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COMMENTS

REFERENDUM ZONING: THE STATE AND FEDERAL ISSUES AND A SUGGESTED APPROACH

Changes in zoning regulations are most important to two groups of people: the community and the individual property owners. For the community, zoning changes have major implications on future growth and land use patterns. For the individual, the type and intensity of development allowed affects both the value of the land and who will be able to use it. This comment examines the applicability of local referendum powers to the rezoning process.

Referendum zoning presents state law issues regarding the classification of rezoning actions as legislative or quasi-judicial functions[1] and the interpretation of state statutes, as well as federal equal protection and due process issues. These questions are particularly significant in view of the widespread interest in local growth control[2] and the judicial decisions limiting the use of zoning for exclusionary purposes.[3] After a brief description of the referendum and of the zoning and rezoning processes, the author will analyze the developing legal controversy over when and whether the referendum process should be applied to rezoning decisions.

I. BACKGROUND: REFERENDA AND REZONINGS

The referendum and its companion process, the initiative, provide the electorate with the opportunity to intervene directly in the legislative process at two different stages. The initiative is the "initiation of municipal legislation and enactment or rejection thereof by the municipal electorate in the event the proposed measure is not enacted by their elected

1. *See* Freilich, *Editor's Comments*, 6 URBAN LAW. vii n.2 (1974): "The characterization of 'judicial' is that of the Oregon supreme court. Ordinarily actions of a legislative body which address a specific set of facts and issuance of a license approval or permit are denominated 'quasi-judicial,' or 'administrative.'"

2. *See* Construction Indus. Ass'n v. City of Petaluma, 522 F.2d 897 (1975), *cert. denied*, 424 U.S. 934 (1976). Golden v. Planning Bd., 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138 (1972).

3. *See, e.g.*, 59 MARQ. L. REV. 211 (1976).

representatives."[4] In contrast, the referendum "is the right of the people to have an act passed by the legislative body submitted for their approval or rejection."[5] Either procedure is usually begun by members of the electorate who circulate petitions seeking a public vote on a specific issue.[6] In some instances, however, a referendum on prespecified issues may be mandatory.[7]

In most states both the initiative and referendum powers have been limited, either by statute or by judicial opinion, to legislative matters and cannot be invoked when the legislature is acting in an administrative or quasi-judicial capacity.[8] This limitation is particularly important in determining the validity of referendum zoning since courts are increasingly concerned with the nonlegislative nature of many rezoning actions.[9]

Zoning, the most commonly used tool to regulate the use of land, is based on the police power of the state to protect the health, safety and general welfare of its citizens. In most states[10] enabling legislation provides the legal basis for community zoning action, and municipal zoning ordinances reflect the powers granted and the requirements imposed by the state enabling legislation. Zoning ordinances typically divide the community into use districts based on residential, commercial and industrial classifications.[11] Regulations applied to each use district control the use, height and area of structures within the district. These regulations are found in the ordinance text, while the application to specific property is recorded on a community map delineating the districts.

4. 5 E. McQUILLAN, MUNICIPAL CORPORATIONS § 16.52 (3d ed. 1969).

5. *Id.* at § 16.53.

6. *Id.* at § 16.59.

7. *See, e.g.*, City of Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668 (1976); James v. Valtierra, 402 U.S. 137 (1971); Hunter v. Erickson, 393 U.S. 385 (1969).

8. 5 E. McQUILLAN, MUNICIPAL CORPORATIONS §§ 16.54, 16.55 (3d ed. 1969).

9. *See, e.g.*, Fasano v. Board of County Comm'rs., 264 Or. 574, 507 P.2d 23 (1973). Fleming v. City of Tacoma, 81 Wash. 2d 292, 502 P.2d 327 (1972).

10. The state enabling legislation only applies to cities subject to general state law. California cases provide an excellent example of cities not subject to general state law. *See, e.g.*, San Diego Bldg. Contractors' Ass'n v. City Council, 13 Cal. 3d 205, 529 P.2d 570, 118 Cal. Rptr. 146 (1974).

11. These basic classifications are divided into zones which fit the needs of the community. For instance, in different residential zones, lot sizes may vary or the zones may be designated for single family or multi-family use. The commercial classifications may be further subdivided into general or highway commercial, neighborhood retail, shopping center, etc., and the industrial classifications may separate light industrial and heavy industrial uses.

The state enabling legislation also provides mechanisms for zoning changes which may be necessitated by mistake, changed circumstances or individual hardship. These mechanisms include variances and amendments to the text or map of the zoning ordinance. This comment will deal with only one of the mechanisms for change, the zoning amendment, which will also be referred to as a "rezoning."[12] Amendments are usually based upon a determination by the appropriate governing body of changed circumstances or of mistake in the original designation and may apply to the community as a whole or to a specific piece of property.

The provision for zoning amendments found in the Wisconsin Statutes[13] is representative of state enabling legislation around the country. Before a zoning ordinance can be amended, the statute requires review by the planning commission, public hearings, and approval by a majority of the municipal legislative body. In addition, if twenty percent of the landowners or twenty percent of adjacent owners in the area to be rezoned object, an extraordinary majority of three-quarters of the legislative body is required to pass the amendment.[14]

12. In this article the terms "zoning amendment" and "rezoning" have been used synonymously. The term "rezoning" may be used to refer only to zoning map amendments. *See, e.g.*, D. HAGMAN, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW § 104 (1971).

13. WIS. STAT. § 62.23(7)(d) (1973) provides in pertinent part:

> The council may change the districts and regulations after first submitting the proposed changes to the city plan commission or board of public land commissioners for recommendation and report and after publishing a class 2 notice, under ch. 985, of the proposed changes and hearings thereon. At least 10 days' prior written notice of changes in the district plan shall be given to the clerk of any municipality whose boundaries are within 1,000 feet of the land to be affected by the proposed change but failure to give such notice shall not invalidate any such change. The council or committee thereof shall give an opportunity to any person interested to be heard. In case of a protest against such change, duly signed and acknowledged by the owners of 20% or more either of the areas of the land included in such proposed change, or by the owners of 20% or more of the area of the land immediately adjacent extending 100 feet therefrom, or by the owners of 20% or more of the land directly opposite thereto extending 100 feet from the street frontage of such opposite land, such amendment shall not become effective except by the favorable vote of three-fourths of the members of the council. Notices of such tentative recommendations or proposed changes in the plan and regulations may contain the street names and house or lot numbers for purposes of identification if the commission, council or board so determines.

14. *Id. See also* D. HAGMAN, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW §§ 220-21 (1971).

II. Discussion: State and Federal Issues

Most of the litigation regarding the application of the referendum and the initiative to zoning has taken place in the state courts, although some cases involving equal protection or due process issues have been decided by the federal courts.[15] The basic issues involved in state decisions are: Is rezoning a legislative or a quasi-judicial action? In a conflict between referendum and zoning provisions, which governs? Can statutory notice and hearing requirements be satisfied by an election process? Should the referendum results, as well as the referendum procedures, be subject to judicial review?

The question of whether a zoning amendment is a legislative or a quasi-judicial action has received a great deal of judicial attention, since it may determine the outcome of the case. The original decision to zone is generally considered a legislative function, and the granting of variances and special permits is considered an administrative act; but the functional classification of zoning amendments is another matter. Many courts consider all zoning amendments to be legislative acts,[16] but others find this classification to be unrealistic and confining.[17] Some courts have distinguished the original policy-making decision to zone and the actions, including amendment, necessary to implement that decision.

> The determination as to whether or not a city desires to embark upon a policy of zoning for the purpose of regulating and restricting the construction and use of buildings within fixed areas is a legislative matter subject to referendum. But when such policy has been determined, the changing of such areas, or the granting of exceptions, are committed to the mayor and council as administrative matters in order to secure the uniformity necessary to the accomplishment of the purposes of the comprehensive zoning ordinance.[18]

15. City of Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668 (1976), Southern Alameda Spanish Speaking Organization v. City of Union City, 424 F.2d 291 (9th Cir. 1970).

16. *See, e.g.*, Forest City Enterprises, Inc. v. City of Eastlake, 41 Ohio St. 2d 187, 324 N.E.2d 740 (1975); San Diego Bldg. Contractors' Ass'n v. City Council, 13 Cal. 3d 205, 529 P.2d 570, 118 Cal. Rptr. 146 (1974); Township of Sparta v. Spillane, 125 N.J. Super. 519, 312 A.2d 154 (1973).

17. *See, e.g.*, Fasano v. Board of County Comm'rs., 264 Or. 574, 507 P.2d 23 (1973); Fleming v. City of Tacoma, 81 Wash. 2d 292, 502 P.2d 327 (1972); Bird v. Sorenson, 16 Utah 2d 1, 394 P.2d 808 (1964).

18. Kelley v. John, 162 Neb. 319, ____, 75 N.W.2d 713, 716 (1956).

Under this analysis, rezonings are nonlegislative actions and are not usually subject to referenda.

Courts have also distinguished between amendments affecting small parcels of land and more comprehensive amendments affecting the community as a whole.

> Ordinances laying down general policies without regard to a specific piece of property are usually an exercise of legislative authority, are subject to limited review, 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.[19]

Thus, the functional classification of rezoning as either a legislative or a nonlegislative act can be determinative of both the propriety of the initiative and referendum procedures and the type of judicial review accorded the rezoning decision. A nonlegislative action is not normally subject to initiative and referendum. Furthermore, even when taken by a legislative body, it is not accorded the presumption of validity and therefore is subject to stricter judicial scrutiny than a legislative action.

State courts in Connecticut, Nevada, Michigan and Oregon have determined that under some circumstances, rezonings are nonlegislative acts to which the referendum power does not apply. The Connecticut[20] and Nevada[21] courts have distinguished the initial policy-making decision to zone from the functions, including amendments, necessary to implement that decision, while the Michigan[22] and Oregon[23] courts have differentiated rezonings of particular parcels from community-wide rezonings.

Other jurisdictions, most notably Ohio, California and New Jersey, consider rezonings to be legislative actions. In cases where the cities are not subject to the general state statutes, such as home rule cities in Ohio and charter cities in Califor-

19. Fasano v. Board of County Comm'rs., 264 Or. 574, ____, 507 P.2d 23, 26 (1973).

20. O'Merara v. City of Norwich, 167 Conn. 579, 356 A.2d 906 (1975).

21. Forman v. Eagle Thrifty Drugs & Markets, Inc., 89 Nev. 533, 516 P.2d 1234 (1973).

22. West v. City of Portage, 392 Mich. 458, 221 N.W.2d 303 (1974).

23. Allison v. Washington County, 24 Or. App. 571, 548 P.2d 188 (1976) [comprehensive rezoning to which referendum would apply].

nia,[24] these courts are faced with the constitutional question of whether equal protection or due process guarantees are violated by referendum zoning. The federal constitutional issues will be discussed later in this comment. In most cases the classification of rezonings as legislative actions raises the issue of whether the statutes governing referenda are compatible with those governing rezonings.

In dealing with general law cities, which unlike charter cities are subject to general state statutes such as the zoning enabling act, California has concluded that the initiative process bypasses and is incompatible with the zoning enabling statute. However, since the referendum vote occurs after the rezoning proposal has been through the procedures mandated by the zoning statute, the California courts have held that the referendum is simply an additional step in the zoning amendment process, and that there is no problem of statutory conflict.[25] Arizona[26] has also adopted this "additional step" rationale.

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24. City of Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668 (1976); San Diego Bldg. Contractors' Ass'n v. City Council, 13 Cal. 3d 205, 529 P.2d 570, 118 Cal. Rptr. 146 (1974).

25. Since 1929, when the California Supreme Court decided Hurst v. City of Burlingame, 207 Cal. 134, 277 P. 508 (1929), the power of initiative has been considered inapplicable to the adoption of zoning ordinances in general law cities which are subject to the state zoning act. Two basic reasons for that decision were: (1) since the city's legislative body would not have the capacity to enact a zoning law without compliance with the state statute, the power of the electorate acting in the same legislative capacity is similarly circumscribed, and (2) where two laws are hopelessly inconsistent, the special statute dealing with a particular subject is controlling over the general statute.

In distinguishing the initiative and referendum powers, *Hurst* pointed the way for the 1958 decision of Johnston v. City of Claremont, 49 Cal. 2d 826, 323 P.2d 71 (1958), which ruled that rezoning actions by the legislative body are appropriately submitted to referendum for approval or disapproval.

26. *See* City of Scottsdale v. Superior Court, 103 Ariz. 204, 439 P.2d 290 (1968); Queen Creek Land & Cattle Corp. v. Yavapai County Board of Supervisors, 108 Ariz. 449, 501 P.2d 391 (1972).

Like the California courts, the Arizona court has distinguished initiative and referenda with regard to zoning amendments. It has determined that initiative is inapplicable to zoning decisions, since it cannot by nature comply satisfactorily with the notice and hearing requirements. The referendum, on the other hand, occurs only after all the procedural requirements of the zoning enabling act have been fulfilled and the legislative body has voted. It is, therefore, not inconsistent with the enabling legislation but simply another step in the amendment process.

The Arizona court's distinction is theoretically sound. However, a closer look at the cases indicates that these distinctions are not really applicable. The *City of Scottsdale* case involved an initiative petition to invalidate the rezoning of a 7-1/2 acre parcel from residential to commercial use, while the *Queen Creek* case involved the rezoning of

New Jersey also recognizes the distinction between initiative, which completely ignores the rezoning statute, and the referendum, which imposes a public vote on an action taken in compliance with the zoning act procedure, but New Jersey does not accept the additional step thesis. Rather, that court has concluded that the effects of the initiative and referendum in rezoning cases are sufficiently similar to apply the same rules and that, as applied to rezonings, both are invalid since they would render meaningless the procedural safeguards of the zoning statute.[27]

Zoning enabling statutes typically contain notice and hearing provisions which are similar to the notice and hearing requirements of procedural due process. The basic notice and hearing issue in referendum zoning cases is whether the statutory requirements can be reconciled with initiative and referendum procedures. The courts have concluded that because the initiative ignores the established statutory procedures for enacting or amending legislation, the initiative procedure cannot comply with these statutory requirements, and consequently the more specific zoning statute should govern. The courts are more divided on the issue of whether the referendum procedure is compatible with the statutory requirements.[28] The potential conflict between the procedural requirements of zoning statutes and the initiative and referendum procedures presents questions of statutory compatibility, not of whether referendum zoning meets constitutional due process requirements of fundamental fairness.

A careful analysis of the facts of a case in light of state law may make inquiry into constitutional questions unnecessary. For instance, if the rezoning is classified as a nonlegislative action, the referendum is inappropriate; if the rezoning is considered a legislative action, the court must determine whether the initiative and referendum powers are compatible with the zoning power, and, if a conflict exists, which power takes pre-

about 3,840 acres, in company ownership, to permit a major mixed use development followed by a petition for a referendum. The cases should not be distinguished by the name given to the electoral procedure. In essence, both were referenda. The real distinction between the cases seems to be in the size and type of development authorized by the rezoning.

27. Township of Sparta v. Spillane, 125 N.J. Super. 519, 312 A.2d 154 (1973); Smith v. Township of Livingston, 106 N.J. Super. 444, 256 A.2d 85 (1969).

28. Township of Sparta v. Spillane, 125 N.J. Super. 519, 312 A.2d 154 (1973); Johnston v. City of Claremont, 49 Cal. 2d 826, 323 P.2d 71 (1958).

cedence. However, if the state law issues are resolved in favor of the referendum, inquiry into constitutional equal protection and due process issues is necessary. Although state constitutions may contain similar provisions, federal constitutional law is usually relied upon in determining the equal protection and due process issues.

The constitutional issues of equal protection and due process arise from the limitations placed by the fourteenth amendment on state powers.[29] As applied to rezonings, these issues have been litigated in two recent federal cases, *Southern Alameda Spanish Speaking Organization (SASSO) v. City of Union City*[30] and *City of Eastlake v. Forest City Enterprises, Inc.*[31]

SASSO involved a rezoning for multi-family residential development which was nullified by a referendum. The Ninth Circuit Court of Appeals held that the effects of a referendum abrogating a rezoning could be so discriminatory with regard to the proposed class of users of the property as to violate the equal protection clause of the fourteenth amendment. However, the court did not find sufficient evidence of discrimination to warrant the injunctive relief sought. The court applied an interpretation of the equal protection clause which the Supreme Court developed in the 1960's. Essentially, this interpretation held that if the effects of the legislation are sufficiently discriminatory, the law will be held to deny equal protection, even though a discriminatory intent has not been found.[32] Later Supreme Court decisions retreated from this interpretation of the equal protection clause,[33] and most recently the Court has voiced its dissatisfaction with the "effects" doctrine.[34] Thus, the federal courts are now unlikely to consider the discriminatory effects of legislation which is not discriminatory on its face, even in the limited manner that the Ninth Circuit did in *SASSO*.

29. U.S. CONST. amend. XIV: "No state shall . . . deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

30. 424 F.2d 291 (9th Cir. 1970).

31. 426 U.S. 668 (1976).

32. *See* Hunter v. Erickson, 393 U.S. 385 (1969).

33. *See, e.g.*, James v. Valtierra, 402 U.S. 137 (1971).

34. Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 45 U.S.L.W. 4073, 4077 (1977); Washington v. Davis, 426 U.S. 229, 242 (1976).

The *SASSO* court decided the due process as well as the equal protection issue, concluding that while the legislature must balance neighbors' preferences in a rezoning case with the public interest, a referendum "is far more than an expression of ambiguously founded neighborhood preference. It is . . . an exercise by the voters of their traditional right through direct legislation to override the views of their elected representatives as to what best serves the public interest."[35] The court also concluded that the result of the referendum was not "such an arbitrary or unreasonable exercise of the zoning power as to be violative of [SASSO's] right to due process of law."[36] This lower court determination foreshadowed the Supreme Court's decision in *Eastlake.*

In *City of Eastlake v. Forest City Enterprises, Inc.,*[37] the United States Supreme Court reversed the Ohio Supreme Court's determination[38] that a mandatory referendum provision in the city charter violated federal due process guarantees. The case involved the rezoning of an eight-acre parcel from industrial to multi-family high rise use. Between the time of the initial rezoning application and the official amendment of the zoning ordinance, the voters adopted an initiative measure requiring fifty-five percent voter approval of all land use changes. Pursuant to this new requirement, the rezoning proposal was submitted to the voters and failed to receive the required measure of approval. The Ohio Supreme Court, classifying the zoning amendment as a legislative act, found that the mandatory referendum was an unlawful delegation of legislative authority which violated the due process protections of the fourteenth amendment.[39] A majority of the Ohio court also

35. 424 F.2d at 294.

36. *Id.*

37. 426 U.S. 668 (1976).

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

39. Due process of law requires that procedures for the exercise of municipal power be structured such that fundamental choices among competing municipal policies are resolved by a responsible organ of government. It also requires that a municipality protect individuals against the arbitrary exercise of municipal power, by assuring that the fundamental policy choices underlying the exercise of that power are articulated by some responsible organ of government. . . . The Eastlake charter provision ignored these concepts and blatantly delegated legislative authority, with no assurance that the result reached thereby would be reasonable or rational.

Id. at 746.

joined in the concurring opinion which focused on the possible discriminatory effects of the mandatory referendum.[40]

The United States Supreme Court found the initiative and referendum to be a reservation, rather than a delegation, of power to the people and that the requirement of discernible standards in the delegation of powers was not applicable. The Court held that the referendum process does not violate due process, although an arbitrary and capricious result bearing no relation to police power objectives would be open to challenge in state courts on both state law and fourteenth amendment grounds.[41]

Mr. Justice Powell[42] argued that the referendum procedure in *Eastlake* was fundamentally unfair. In a separate dissent Mr. Justice Stevens,[43] joined by Mr. Justice Brennan, also attacked the referendum procedure as fundamentally unfair, but went further to examine the nature of the rezoning process and the majority's inference that due process guarantees do not extend to legislative actions. Justice Stevens argued that the "'legislative' label should not save an otherwise invalid process."[44] His dissent also cogently argued that the special nature of the zoning process, which involves an adjudication of the rights of individual property owners, makes it subject to due process protections. This argument goes to the heart of both the constitutional and functional classification issues.[45]

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40. *Id.* at 748.

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

42. *Id.* at 680.

43. *Id.*

44. *Id.* at 686.

45. The complexity of the issues dealt with in the dissent makes the reasoning difficult to follow at times. Justice Stevens's points, however, are provocative. A few of these points will be quoted, but the dissent is best read in its entirety, particularly since his footnotes show a great deal of research and thought. "A zoning code is unlike other legislation affecting the use of property. The deprivation caused by a zoning code is customarily qualified by recognizing the property owner's right to apply for an amendment . . . ." *Id.* at 682.

> I have no doubt about the validity of the initiative or the referendum as an appropriate method of deciding questions of community policy. I think it is equally clear that the popular vote is not an acceptable method of adjudicating the rights of individual litigants . . . .

Id. at 693.

> Since the ordinance places a manifestly unreasonable obstacle in the path of every property owner seeking any zoning change, since it provides no standards or procedures for exempting particular parcels or claims from the referendum requirement, and since the record contains no justification for the use of the

The majority decision in *Eastlake* effectively eliminates the argument that referendum zoning procedures violate federal due process guarantees. However, state due process provisions can be interpreted differently. This possibility was briefly considered by the Ohio Supreme Court on remand of the *Eastlake* decision. On the record of that case, however, the Ohio court refrained from imposing different state due process standards.[46]

These varying state judicial approaches to the functional classification of rezoning and the compatibility of zoning and referendum procedures are representative of those taken by courts around the country.[47] In those jurisdictions which find referendum zoning procedurally valid, the referendum results may nevertheless be challenged as arbitrary and capricious,[48] as having been based on a lack of reasonable information,[49] or on improper motivation.[50] However, the traditional judicial restraint in reviewing legislative actions which have any reasonable basis limits critical judicial scrutiny of the referendum results.

In considering the reasonableness of the referendum result, the courts may be forced to return again to the requirements of the zoning enabling statute. For instance, in many jurisdictions the traditional requirement that zoning be in accordance with a comprehensive plan has been strengthened by recent legislation[51] or by judicial interpretation.[52] The comprehensive plan provides the court with a basis for scrutinizing the reasonableness of the rezoning action. However, a referendum result rejecting a rezoning is unlikely to conflict with the plan if the original zoning was based on that plan. Similarly, a referendum approving a rezoning is likely to be reasonable in light of

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procedure in this case, I am persuaded that we should respect the state judiciary's appraisal of the fundamental fairness of this decisionmaking process in this case.

Id. at 694.

46. Forest City Enterprises v. City of Eastlake, 48 Ohio St. 2d 47, 356 N.E.2d 499, ___, *per curiam opinion on remand from U.S. Supreme Court* (November 3, 1976).

47. *See* Annot., 72 A.L.R.3d 1030 (1976); Annot., 72 A.L.R.3d 991 (1976).

48. 426 U.S. 668 (1976).

49. Anne Arundel County v. McDonough, 277 Md. 271, 354 A.2d 788 (1976).

50. Andover Dev. Corp. v. City of New Smyrna Beach, 328 So. 2d 231 (Fla. 1976).

51. FLA. STAT. ANN. § 163.3194 (West Supp. 1976); CAL. GOV'T CODE § 65860 (West Supp. 1975); N.J. STAT. ANN. §§ 40:55D-1 - 40:55D-92 (West Supp. 1976) (effective Aug. 1, 1976).

52. Green v. Hayward, 275 Or. 693, 552 P.2d 815 (1976); Baker v. City of Milwaukie, 271 Or. 500, 533 P.2d 772 (1975); City of Erlanger v. Hoff, 535 S.W.2d 86 (Ky. 1976).

a previously determined change in circumstances or a mistake in the original zoning or of an already effected change in the comprehensive plan.

Compatibility with the comprehensive plan is but one standard for determining the reasonableness of a rezoning and is not an end in itself. The plan, like the zoning process, is simply a tool for achieving rational and beneficial land use patterns. The hidden and disquieting question in the initiative and referendum zoning cases is the motivation of the voters in accepting or rejecting the rezoning in a referendum election. Over the past decade several state and federal courts have dealt harshly with "exclusionary zoning" practices on equal protection grounds.[53] In the context of referendum zoning, however, the voters' reasons for proposing or rejecting a rezoning are unlikely to be a matter of public record, and since the present Supreme Court favors referenda and disfavors the "effects" doctrine, neither discriminatory motivation nor discriminatory effect are fruitful areas for an equal protection challenge in the federal courts.[54] The state courts are also unlikely to scrutinize the voters' motivation or the discriminatory effect of the referendum results, both because of the lack of an adequate factual record and because of their deference to federal equal protection and due process precedents in interpreting similar state constitutional clauses.[55]

III. CONCLUSION: A SUGGESTED APPROACH

The issues involved in a referendum zoning case may be condensed into a four-step analysis:

(1) Is the zoning change a legislative action?

(a) If no, the referendum is inappropriate.

(b) If yes:

(2) Is the municipality subject to state zoning enabling legislation?

53. *See* Southern Burlington County NAACP v. Township of Mt. Laurel, 67 N.J. 151, 336 A.2d 713 (1975); Hawkins v. Town of Shaw, 461 F.2d 1171 (5th Cir. 1972); Kennedy Park Homes Ass'n, Inc. v. City of Lackawanna, 436 F.2d 108 (1970), *cert. denied*, 401 U.S. 1010 (1971).

54. *See*, 45 U.S.L.W. 4073 (Jan. 11, 1977); Washington v. Davis, 426 U.S. 229, 242 n.12 (1976).

55. *See* Southern Burlington County NAACP v. Township of Mt. Laurel, 119 N.J. Super. 164, 290 A.2d 465 (1972), *but see* Justice Hall's modification of that decision applying state rather than federal constitutional law, 67 N.J. 151, 336 A.2d 713, 725 (1975).

(a) If no, the referendum may be appropriate.
(b) If yes:

(3) Are the zoning and referendum procedures compatible?

(a) If no, the referendum is inappropriate.[56]
(b) If yes, the referendum may be appropriate.

(4) If the referendum procedures are applicable to the rezoning process under state law (situations (2)(a) and (3)(b)), do the procedures as applied and do the results satisfy state and federal constitutional due process and equal protection requirements?

(a) If no, the referendum is invalid.
(b) If yes, the referendum is appropriate to the rezoning situation.

In applying this analysis the court must first determine how it wishes to classify rezoning actions[57] and must apply that classification scheme to the facts of the case.[58] Secondly, the court must determine whether the municipality involved is subject to general state statutes.[59] Thirdly, the court must consider any conflicts between the terms of the particular zoning statute and the state's referendum laws,[60] bearing in mind the history of the use of the referendum in the state.[61] Broader

56. For an alternate view see City of Coral Gables v. Carmichael, 256 So. 2d 404 (Fla. 1972).

57. *E.g.*, all rezonings are legislative actions; rezonings implement the zoning plan and are seldom, if ever, legislative actions; whether or not a rezoning is a legislative action depends upon its size and/or impact on the community.

58. *See, e.g.* Allison v. Washington County, 24 Or. App. 571, 548 P.2d 188 (1976) [comprehensive rezoning subject to referendum].

59. *See, e.g.*, San Diego Bldg. Contractors' Ass'n v. City Council, 13 Cal. 3d 205, 529 P.2d 570, 118 Cal. Rptr. 146 (1974).

60. Such elements include the comprehensive planning requirement found in most zoning acts and whether the referendum laws are procedural or substantive. Other requirements of the zoning act such as for public hearings and, more particularly, the veto power of a small percentage of neighbors over a rezoning proposal, unless passed by extraordinary majority of the City Council, may be superfluous if a referendum can later defeat the proposed change. To this author, such a situation is a strong indicator of incompatibility between the statutes.

61. California's entire history demonstrates the repeated use of referendums to give citizens a voice on questions of public policy. A referendum provision was included in the first state constitution, . . . and referendums have been a commonplace occurrence in the State's active political life.

James v. Valtierra, 402 U.S. 137, 141 (1971). *See also,* Lefcoe, *The Public Housing Referendum Case, Zoning, and the Supreme Court,* 59 CALIF. L. REV. 1384, 1401 (1971).

considerations, such as the special nature of the zoning process and the possible discriminatory effects of referendum zoning,[62] may influence a court's analysis of the classification and compatibility issues, or may enter into the court's constitutional analysis. The variety of state positions on these issues and subissues will necessarily affect the results of the analysis and will lead to different conclusions as to whether, and in what context, referendum zoning is appropriate.

CORNELIA GRIFFIN FARMER

62. *See, e.g.*, Forest City Enterprises, Inc. v. City of Eastlake, 41 Ohio St. 2d 187, 324 N.E.2d 740 (1975) (Stern, J., concurring), *rev'd*, City of Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668 (1976) (Stevens, J., dissenting).