth v. Seldin: The Potential Resident Challenger of an Exclusionary Zoning Scheme*, 11 URBAN L. ANN. 223 (1976). For a discussion of discriminatory ordinances, see 1 A. RATHKOPF, *THE LAW OF ZONING AND PLANNING*, §§ 8.01-.07 (4th ed. 1975).

6. 426 U.S. 668 (1976).

7. *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 679 (1976).

Eastlake is but one of more than a dozen suburbs surrounding Cleveland, Ohio, which requires some form of mandatory referendum on zoning decisions.<sup>8</sup> Eastlake adopted a city charter amendment which required every land use decision, after consideration and approval by both the city planning commission and the city council, to be approved by fifty-five percent of those voting in a mandatory referendum election before the proposed change would become effective.<sup>9</sup> Forest City Enterprises' application for the rezoning of an eight-acre parcel from industrial to high-rise multi-family residential had been approved by both the planning commission and the city council. However, the proposed change failed to get the fifty-five percent<sup>10</sup> majority approval in the referendum election.

Forest City Enterprises challenged the charter amendment as an unconstitutional delegation of legislative power to the people. The Ohio Supreme Court agreed and held that the delegation violated settled state law practice and federal due process guarantees because the voters were given no standards to guide their decision.<sup>11</sup> The United States Supreme Court reversed holding that the city charter as amended did not violate due process as an improper delegation because the referendum, when properly applied to a decision of commu-

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8. Eighteen Greater Cleveland communities have now adopted versions of mandatory referenda on zoning. Each requires majority approval by referendum for zoning changes to multi-family units. See *Voter Control of Zoning Kills Most Projects*, Cleveland Plain Dealer, July 18, 1976, § 1, at 2, col. 1. All zoning changes, whether on the petition of individual property owners or at the initiative of municipal officials, have in fact been virtually halted. For example, after full approval by their respective legislative bodies, suburban voters have vetoed these changes: rezoning an eight-acre parcel from industrial to apartment (Eastlake, May, 1972); three proposals to vacate alleys (Eastlake, May, 1974, Nov., 1974); rezone parcel from suburban (5-acre minimum) to multi-family (Eastlake, Nov., 1974); rezone parcel from research-manufacturing to industrial park and single family (Parma, Nov., 1974)); two proposals to rezone lots from two-family to single family (Parma, Nov., 1975); and rezone parcel from single family to public building for the Temple-on-the-Heights (Pepper Pike, Nov., 1974). *Id.* The irrationality of voter reaction was dramatized in Pepper Pike where voters approved a bond issue to build a municipal garage while simultaneously refusing, by referendum, to rezone the lot next to the village hall necessary to construct the garage. Brief for Appellant for Further Proceedings Upon Mandate from the United States Supreme Court, *Forest City Enterprises, Inc. v. City of Eastlake*, 41 Ohio St. 2d 187, 324 N.E. 2d 740 (1975).

9. Eastlake City Charter, Art. VII, § 3.

10. The 55% super-majority aspect was not challenged, but presumably the Court's ruling in *Gordon v. Lance*, 403 U.S. 1 (1971) (a 60% super-majority requirement in an election held not violative of the fourteenth amendment) would similarly "cover" the 55% super-majority status of the Eastlake ballot.

11. *Forest City Enterprises, Inc. v. City of Eastlake*, 41 Ohio St. 2d 187, 324 N.E. 2d 740 (1975).

nity concern, is a power reserved to the state's citizens by the Ohio Constitution.<sup>12</sup>

The applicability of the referendum process to zoning ordinances is dependent upon state law. Generally, the authorizing state enabling act or home rule grant limits the referendum to matters of legislative decision-making.<sup>13</sup> If legislative powers are reserved by the people in the state constitution, the use of referenda is not violative of due process on grounds of improper delegation of legislative power.<sup>14</sup> If the determination by the local decision-maker is "quasi-judicial" or "administrative," the decision lies outside the scope of referendum applicability because there are fundamentally required procedures for "administrative" or "judicial" actions.<sup>15</sup> Thus, the application of the

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12. 426 U.S. at 679. The Supreme Court specifically stated that its decision was confined to the federal due process grounds of the Ohio decision. *Id.* at 677 n.11. See THE FEDERALIST No. 39 (J. Madison).

13. The authorization for the use of a referendum is found in the state constitution, a statute or in the home rule charter. See 1 A. RATHKOPF, THE LAW OF ZONING AND PLANNING § 3.01 (4th ed. 1975). The reservation of legislative power to be exercised by referendum is limited to legislative acts. See, e.g., Hilltop Realty, Inc. v. South Euclid, 110 Ohio App. 535, 164 N.E.2d 180, *appeal dismissed*, 170 Ohio St. 585, 166 N.E.2d 924 (1960) (an amendment of zoning ordinance was a legislative rather than administrative measure, and so was one on which referendum was applicable); Dwyer v. City Council of Berkeley, 200 Cal. 505, 253 P. 932 (1927) (an ordinance to reclassify zoning districts and authority to erect structures is subject to referendum). For a general discussion on the history of the referendum, see J. WILLARD HURST, THE GROWTH OF AMERICAN LAW—THE LAW MAKERS 37-39 (1950); C. LOBINGIER, THE PEOPLE'S LAW OR POPULAR PARTICIPATION IN LAW MAKING 358-69 (1909); E. PHELPS, SELECTED ARTICLES ON THE INITIATIVE AND REFERENDUM (1914); H. WALKER, THE LEGISLATIVE PROCESS 451-55 (1948).

14. See, e.g., James v. Valtierra, 402 U.S. 137 (1971). Formerly, it was held that a zoning amendment by referendum was violative of due process because the electorate was uninformed of the proper zoning classifications and was unable to evaluate the amendment in light of the comprehensive plan. City of Scottsdale v. Superior Court, 103 Ariz. 204, 439 P.2d 290 (1968); Korash v. City of Livonia, 388 Mich. 737, 202 N.W.2d 803 (1972); Sparta v. Spillane, 125 N.J. Super. 519, 312 A.2d 154 (App. Div. 1973); Elkind v. City of New Rochelle, 5 Misc. 2d 296, 163 N.Y.S.2d 870 (1957), *aff'd*, 5 N.Y.2d 838, 181 N.Y.S.2d 509 (1958). As the *Eastlake* Court found, due process merely requires notice and hearing for the referendum to be constitutionally sufficient. *Accord*, Johnston v. City of Claremont, 49 Cal.2d 826, 323 P.2d 71 (1958); Hilltop Realty, Inc. v. South Euclid, 110 Ohio App. 535, 164 N.E.2d 180, *appeal dismissed*, 170 Ohio St. 585, 166 N.E.2d 924 (1960). The referendum in the zoning context meets the due process requirements of notice and hearing because both the planning commission and city council decisions are made after public hearing. Unfortunately, as Rathkopf notes, if the electorate is uninformed the notice and hearing are useless. 1 A RATHKOPF, THE LAW OF ZONING AND PLANNING § 8.01-.07 (1975).

15. Compare Bi-Metallic Investment Co. v. State Bd. of Equalization, 239 U.S. 441 (1915) (no constitutionally required procedures for legislative action) with Londoner v. Denver, 210 U.S. 373 (1908) (administrative actions must meet due process require-

referendum to zoning decisions is dependent upon whether such a decision is legislative or administrative.

Although the trend is to characterize a rezoning as "administrative" or "quasi-judicial,"<sup>16</sup> the majority of states still hold that a zoning amendment is a legislative act.<sup>17</sup> Because governmental decision-making bodies, particularly at the local level, perform not only legislative, but also executive and judicial functions, there is confusion in differentiating legislative, executive and judicial functions.<sup>18</sup> The distinction rests upon the relative impact of the action on the parties and the community. Thus, the characterization is based on whether the action produces a general rule or policy which is applicable to an open class of

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ments). For a general discussion of the procedural requirements of judicial functions for local administrative agencies, see Merrill, *The Local Administrative Agencies*, 22 VAND. L. REV. 775, 791-801 (1969).

16. The crucial test for distinguishing legislative action from administrative or executive action is whether the action taken was one making a law, or one executing or administering a law already in existence. *Kelley v. John*, 162 Neb. 319, 75 N.W.2d 713 (1956). See *Fasano v. Board of County Comm'rs*, 264 Ore. 574, 507 P.2d 23 (1973):

Ordinances laying down general policies without regard to a specific piece of property are usually an exercise of legislative authority, are subject to limited (judicial) review, and may be attacked only 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 property is subject to an altogether different test.

*Id.* at 580-81, 507 P.2d at 26. See generally *West v. City of Portage*, 392 Mich. 458, 221 N.W.2d 303 (1974); *Fleming v. City of Tacoma*, 81 Wash. 2d 292, 502 P. 327 (1972). For a general discussion of this "administrative" quality of the zoning amendment, see R. BABCOCK, *THE ZONING GAME* (1966); Comment, *The Initiative and Referendum's Use in Zoning*, 64 CALIF. L. REV. 74, 88 (1976).

17. See, e.g., *Frankel v. City & County of Denver*, 147 Colo. 373, 363 P.2d 1063 (1961); *Schauer v. City of Miami Beach*, 112 So. 2d 838 (Fla. 1959); *Robinson v. City of Bloomfield Hills*, 350 Mich. 425, 86 N.W.2d 166 (1957); *Tuber v. Perkins*, 6 Ohio St. 2d 155, 216 N.E.2d 877 (1966); *O'Rourke v. City of Tulsa*, 457 P.2d 782 (Okla. 1969). Legislative action carries with it the strong but rebuttable presumption of constitutionality. 1 R. ANDERSON, *THE AMERICAN LAW OF ZONING* § 2.14 (2d ed. 1968). Generally, the opponent of a legislative action must prove either by clear and convincing evidence, *id.* at § 2.17, or beyond a reasonable doubt, *id.* at § 2.18, that the zoning amendments embodied in an ordinance or regulation fail to bear a substantial relation to the public health, safety, morals or general welfare. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 368 (1926). See also *STANDARD STATE ZONING ENABLING ACT* § 3 (rev. ed. 1926); Comment, *Zoning Amendments—The Product of Judicial or Quasi-Judicial Action*, 33 OHIO ST. L. J. 130 (1972).

18. See, e.g., *Hyson v. Montgomery County Council*, 242 Md. 55, 62, 217 A.2d 578, 582 (1966); B. BURRUS, *ADMINISTRATIVE LAW AND LOCAL GOVERNMENT* 108 (1963); 1 E. YOKLEY, *MUNICIPAL CORPORATIONS* § 74 at 179 (1956).

people or a more limited rule applicable toward specific individuals or situations.<sup>19</sup>

Regardless of whether the classification is deemed legislative or administrative, certain standards must be satisfied or the zoning regulation will violate the fourteenth amendment due process clause. In *Village of Euclid v. Ambler Realty Company*<sup>20</sup> the United States Supreme Court held that a zoning regulation does not violate fourteenth amendment due process if it is reasonable *and* bears a substantial relationship to the public interest.<sup>21</sup> This test balances the public

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19. The Supreme Court in *Bi-Metallic Investment Co. v. State Bd. of Equalization*, 239 U.S. 441, 446 (1915) illustrated the distinction:

A relatively small number of persons was concerned, who were exceptionally affected, in each case upon individual grounds, and it was held that they had a right to a hearing. But that decision is far from reaching a general determination dealing only with the principle upon which all the assessments in a county had been laid.

*See, e.g.*, *O'Rourke v. City of Tulsa*, 457 P.2d 782, 786 (Okla. 1969) (Berry, C.J., dissenting).

20. 272 U.S. 365 (1926). Two other "police power" cases are generally reviewed in conjunction with *Euclid*: *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 228 U.S. 116 (1928) and *Eubank v. City of Richmond*, 226 U.S. 137 (1912). *Roberge* involved a Seattle ordinance allowing the construction of a philanthropic home if the consent of two-thirds of the property owners within four hundred feet of the proposed building was obtained. *Eubank* considered the validity of a Richmond ordinance requiring a "committee on streets" to establish a building set-back line for all of the buildings in a particular block whenever two-thirds of the property owners on the block objected to the proposed use change. The Supreme Court invalidated each ordinance because the two-thirds provision portions lacked standards to guide the exercise of the power. Thus, the police power authorized in the ordinances was susceptible to arbitrary and capricious exercise.

21. 272 U.S. at 368 (1926). Interestingly enough, in *Eastlake* as well as in *Euclid*, the ordinance was struck down on both state law practice and federal due process grounds. Yet, in each case the Supreme Court found it unnecessary to review Ohio constitutional law. For a discussion which proves that settled state law practice is state constitutional law, see DIXON, *DEMOCRATIC REPRESENTATION*, chs. 5, 6 (1968). Contrary to the Court's reasoning, then, the question is not the same under both Constitutions. When the state strikes down a regulation on the basis of a separable state due process issue, it identifies a state law practice which may differ from federal due process notions. Indeed, more and more state courts are construing state counterparts to federal constitutional rights to guarantee broader rights than those guaranteed by the United States Constitution. *See, e.g.*, *People v. Disbrow*, 16 Cal. 3d 101, 545 P.2d 272, 127 Cal. Rptr. 360 (1976) (California constitutional privilege against self-incrimination is upheld despite conflicting decisions of the U.S. Supreme Court); *State v. Johnson*, 68 N.J. 349, 346 A.2d 66 (1975) (state has constitutional right to impose higher standards on searches and seizures); *Southern Burlington County NAACP v. Township of Mount Laurel*, 67 N.J. 151, 336 A.2d 713, *cert. denied*, 423 U.S. 808 (1975) (developing municipality which adopts land use regulation to preclude low-income housing has violated state constitutional due process and equal protection provisions). *See also* United States Supreme Court Justice Brennan's comment concerning the need for active state courts, 62 ABA J. 993, 994 (1976).

Thus, once the presence of a separable state issue is identified, the Supreme Court loses its jurisdiction. Although the Ohio Supreme Court failed to identify for the

interest in health, safety, morals and general welfare with the public interest in private property.<sup>22</sup> Moreover, the Court concluded in *Euclid* that the regulation is presumptively valid if it received "painstaking consideration" by the enacting authority.<sup>23</sup>

Supreme Court its discussion of the settled state law of due process (requiring standards), it may clarify this issue if it decides to rehear the case on remand. The Ohio constitutional issues, therefore, are now ripe for decision. Brief for Appellant for Further Proceeding Upon Mandate From the United States Supreme Court at 6-7, *Forest City Enterprises, Inc. v. City of Eastlake*, 41 Ohio St. 2d 187, 324 N.E.2d 740 (1975).

22. If it be a proper exercise of the police power to relegate industrial establishments to localities separated from residential sections, it is not easy to find a sufficient reason for denying the power because the effect of its exercise is to divert an industrial flow from the course which it would follow, to the injury of the residential public if left alone, to another course where such injury will be obviated. *It is not meant by this, however, to exclude the possibility of cases where the general public interest would so far outweigh the interest of the municipality that the municipality would not be allowed to stand in the way.*

272 U.S. 365, 389-90 (1926) (emphasis added). It is imperative to recognize the essence of the balancing process the Court outlines in *Euclid*. Although *Euclid* has the power to regulate the course of the industrial flow (from Cleveland to the suburbs), the Court recognizes that this grant of power is limited by those cases in which the general public interest is greater than the interest of the municipality. *Eastlake* is silent on this point although the dissent avers to such a theory. 426 U.S. at 680-95. *Euclid* supports the notion that there *can* be a greater public interest in zoning than that of the lone municipality. Perhaps such a greater public interest is met in the conception that all suburbs must share the burdens of providing sufficient housing to meet the needs of an expanding urban population.

23. 272 U.S. 365 (1926). *Accord* *Gorieb v. Fox*, 274 U.S. 603, 608 (1927). However, zoning laws and regulations must also satisfy the requirements of the constitutional guaranty of equal protection of the laws. *See, e.g.,* *Dennis v. Village of Tonka Bay*, 64 F. Supp. 214 (D.C. Minn.), *aff'd*, 56 F.2d 672 (8th Cir. 1946).

Courts have imposed a strict burden of proof on local decision-making bodies to show that they have engaged in deliberation necessary and sufficient to be presumed valid. Illustrations of the imposition of a stricter burden of proof are listed below.

(i) "Spot-zoning" or zoning of individual pieces of property in a manner which varies from that prescribed in the comprehensive plan or zoning ordinance may be improper, but it is not illegal in all cases. *Katobimor Realty Co. v. Webster*, 20 N.J. 144, 118 A.2d 824 (1955); *Partain v. City of Brooklyn*, 138 N.E.2d 180 (Ohio Comm. Pl. 1955), *aff'd*, 101 Ohio App. 279, 133 N.E.2d 616 (1956). Spot-zoning is also to be considered in relation to the general welfare. *Schmidt v. Bd. of Adjustments of Newark*, 9 N.J. 405, 88 A.2d 607 (1952); *Partain v. City of Brooklyn*, 138 N.E.2d 180 (Ohio Comm. Pl. 1955), *aff'd* 101 Ohio App. 279, 133 N.E.2d 616 (1956). But the general rule is that the amendment is designed to serve the best interests of the community as a whole and in accordance with a comprehensive plan. *See, e.g.,* *Huff v. Bd. of Zoning Appeals*, 214 Md. 48, 133 A.2d 83 (1957). *Cf. Mandelker, Delegation of Power and Function in Zoning Administration*, 1963 WASH. U.L.Q. 60, 61-65 (amendment often employed for limited changes in use of one lot). *See generally* 1 R. ANDERSON, *THE AMERICAN LAW OF ZONING*, §§ 5.04-5.13 (1968). The requirement that a zoning ordinance be in accordance with a comprehensive plan is intended to avoid an arbitrary and unreasonable exercise of the zoning power. A zoning ordinance which is not formulated on a comprehensive plan is an unreasonable exercise of the police power, and, therefore, unconstitutional. *See N.T. Hegeman Co. v. Mayor of Borough of River Edge*, 6 N.J. Super. 495, 69 A.2d 767

The Ohio Supreme Court in *Eastlake* recognized that a referendum requirement for an "administrative" decision is invalid. However, ruling that rezoning is "legislative,"<sup>24</sup> the Ohio court held that rezoning by referenda is an invalid delegation of legislative power violative of due process.<sup>25</sup> The court reasoned that an exercise of the police power designed to restrain the private use of land must be imbued with the dual standard of reasonableness and substantial relation to the general welfare. The underlying infirmity in *Eastlake's* charter amendment was the absence of procedures to insure that those given the power to regulate privately-owned land would apply the *Euclid* standards.

The United States Supreme Court reversed the Ohio ruling and held that the use of a referendum to approve a zoning change was not an unconstitutional delegation of power.<sup>26</sup> Relying on the Ohio court's characterization of rezoning as legislative, the Supreme Court found that the Ohio law permitted a referendum in all matters assigned to the legislature. In accordance with *James v. Valtierra*,<sup>27</sup> the Court found

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(1949). See generally Haar, *In Accordance with a Comprehensive Plan*, 68 HARV. L. REV. 1154 (1955).

(ii) Several state courts have ruled that mere popular opinion expressed by a given majority should not be the determinative factor in a rezoning. See, e.g., *Jemison v. City of Kenner*, 277 So. 2d 728, 730 (La. Ct. App. 1973); *Ford v. Baltimore County*, 268 Md. 172, 300 A.2d 204, 211 (1973); *Certain-Teed Products Corp. v. Paris Township*, 351 Mich. 434, 446, 88 N.W.2d 705, 711-12 (1958); *DeSena v. Gulde*, 24 App. Div. 2d 165, 171, 265 N.Y.S.2d 239, 246 (1965).

(iii) Decisions to make or deny changes in the zoning ordinance must show evidence of forethought and deliberation. See, e.g., *Udell v. Haas*, 21 N.Y.2d 463, 470-71, 288 N.Y.S.2d 888, 894-95 (1968): "One of the key factors used by our courts in determining whether the statutory requirement has been met is whether forethought has been given to the community's land use problem . . ." *Accord*, *Fleming v. City of Tacoma*, 81 Wash. 2d 292, 295, 502 P.2d 327, 329 (1972).

24. The ruling that rezoning is legislative is not as clear as suggested by the Ohio Supreme Court. See note 36 *infra* for a discussion of the current Ohio law characterizing rezonings.

25. *Forest City Enterprises, Inc. v. City of Eastlake*, 41 Ohio St. 2d 187, 324 N.E.2d 740 (1975).

26. 426 U.S. at 672.

27. 402 U.S. 137 (1971). *Valtierra* involved an authorization to a public body to develop, construct or acquire low-rent housing. The California Supreme Court had earlier held that actions of local housing authorities established to take advantage of federal financing for low-rent housing were not subject to California's referendum provisions. The California Constitution was then amended to provide that no public body might develop, construct or acquire any low-rent housing until the project had been approved at a referendum election. Citizens claiming they qualified for low-rent housing challenged the referendum requirement on the basis that it effectively deprived them of low-rent housing and was therefore violative of the supremacy clause, the privileges and immunities clause, and the equal protection clause. The Court upheld the referendum as a proper forum for public participation in community policy-making.

the use of referenda to be an exercise of powers reserved to the citizenry rather than an unconstitutional delegation of power.<sup>28</sup>

The Court concentrated primarily on the issue of standards to guide the electorate in their decision-making. Criticizing the Ohio court's reasoning that standards were necessary, the Supreme Court felt that since there is no more assurance that a legislative body will act conscientiously, standards were not necessary where the people acted as legislators.<sup>29</sup> In addition, the Court stated that even the sovereignty of the people is subject to constitutional limits and when a substantive result is arbitrary, the referendum will be invalid.<sup>30</sup>

In contrast, the dissent<sup>31</sup> focused on the issue of whether due process procedures were required in rezoning<sup>32</sup> individual parcels of land. The dissent found a need for fair procedures when dealing with individual parcels because every zoning plan regularly provides for changes and due process guarantees insure that the owner is afforded protection in making legitimate use of his property. Consequently, the

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28. See OHIO CONST. art. II, § 1. The Court analogized this referendum power to the New England town meeting. In both cases, the citizens were given a direct voice in matters of public policy. 426 U.S. at 673 n.6.

29. 426 U.S. at 675-76 n.10.

30. The Supreme Court stipulated that its decision is inapplicable to the cases of unnecessary hardship and that if the referendum result was challenged as unreasonable or arbitrary the election could be set aside on the holding of *Hunter v. Erickson*, 393 U.S. 385, 392 (1969) (Akron housing ordinance election ballot set aside as worded discriminatorily and a violation of equal protection). It is difficult to conceive, however, how this would apply to ordinary rezoning requests which if turned down leave the property owner with the zoning use which the property was assigned in the first instance, prior to the request for change.

31. There were two dissenting opinions filed in *Eastlake*. In a short cryptic dissent, Justice Powell agreed with the majority to the extent that a referendum would be appropriate for generally applicable zoning law. But he found the referendum fundamentally unfair when only one individual's property was in issue because the individual property owner would have no realistic opportunity to be heard by the electorate. 426 U.S. at 680 (Powell, J., dissenting). The other dissenting opinion was written by Justice Stevens.

32. Justice Stevens' discussion of the character of the decision-maker provided an opportunity to broaden the holding of the opinion which he wrote in *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976). A broad reading of *Mow Sun Wong* intimates that due process procedures require that a decision be made only by a decision-maker who is both qualified and likely to consider all factors. See *The Supreme Court, 1975 Term*, 90 HARV. L. REV. 56, 111 (1976). This is Professor Tribe's "structural due process" concept which requires that when a government body infringes on individual rights, the government body must be both "proper" to consider the issues and it must reach its determinations "fairly and responsively." See Tribe, *The Emerging Reconnection of Individual Design and Institutional Rights: Federalism, Bureaucracy, and Due Process of Law Making*, 10 CREIGHTON L. REV. 433, 449 (1977).



dissent found the legislative label inappropriate for rezoning actions.<sup>33</sup> Furthermore, the dissent felt that a referendum rezoning is valid only when issues of community-wide policy or public interest predominate.<sup>34</sup>

The crux of *Eastlake* is that the Supreme Court considers land use policy a matter for the state courts to fashion. So framed, the issues in *Eastlake* are two-fold: (1) whether rezonings of individual parcels are characterized *qua* "legislative," thereby qualifying for the *Euclid* style presumptive validity; and, (2) what will be the effect of mandatory referenda on all land use changes for rational land use planning, for the development process, for development costs, and in social terms, for continued suburban segregation.

The proper characterization of a rezoning is currently debated, but the labelling distinction has considerable significance for the exercise of power in referendum zoning. Basically the determination of the character of the decision depends on whether the action produces a general policy applicable to the entire community or one with a more limited application.<sup>35</sup> Utilizing this approach, a rezoning is properly characterized as an administrative action. The Supreme Court's adherence to the Ohio label circumvented the characterization issue<sup>36</sup> and as a result it is inconsistent with the current trend in state law which holds rezoning to be an administrative function.<sup>37</sup>

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33. 426 U.S. at 686 (1976) (Stevens, J., dissenting). Justice Stevens found that the requirement for fair procedures should not depend on the label which a state court chooses to apply.

34. 426 U.S. at 693. Mr. Justice Stevens' argument at this point is a classical constitutional argument reminiscent of Justice Jackson's decision in *Youngstown Steel & Tubing v. Sawyer*, 343 U.S. 579 (1952). Compare *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668 (1976) (Stevens, J., dissenting) (three-pronged analysis focusing on the general public interest threat, no threat to the public interest, and needs of the individual property owner) with *Youngstown Steel & Tubing v. Sawyer*, 343 U.S. 579 (1952) (three-pronged analysis focusing on the appropriateness of an executive order where Congress has explicitly authorized such power, not authorized the power, and where Congress has made no comment).

35. This test of proper characterization is called the functional approach. It is best summarized in *Bi-Metallic Investment Co. v. State Bd. of Equalization*, 239 U.S. 441 (1915). See note 19 *supra*.

36. The legislative classification of a rezoning is not as settled in Ohio as the Ohio court suggested in *Eastlake*. In holding the rezoning legislative, the Ohio court cited *Donnelly v. City of Fairview Park*, 13 Ohio St. 2d 1, 233 N.E.2d 500 (1968). But in *Donnelly*, Ohio adopted the Nebraska rule of *Kelley v. John*, 162 Neb. 319, 75 N.W.2d 713 (1956), which held the rezoning administrative and therefore not subject to the referendum.

37. See note 16 *supra*. See, e.g., *Sabo v. Township of Monroe*, 394 Mich. 531, 232 N.W.2d 584 (1975); *Minneapolis-Honeywell Regulator Co. v. Nadasdy*, 347 Minn. 159,

The majority's reliance on *James v. Valtierra*<sup>38</sup> further confused the issue of whether rezoning is properly characterized as legislative. The use of *Valtierra* reasoning presupposes a referendum question which affects the entire community so that an election is justified.<sup>39</sup> In *Eastlake*, however, no community-wide effect was alleged and the planning commission and the city council found that no adverse community-wide effect would result.<sup>40</sup> This use of *Valtierra* suggests that the

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76 N.W.2d 670 (1956); *Lowe v. City of Missoula*, 525 P.2d 551 (Mont. 1974); *Kelley v. John*, 162 Neb. 319, 75 N.W.2d 713 (1956); *Forman v. Eagle Thrifty Drugs and Markets, Inc.*, 89 Nev. 533, 516 P.2d 1234 (1973); *Fasano v. Board of County Comm'rs*, 264 Or. 574, 507 P.2d 23 (1973); *Bird v. Sorenson*, 16 Utah 2d 1, 394 P.2d 808 (1964). See also Sullivan, *From Kroner to Fasano: An Analysis of Judicial Review of Land Use Regulation in Oregon*, 10 WILL. L. J. 358 (1974).

38. 402 U.S. 137 (1971). *Valtierra* involved an equal protection challenge to a California constitutional amendment requiring referendum approval before a public body could develop, construct or acquire any low-rent housing. Federal courts have traditionally upheld challenges to the referendum process by affirming its validity on inherent democratic qualities. *Valtierra* represents one of the few forays by the federal courts into the referendum "thicket."

The only other referendum case in federal court which raised a due process claim is *Hunter v. Erickson*, 393 U.S. 385 (1969). *Hunter* was, however, decided on equal protection grounds. The early cases reaching the Supreme Court and challenging the validity of referendum laws asserted violations of Art. IV, § 4 of the United States Constitution. That section guarantees every state a republican form of government. *Pacific States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118 (1912); *Kiernan v. Portland*, 223 U.S. 151 (1912). The cases were dismissed for want of jurisdiction because the court felt that the questions presented were political and governmental in nature and *ipso facto*, solely within the Congressional power. *Id.* at 151. These cases were decided before the Court decided it could enter the "political thickets" in *Baker v. Carr*, 369 U.S. 186 (1962). See, R. DIXON, DEMOCRATIC REPRESENTATION (1968).

Recently, federal courts have taken jurisdiction on challenges to referenda on equal protection grounds. *James v. Valtierra*, 402 U.S. 137, 141-42 (1971); *Ranjel v. City of Lansing*, 417 F.2d 321, 324 (6th Cir. 1969), *cert. denied*, 397 U.S. 980 (1970); *Spaulding v. Blair*, 403 F.2d 862, 863-64 (4th Cir. 1968). *Ranjel* is particularly interesting because it was an appeal by poor Blacks and Americans of Mexican descent to enjoin a referendum on a spot-zoning ordinance which allowed a low-income housing project. They brought an equal protection suit but the Court held that the referendum was facially neutral. The political question issue did not surface and generally no longer does.

39. The Supreme Court's analysis presupposes that the particular issue in question is appropriate to a referendum before the entire electorate of the municipality. The Court relied on a passage from *Southern Alameda Spanish Speaking Organization v. Union City*, 424 F.2d 291, 294 (9th Cir. 1970) (SASSO sued to enjoin the city from following the result of a city-wide referendum nullifying an ordinance rezoning which permitted construction of federally-financed housing for low- and moderate-income families). The decision says that it is appropriate to allow the city itself to legislate through its voters in overriding the views of their elected representatives as to what best serves the public interest. *Id.*

40. In addition, one might argue that given that the Eastlake comprehensive plan was validly adopted, that Eastlake's ordinance was in accordance with that plan, and that the amendment was endorsed by the planning commission after hearings, the decision by the electorate is both arbitrary and capricious in terms of rational land use planning.

referendum may be utilized even when no question of community-wide concern is at the issue.

The terminological analysis is crucial in terms of its practical effects on development costs. The referendum itself is costly and time-consuming. It results in a shift of the burden of persuasion to the property owner who seeks the change for his parcel of land. If the voters reject the property owner's proposal he must now prove that the pre-existing classification is an arbitrary and capricious taking of property. Before *Eastlake* a developer need only have shown to the municipality that the rezoning was desirable and compatible with the comprehensive plan and the community welfare. The existing classification will rarely be so arbitrary as to amount to a taking of property. In addition, the administrative relief *qua* a variance which is available if the voters reject the rezoning, is contrary to the general rule of land use law that a variance is only available for major revisions in land use.<sup>41</sup>

Most importantly, *Eastlake* represents a failure to recognize the realities of urban regions. The referendum zoning practice of *Eastlake* is a common reaction of no-growth oriented enclaves and is illustrative of exclusionary practices of suburbs nationwide.<sup>42</sup> The "Eastlake solution," the referendum zoning requirement, is an effectively exclusionary practice which frustrates comprehensive planning of community and regional development. The community interest of the suburban municipality, as expressed in a referendum, has overreached the general community interest of the larger urban community.

*Gerald Goulder*

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41. In footnote 13, the majority asserted that variance relief is available to the developer in *Eastlake*. 426 U.S. at 679 n.13. This assertion, however, is misguided. The majority cited 8 MCQUILLAN, MUNICIPAL CORPORATIONS § 25.159 (3d ed. 1976) for their suggested remedy. However, MCQUILLAN at § 25.160 clearly illustrates that a variance should not and is not used to rezone a scheme in essentials. Furthermore, the availability of the variance for relief is subject to a developer's interest in the property before even applying for a variance. *Id.* at § 25.162(a). Only the most aggressive developer would gamble on "winning" a referendum rezoning in contemplation of purchasing property.

42. The true purpose of the *Eastlake* charter amendment requiring the referendum eluded neither the Ohio court nor the dissenting Justices on the Supreme Court:

Zoning provisions such as that in *Eastlake's* charter have a single motive, and that is to exclude, to build walls against the ills, poverty, racial strife and the people themselves, of our urban areas . . . . The inevitable effect of such provisions is to perpetuate the de facto divisions in our society between black and white, rich and poor.

41 Ohio St. 2d at 190, 324 N.E.2d at 749 (Stern, J., concurring). Justice Stevens in dissent cited this passage, 426 U.S. at 689.

