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INITIATIVE AND REFERENDUM IN THE LAND USE PROCESS

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Technical Service Report No. 17
The Rocky Mountain Land Use Institute

UNIVERSITY OF DENVER
COLLEGE OF LAW

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I. INTRODUCTION

"We've got to take things back into our own hands!" This is the battle cry heard around the western United States, as concerned citizens, like their revolutionary forefathers, rush to gather enough signatures to place another initiative on the ballot. Across the country, there is a growing trend among local voters and citizens who have lost confidence in their local municipal bodies to make acceptable land use planning decisions. As a result of their perceived disenfranchisement, citizens are taking matters into their own hands and opposing major land use decisions they don't agree with through the use of initiative and referendum. Clearly, the use of direct democratic procedures, such as initiatives and referenda, has changed the decision making process in many states.

Nowhere is this growing trend more evident than in the struggle for control of local land use policy. Urban sprawl, with its accompanying problems, plagues many of our major metropolitan areas, often pitting neighbors against developers and pro-growth public officials. Due to the inherent conflicts posed by competing land uses, initiatives and referenda offer an alternative to the electorate by which to override the traditional decision making process of local municipalities. Increasingly used by dissatisfied citizens, initiatives and referenda are a powerful, but blunt weapon often wielded against local legislative bodies in an effort to control local land use decisions.

Traditionally, power to control land use decisions is vested primarily in the hands of local elected officials. In the landmark case of Village of Euclid v. Ambler Realty, the United States Supreme Court upheld the use of police power regulation of land use development and validity of zoning ordinances enacted by municipal legislative bodies.[1] Under this system of public regulation, local elected officials have significant decision making power. As a result, the role of interested citizens, such as landowners and affected neighbors, was severely curtailed, as their power was limited to casting votes for elected officials and presenting their views at public hearings. Consequently, control of the local land use planning process was, as in many cases today, held by a small number of public servants. These concentrations of power limit citizens from controlling the environment around them, often leading to resentment, anger and disenfranchisement among the local electorate.

However, the empowerment of local elected officials to make land use planning decisions conflicted with many state constitutional and statutory provisions, most notably the initiative and referendum, which encouraged direct citizen participation in state and local decisions. While states consistently adopted and amended their constitutions by the use of referenda, the use of initiatives and referenda at the state and local levels was slow to develop.[2] Growing out of pervasive distrust of corrupt local and state governments during the late nineteenth century, the Populist and Progressive parties, along with the support of organized labor, encouraged the spread of direct democracy. It wasn't long before the courts were involved.

Following the Euclid decision, state courts confronted the application of referendum requirements to zoning decisions, underscoring the incompatibility of representative versus

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[1] 275 U.S. 365 (1926).

[2] Ronald H. Rosenberg, *Referendum Zoning: Legal Doctrine and Practice,* 53 U. Cin. L. Rev. 381-87 (1983).

direct means of land use regulation. The Supreme Court was forced to resolve this conflict in the landmark 1976 case of City of Eastlake v. Forest City Enterprises.[3] The Court found that community ratification by referendum of the municipality's zoning changes does not violate federal due process.[4] The majority opinion rejected the notion that the referendum power was an improper delegation of power because the court found that voters are the source of local legislative authority: Simply, the referendum is a means for direct political participation, allowing people the final decision, amounting to a veto power over enactments of representative bodies. The practice is designed to give citizens a voice on questions of public policy.[5] Accordingly, the Court endorsed the practice, allowing the use of the referendum to overturn conventional methods of regulating land use development.[6] However, basic conflicts remain between the rights of landowners, voters, interested third parties, and governmental policies favoring rational planning and growth.[7]

Not surprising, these direct democracy devices are a source of much debate, often forcing state courts to determine their validity under state law. Consequently, a problematic issue arises in land use zoning on who is the appropriate party to make these decisions. Many scholars and commentators question the use of direct democracy as a means of making appropriate land use decisions, coining the phrase "ballot box planning" to describe their negative views on the practice.[8] Conversely, proponents of using initiative and referenda to make land use decisions believe these forms of direct democracy increase voter involvement in

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[3] 426 U.S. 668 (1976) (In *Eastlake*, Forest City Enterprises acquired a parcel of land zoned for light industrial uses in Eastlake. Because Forest City wanted to build a high-rise apartment building on the site, they applied to and were granted a zoning change by the Eastlake City Planning Commission. Shortly thereafter, the voters of Eastlake amended the city charter to require that any land use changes agreed to by the City Council be approved by a fifty-five percent vote in a referendum. Forest City's subsequent application for parking and yard approval was denied on the grounds the voters had not yet approved the rezoning. Forest City challenged the charter amendment as an unconstitutional delegation of legislative power to the people. An Ohio appellate court held the amendment was valid. The Ohio Supreme Court reversed, finding the amendment violated the due process clause.) *See also Southern Alameda Spanish Speaking Organization v. Union City,* 424 F.2d 291(Ca. 1970); *James v. Valtierra*, 402 U.S. 137 (1971); *Hunter v. Erickson,* 393 U.S. 385 (1969).

[4] *Id.*

[5] Sherman J. Clark, *A Populist Critique of Direct Democracy,* 112 Harv. L. Rev. 434-38 (Dec. 1998).

[6] Although *Eastlake* is cited for the proposition that the use of initiative and referendum in zoning does not violate due process, the decision has been heavily criticized by scholars and commentators. *See* David L. Callies et al. *Ballot Box Zoning: Initiative, Referendum and the Law,* J. Urb and Contemp. L 53, 70-71 (1991) (arguing "*Eastlake* is good law only to the extent of its narrow holding: where the Ohio Constitution reserved the power to the people, the use of referendum to rezone was not a standardless delegation of power violating part of the federal due process requirements. The *Eastlake* decision offers no guidance on whether its holding applies to initiatives.) *Id.* at 73. *See also,* Ronald H. Rosenberg, *Referendum Zoning: Legal Doctrine and Practice,* 53 U.Cin. L. Rev. 381, 412 (1983) (stating, "the *Eastlake* holding has not served as a great impetus for the adoption of referendum zoning; in fact, state law has been substantially more influential.") *Id.*

[7] Mark August Nitikman, *Instant Planning -Land Use Regulation by Initiative in California,* 61 S. Cal. L. Rev. 497 (1988).

[8] Daniel P. Selmi, *Reconsidering the Use of Direct Democracy in Making Land Use Decisions,* 19 UCLA J. Envtl. L. & Pol'y 293 (2001/2002).

the political process, balance unresponsive government, and reduce errors in translating the majority's will into legislation under our form of representative government.[9]

This article examines the growing trend of the use of initiative and referendum in the land use planning process. Because land use policy is primarily made at the local and state levels, each state deals with these direct democracy tools differently. The Supreme Court's ruling in Eastlake forms the foundation for the analysis, as the ramifications of this decision have profoundly impacted how state courts deal with the use of direct democracy in the land use context. The four diverse states of Colorado, Utah, Arizona, and California are ideal examples in which to analyze the influence and effects of initiative and referendum because each treats the issue very differently. The article analyzes how these states respond to challenges of municipal land use decision making by citizens using initiative and referendum processes.

In Part II, the article briefly summarizes the direct democracy tools of initiative and referendum, contrasting their basic procedural differences. Potential motivations underlying the use of initiative and referendum by the electorate are discussed, emphasizing common situations in which their use is generally expected. Part II concludes with an examination of the principal objections to using initiatives and referenda to make land use decisions. Accordingly, these objections fall into two broad categories: (1) objections relating to the process of land use decision making, and (2) objections that concern the subsequent effects of using these decisions.

Part III of the article examines the general limitations imposed by the courts and legislature when using initiatives and referendum to change a particular jurisdiction's decision. More specifically, the article reviews the 'legislative act' requirement, which serves as a dam holding back waves of initiative and referenda. While every state agrees that legislative acts are subject to initiative and referenda, they are split on the crucial issue of whether rezonings should be characterized as legislative or quasi-judicial acts. This section contrasts the different tests used in the above states to determine the legitimacy of overriding a local legislature with respect to these direct legal devices, emphasizing the unique aspects of each particular state's scheme.

II. THE PROCEDURAL AND POLICY FOUNDATIONS

A. The Initiative and Referendum Process

1. Initiative

Briefly, initiatives are direct legal devices whereby citizens bypass traditional law making bodies (city council or county board of commissioners) and enact their own legislation. Initiatives offer the people an opportunity to speak more clearly than is possible through their representatives, avoiding potential distortion inherent in the legislative process.

Procedurally, proponents circulate a petition, which includes the proposed legislation, in order to garner the statutorily required number of signatures from registered voters in the subject jurisdiction.[10] Once the petition is certified, the jurisdiction's legislative body must

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[9] Rathkopf, *The Law of Zoning and Planning* §46.1-2 Vol. 3 (2001).

[10] Colorado Constitution, Article V, Sec. 1 (signatures by registered electors in an amount equal to at least five percent of the total number of votes cast for all candidates for the office of secretary of state at the previous general election.); Utah Constitution, Article VI, Sec. 1.

approve the proposed legislation or place the measure on the ballot at the next general election or specifically called election.[11]

2. Referendum

In contrast, a referendum allows the electorate to determine the validity of previously enacted legislation. After the bill is signed into law, citizens are often allowed a short period of time, usually thirty days[12], in which to challenge the legislation. Challengers must accumulate the required number of signatures[13] in order to bring the measure before the voters. Once certified, the referendum is then considered at the next general election.

In distinguishing the initiative from the referendum, it is important to understand how these two devices differ in terms of procedural requirements prescribed by enabling legislation. In a referendum, all procedural requirements, such as notice to affected parties and hearings, are met before the referendum process is commenced.[14] Accordingly, the referendum process does not violate the due process clause of the Fourteenth Amendment nor provisions of the state constitution when applied to a rezoning ordinance.[15]

However, in the initiative process, affected property owners have no opportunity to be heard, except during the election campaign.[16] Because initiatives infringe upon affected property owner's due process rights and statutory rights to notice and hearing, some state court decisions hold that citizens may not create, amend, or expand city or county zoning ordinances by initiative.[17]

Other limitations on the process also exist. For example, the electorate can consider only those measures that are within the power of the local legislative body to enact.[18] In addition, statutes may expressly or implicitly restrict the initiative and referendum process or limit their scope and effect upon matters of regional or statewide concern.[19]

B. Why Do Electors Choose the Initiative and Referendum?

1. The Populist Case for Direct Democracy

The origins of the initiative and referendum can be traced back to the Populist and Progressive Movements of the late 1800s and early 1900s.[20] Concerned that government was

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[11] Elisabeth R. Gerber, *The Populist Paradox* 15 (1999).

[12] C.R.S. §31-11-105 (Most states have procedural requirements that are similar to Colorado's.).

[13] *Id.*

[14] Rathkopf at §46.4 (2001)

[15] 72 A.L.R 3d 1030 at 4, citing *Taylor Properties, Inc. v. Union County,* 583 N.W.2d 638 (S.D. 1998).

[16] *Id.*

[17] *Transamerica Title Ins. Co. v. City of Tucson*, 157 Ariz. 346, 757 P.2d 1055 (1988) (reaffirming its earlier decision in *Scottsdale,* holding that initiative measures may not be used to amend city and county zoning ordinances because such action would violate a property owner's due process and statutory rights to notice and hearing as set out in zoning enabling statutes.).

[18] *Id.* at § 46.1 (2001).

[19] *Id.*

[20] *See* Ronald H. Rosenberg, *Referendum Zoning: Legal Doctrine and Practice*, 53 U. Cin. L. Rev. 381, 383-88 (1983). Following the American Revolution, state and local governments followed the legislative

being unduly influenced and corrupted by highly influential and powerful people, the American people sought legal devices, most notably the initiative, referendum and recall, to stop the erosion of their political power.[21] In order to better understand why today's electors may favor ballot initiatives and referenda over other forms of representative government in the land use planning process, it is important to first recognize the underlying assumptions of direct democracy that appeal to the general electorate. A brief discussion of these underlying assumptions follows.

a. 'Direct' is Better Than 'Indirect'

Laying at the core of Populist arguments in support of direct democracy is the notion that direct democratic processes are more democratic and more legitimate than representative institutions because they are more directly responsive to the will of the people.[22] As one commentator states, "it is natural to assume that direct is better, more nearly perfect, than indirect - that the ideal of consent of the governed is better achieved by consenting to the laws themselves, rather than to representative lawmakers."[23]

Supporters of direct democracy argue initiatives and referenda allow the people to speak more clearly, without the distortion inherent in traditional representative government.[24] Simply, the more direct the process of determining the people's will, the clearer their voice. Therefore, when the assumption that 'direct [democracy] is better than indirect' is combined with voter disenfranchisement, often brought on feelings of political favoritism, an initiative or referendum becomes an attractive option available to the voters.

b. Empowerment

Not unlike today, money and the power that flows from it, was seen as retarding the influence and will of the people. The perception that money corrupted elected representatives further fueled Populists' desire to curb the privileges of wealth. In this regard, initiatives and

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system of governance adopted at the federal level by the United States Constitution. Favoring a republican form of government, the drafters of the Constitution made no explicit provision for direct democratic decision making, reflecting a fear that direct democracy could lead to a tyranny of the majority. During the nineteenth century, political power was centralized in the state legislatures which limited the freedom of action of municipal corporations. However, as the century progressed, the needs of rapidly growing urban areas required cities be granted this power to effectively address their emerging problems. While state governments did reluctantly authorize local governments to submit a limited range of issues for approval to the voters, little interest existed in the power of initiative and referendum until the late nineteenth century. Due to the concentration of power in the state legislatures, voters believed the influence of business interests, particularly railroad interests, corrupted government. As a cure for government corruption, the Progressive Movement, led in part by Robert M. Lafollet, argued that initiatives and referenda were necessary to repeal self-interested laws and enact beneficial measures which legislators refused to consider. The Progressive Movement was ultimately successful in its efforts to inject the initiative and referendum into local political decision making. Between 1898 and 1918, nineteen states adopted initiatives. By 1972, all states had adopted various initiative amendments to their state constitutions.

[21] Roger W. Craves, *Land Use Planning: The Ballot Box Revolution* 12 (1992).

[22] Sherman J. Clark, *A Populist Critique of Direct Democracy*, 112 Harv. L. Rev. 434, 437 (1998).

[23] *Id.* at 438.

[24] *Id.* at 434.

referenda were seen, like today, as mechanisms that empowered citizens to override corrupt legislatures and redistribute political influence.[25]

Because direct democracy is accomplished outside the controls and procedures of the legislative process, initiatives may have an empowering effect, but their effectiveness remains debatable. Today, especially in more populated states like California, money is essential to simply acquire enough signatures to place the initiative on the ballot.[26] Still more capital is needed to wage a successful media campaign in which to disseminate information about the initiative's purpose and goals. Thus, in theory, the initiative is still a weapon against compromised legislative bodies, but in practice, capital still acts as a barrier to initiative-minded citizens.[27]

2. Unresponsive Government

Echoing these sentiments today, dissatisfied, and sometimes angry citizens wield the initiative as a weapon against unresponsive government. While the reasons underlying the pursuit of direct democracy vary from situation to situation, citizens engaging in initiative and referendum activities cite voter dissatisfaction with local land use decisions made in their community as a principal motivation in utilizing such devices.[28]

In November of 2001, residents of Newport Beach, California passed the "Greenlight Initiative", which requires a city-wide vote if a development project exceeds growth standards.[29] The Greenlight Initiative is a prime example of local voters and citizens losing confidence in municipal bodies to render acceptable land use planning decisions.[30] Greenlight supporters indicated complete disenfranchisement with the land use planning process as the underlying reason for the measure, arguing that their comments and suggestions regarding the city's growth problems were consistently ignored by the Planning Commission and City Council.[31]

a. Growth Control

Of particular concern to the voter are the impacts of development, which they often believe occur because local elected officials favor development.[32] Due to the pervasive belief

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[25] Richard B. Collins and Dale Oesterle, *Governing by Initiative: Structuring the Ballot Initiative: Procedures That Do and Don't Work*, 66 U. Colo. L. Rev. 47, 56 (1995).

[26] *Id.*

[27] The abuse of the initiative process is addressed in section C of this section of the article.

[28] David L. Callies & Daniel J. Curtin, *On the Making of Land Use Decisions through Citizen Initiative and Referendum*, 222 APA J. (Spring, 1990) (noting "outrage over particularly sensitive decisions, frustration over rampant and seemingly unplanned development, or anger at seemingly unresponsive officials over the inability of communities to provide the necessary infrastructure to support new development.").

[29] The Greenlight Initiative, Measure S required proposed developments that exceed the City's general plan by a) 100 residential units, b) 40,000 square feet, or c) 100 peak hour car trip would require a city-wide approval. *See* Seema Mehta, *Three Cities Could See Voters Put Lid on Growth,* Los Angeles Times (Oct. 22, 2000) at B1.

[30] Paul J. Weinberg, *The Green light Initiative and Ballot Box Zoning: California Tea Party and Harbinger of Things to Come?* Zoning and Planning L. Rep. 17 (Mar. 2002).

[31] *Id.* at 19.

[32] Daniel P. Selmi, *Reconsidering the Use of Direct Democracy in Making Land Use Decisions*,19 UCLA J. Envtl. L. & Pol'y 293 (2001/2002).

among growth opponents that local officials actively recruit and court industry to locate within their boundaries, anti-growth initiatives are popular among citizens in the western United States. In fact, in November 2000, there were 94 growth management measures at the state and local levels - 42 in the Midwest, and 52 in the West, but no such measures were on the ballot in the South and Northeast.[33]

While development brings advantages to the community, it is often regarded as destroying quality of life, as traffic congestion and school overcrowding increase.[34] Too much development potentially can prevent the municipality from adequately repairing and maintaining local infrastructure, further angering local voters.[35] In this situation, initiative and referendum devices act as a "safety valve with which the voters can bypass legislative inaction, challenge government policies, and rid themselves of unsatisfactory elective officials."[36]

Similar to California's Greenlight Initiative and Colorado's Amendment 24 discussed below, Arizona's Proposition 202[37], known as the Citizens Growth Management Initiative (CGMI), exemplifies a classic anti-growth measure. Conceived and supported by the Sierra Club, its origin was rooted in the failure of the Arizona legislature to address the state's robust urban sprawl.[38] Under the weight of an aggressive media campaign orchestrated by developers and home builders, the measure was defeated in the November election. While CGMI followed a predictable demise, its origins and supporters uniquely show how the initiative process can be used by national interest groups with a desire to control state and local decision making.

3. A Means of Avoiding Debate

Citizens may turn to initiatives and referenda as a means of avoiding lengthy policy debates, which may threaten to dilute their proposed legislation with amendments or 'poison pills', which are controversial or unacceptable language inserted to ensure the initiative's demise.[39] Because voters usually cannot amend initiatives prior to their passage, which prevents compromise on contentious parts of the measure, initiative proponents can insulate the proposed legislation from outside control, further ensuring the initiative's survival as originally conceived.[40]

4. Agenda Setting Mechanism

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[33] Phyllis Myers and Robert Puentes, *Growth to Ballot Box: Electing the Shape of Communities in November, 2000,* Brookings Inst. Center on Urb. and Metro. Policy, 21 (Feb. 2001).

[34] Craves, *supra* n. 21, at 11.

[35] *Id.*

[36] D.R. Berman, *State and Local Politics* 66 (1975) Boston, Holbrook Press.

[37] Arizona Proposition 202, if passed, would have established urban growth areas, limiting new urban development and services outside the area. *See* Sec'y of State, State of Ariz., 200 Ballot Propositions & Judicial Performance Review, Prop. 202 11-1602(A)(1), at 109 (Nov. 7, 2000), available at <http://www.sosaz.com/election/2000/info/pubpamplet/english/prop202.pdf.>.

[38] Paul J. Weinberg, *supra* n. 30, at 22.

[39] Craves, *supra* n. 21, at 9.

[40] Selmi at 7 (arguing initiatives are "procedurally blunt instruments for the electoral process lacks the ameliorative, power-distributing features of the legislative process.").

Fourth, initiatives and referenda may be used as agenda-setting mechanisms designed to bring publicity to an issue of proponent concern.[41] Because many initiatives and referenda generate substantial media coverage, and may employ sophisticated advertising campaigns in an effort to persuade local voters, proponents can quickly bring their issues to the forefront of voter concern. In this regard, such mechanisms can be effective in motivating unresponsive local legislative bodies and the electorate to address these concerns.

A good example of this function is the anti-growth measure Amendment 24, which occurred in Colorado in March of 2000. Backed by a coalition of environmental groups, Amendment 24 would have amended the Colorado Constitution to require local governments to designate 'growth areas' for all new development.[42] The Amendment's sponsors claimed the state legislature had failed to pass growth control legislation, and thus, such an initiative was necessary.[43] Initially, voters were extremely supportive of the initiative, as seventy-eight percent of those polled favored the measure.[44]

However, opponents, mainly the real estate and development industry, waged an impressive media campaign against Amendment 24, amassing nearly six million dollars to defeat the measure.[45] Using the slogan "No on 24", opponents successfully characterized the measure as 'extreme,' asserting its effects would devastate the economy.[46] Supporters countered with commercials warning that Amendment 24 was necessary because "every hour Colorado loses 10 acres of ranchland and open space to sprawling development."[47] Ultimately, Amendment 24 only garnered thirty percent of the vote on election day, capping a bitter, but successful media campaign against the measure.

Despite the defeat of Amendment 24, the initiative successfully brought the issue of growth management to the forefront of local politics, forcing elected officials to address the issue. Interestingly, in the summer of 2002, Colorado Governor Bill Owens called the state assembly into a special session to address Colorado's urban sprawl problems without results.

C. Critical Objections to Use of Direct Democracy in the Land Use Decision Making Process

The right of the citizens to employ the initiative is neither unlimited nor absolute. The power of local voters to exercise direct democracy must be measured against the rights of

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[41] D. Magleby, *Direct Legislation: Voting on Ballot Propositions in the United States* 604 (1988) Baltimore: Johns Hopkins Press.

[42] Legislative Council of the Colo. Gen. Assembly, An Analysis of the 2000 Statewide Ballot Proposals, Amend. 24 4(4), (6), at 54, 56 (Nov. 7, 2000), available at http://www.state.co/us/gov dir/leg dir/lcsstaff/2000/ballot/Bluebook/HTML/2000bluebook.htm.

[43] Fred Brown, *Growth Challenge Difficult to Contain*, Denver Post, May 7, 2000 at 1A.

[44] John Sanko, *Tax Cut, Sprawl Proposals Lose Steam; Both Ballot Measures Still Lead in Colorado Poll, but Both Have Lost Significant Ground Since Early June*, Rocky Mountain News, Sept. 11, 2000 at 4A.

[45] *See* Michelle Ames, *Money Talked in Colorado Election,* Denver Rocky Mountain News, Nov. 10, 2000 at 6A (noting opponents of Amendment 24 waged the most expensive initiative campaign in Colorado history, raising $5.7 million to fight the Amendment).

[46] Charles Roos, *Truth Being Swallowed Up in Political Advertising*, Denver Post, Oct. 27, 2000 at 33A.

[47] Mark Obmascik, *Accuracy Isn't the Hallmark of Two Sides' Amend. 24 Ads*, Denver Post, Oct. 17, 2000 at A12.

individuals, regional and state concerns, and other public policies.[48] In deciding whether the use of initiative and referendum are viable tools to be used when making land use decisions, it is useful to note the objections leveled at these direct democracy devices. The following discussion categorizes these objections into two groups: those relating specifically to the use of initiatives in the land use context, and general criticisms applicable to all initiatives.

1. Objections to Initiatives in the Land Use Process

a. The "Planner, not Voter" Criticism

Arguably, the most prevalent objection to making land use decisions by initiative involves the incompetence and lack of expertise of the voters as a whole. Given the complexities of local land use planning, critics argue these decisions should be left to professional planners and local planning departments which possess the requisite skills to address these issues.[49] Professional planning staff undertake detailed analysis of land use proposals, including gathering information about the proposal's impacts and consistency with municipal land use policies, economic development goals, and recreational opportunities. Voters, on the other hand, usually do not possess such sophisticated means or governmental resources to accurately determine the impacts of the proposal, nor the ability to objectively evaluate the plan. As a result of the parties' unequal positions, use of direct democracy diminishes the influence of professional planning staff at the local government level, since their opinions and analysis of the proposed land use can be bypassed. Essentially, direct democracy politicizes a decision that is otherwise one of reasoned analysis.[50]

However, initiative supporters argue that although professional planning staffs are supposed to be value-neutral, in practice many of them do not impartially consider land use proposals.[51] As a result, planners in many cases have become overly favorable toward development interests. Therefore, it is erroneous, supporters argue, to assume that planning expertise is immune from politics, when in fact the politics of land use play a critical role in development decisions.[52]

Underlying these criticisms is the assumption that planners' knowledge and expertise are subverted by their own inherent political desires or loss of faith in their efforts to affect the outcome of the decision making process. While these concerns are certainly valid, they don't overcome the fact that on the whole planning departments and professional planners are in a better position to determine the impact of proposed land use; have greater resources with which to make such decisions; and generally are more experienced and familiar with overarching municipal policy than the voters. Because initiatives bypass such institutional knowledge, they can potentially neutralize traditional planning functions.

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[48] *See* Nitikman, *supra* n. 7 at 516 (discussing the balancing of interests involved in allowing use of initiatives).

[49] *See* Selmi, *supra* n. 8 at 10 (discussing the expertise objection to making land use decisions by direct democracy).

[50] *Id.*

[51] *Id.* (arguing the vision of planning does not always correspond with the real world. "Even if it is assumed that 'technical expertise' is itself value-neutral, the land use activities of many planners today are not. Instead these activities are often highly politicized.").

[52] *Id.*

b. Insufficient Information

By design, initiatives allow voters to propose bills and laws, and to enact or reject them at the polls independent of legislative assembly. Because initiatives are created and supported outside the traditional legislative process, information regarding the initiative differs markedly from that which is generated through public hearings, floor debates, committee meetings, and other factual inquiries of the local legislative body.[53] In order to rationally review and decide any initiative, accurate information must be distributed to the voters. Unfortunately, accurate information is not always available.

The most obvious problem relating to initiative information is that usually no public record is generated by those who debate and consider the merits of the proposal. Because a land use initiative can spawn substantial publicity, consideration of the measure is usually waged in the media through the use of short attack advertisements designed to quickly persuade voters. As a result, rational debate of the issue is lost, as such advertisements reduce the issues to short sound-bites, often characterizing the measure as "extreme," and employ easily remembered slogans such as "No on 24" in an effort to garner support.[54] Moreover, as part of an organized media campaign, the issues surrounding the initiative are often clouded by broadcast images designed to shock the voter into supporting the measure. For example, during consideration of Colorado's Amendment 24 in March of 2000, initiative opponents aired commercials featuring smoke-spewing bulldozers, traffic jams, and smog-shrouded mountains covered with tract houses in an effort to 'warn' Coloradans that without Amendment 24 sprawling development would continue to swallow up ranchland and open space.[55] Not surprisingly, initiative critics condemn the sufficiency of the information available to voters, suggesting it is of such poor quality that any decision based upon it should be invalidated.[56]

c. The Initiative Industry

The increasing use of the initiative during the late 1970s, especially in California, laid the groundwork for an industry devoted entirely to passing the proposed initiative or referendum. Key components of the 'initiative industry' include signature collection companies, computer mail specialists, advertising companies, and campaign consultants. Because many campaigns are run for profit, the modern initiative process tends to benefit those who can afford to wage such a campaign, as these consultants and services are extremely expensive to procure.[57] Thus, direct

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[53] Because referendum challenges seek to overturn a legislatively approved action, the public record is available to voters when the legislative body originally considered the measure. Thus, information generated through the referendum process is generally of the same quality as normal legislative proposals, although its dissemination may be an issue. *See Id.* at 8.

[54] During consideration of Amendment 24 in Colorado, commercials warned voters that the measure was "extreme" and would devastate the economy. *See* Roos, *supra* n. 44.

[55] Nicole Stelle Garnett, *Trouble Preserving Paradise?*, 87 Cornell L. Rev. 158, 167 (Nov. 2001) (citing Karen Abbott, *Growth-Control Ads Tap into Emotions: Amendment 24 Motivates Supporters, Detractors to Evoke State's Beauty,* Denver Rocky Mountain News, Oct. 27, 2000 at 32A.).

[56] *See* Selmi, *supra* n.8 at 8 (discussing the informational deficiency objection to making land use decisions by direct democracy). *See also* Daniel M. Warner, *Direct Democracy: The Right of the People to Make Fools of Themselves; The Use and Abuse of Referendum, A Local Government Perspective,* 19 Seattle U. L. Rev. 47, 74 (1995).

[57] For example, opponents of Colorado's Amendment 24 amassed an enormous war chest of nearly $6 million to defeat the measure. *See supra* n. 45.

democracy is no longer being used as originally intended, as a tool for an aggrieved citizenry to overcome a legislature captured by special interest. Rather, those special interests have realized that by spending enough money, they can use the initiative process for their own political gain.[58]

Special interest use of the initiative process in the land use context raises concerns of majority tyranny.[59] When an initiative or referendum concerns the rezoning of a particular parcel of land affecting a small minority, usually one person, it becomes very easy for a self-interested majority to form and sacrifice the interests of the minority landowner. Without adequate safeguards, the initiative process can be wielded to proscribe the rights of affected landowners. In such a situation, the only remedy available to the landowner is challenging the validity of the initiative through expensive litigation.

1. Signature Gatherers - Potential for Abuse and Cost of Verification

In order for an initiative to be recognized as legitimate, a required number of signatures is necessary for the measure to be placed on the ballot of the next election. The signature requirement is important because it precludes those measures that do not have sufficient public support. Meeting this threshold requirement signals to the state and opponents of a proposed bill that sufficient citizen support exists, allowing such parties to organize against or in support of the bill.

However, the desire to meet this threshold requirement can lead to abuses by both volunteer and professional signature gatherers. One of the most prolific criticisms of the initiative industry is the use of professional signature gatherers, who earn profits on each signature they collect, which can lead to rampant abuse.[60] Ironically, such abuse led to the adoption of Measure 26 in Oregon during the November 2002 election. Measure 26 prohibits payment for signatures when a certain number of signatures is required to place an initiative on the ballot.[61] Measure 26 passed overwhelmingly.[62]

Besides paying for signatures, there are several other ways to abuse the signature requirement. In California and other states, gatherers often use "cover up" devices, usually

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[58] In Oregon, a group called Oregon Taxpayers United is a good example of an organization whose self-serving initiatives are tilted to benefit Oregon's most wealthy residents. *See The Oregon Taxpayers United Chronicles* <http://www.billsizemore.org> (accessed Nov. 20, 2002). *See infra* n. 59.

[59] Founding Father James Madison argued that 'factions' (groups of citizens united by an interest adverse to the rights of other citizens) were a fundamental problem with direct democracies because democracies fail to provide any safeguards against a faction routinely imposing its will upon a weaker minority. *See* The Federalist No. 10, at 20 (J. Madison) (R. Fairfield 2 ed. 1961).

[60] Oregon Taxpayer United, headed by prolific initiative author Bill Sizemore, was recently penalized $2.5 million for racketeering and other election law abuses. The Educational Foundation wing of the group, operating as a tax-exempt foundation, was recently determined to be in violation of federal law by the Oregon Attorney General for allegedly transferring money to political action committees and companies that gather signatures for ballot initiatives. *See* Dave Hogan & Jeff Manning, *Sizemore Charity Appears in Violation of Federal Law,* The Oregonian C1 (Nov. 7, 2002).

[61] Garret Epps, *Send Signature Gatherers Packing,* Oregonian F5 (Nov. 10, 2002).

[62] *Id.* The measure may not be constitutional in light of the United States Supreme Court holding in *Meyer v. Grant,* which invalidated a similar law in Colorado in 1988 because the circulation of petitions involves protected political speech.

cards on other documents, that are placed over the actual language of the initiative or the Attorney General's official summary of the initiative in an effort to obstruct the voter's information.[63] Other signature collection abuses include using children as signature gatherers; illegally distributing circulars in counties and areas where proponents do not reside; and simply forging signatures of unsuspecting voters. Because representative government does not require signatures to put the issues before the legislature, representative government is not vulnerable to these particular abuses.

Moreover, initiatives and referenda place a tremendous burden upon the state, which must spend large sums of money to verify each signature and conduct the election provided enough legitimate signatures are gathered.[64] Once the signatures are verified and the measure is qualified for the ballot, the state bears the cost of preparing the voter information pamphlet describing the issues on the ballot; providing voting booths, and performing accounting procedures to tabulate the votes. These costs are especially burdensome if the initiative triggers a special election.[65] However, under a representative form of democracy, these costs are much less since it is not necessary to explain individual issues in great detail. Accounting costs are substantially reduced because there are far fewer items on the ballot. For these reasons, representative government elections are more efficient and less costly to produce.

D. Typical Land Use Initiatives and Referenda

Theoretically, electors can consider a wide variety of land use measures through the initiative and referendum process.[66] Generally, however, these decisions fall into three broad categories, distinguished by the size of the property and scope of the proposed change.[67] These categories are discussed in greater detail below.

1. Site-Specific Rezonings - "How dare you put a Wal-Mart next door"

Arguably, the most prevalent source of conflict between local voters and developers arises when local government changes or amends the zoning map to designate a new land use on a parcel of property previously prohibited by the applicable zoning ordinance, but allowed under the comprehensive plan. If permitted, the new use is defined as a rezoning.[68] While rezoning from a lower to a higher intensive use may draw fire from some individuals, 'down-zoning' from a higher to lower intensive use (i.e., commercial to residential) can also create

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[63] Cynthia L. Fountain, *Note: Lousy Lawmaking: Questioning the Desirability and Constitutionality of Legislating By Initiative,* 61 S. Cal. L. Rev. 733, 745 (1988).

[64] *Id.* at 751 (In 1971-72, initiative proponents filed 3,024,251 signatures in Los Angeles County. The cost of verifying these signatures was $589,890, which is approximately twenty cents per signature. The verification work was accomplished by 600 employees working around the clock.).

[65] *Id.* (The costs of a 1973 special election in California topped $30 million.).

[66] *See* Selmi, *supra* n. 8 at 5 (discussing five broad categories of land use decisions most often subjected to initiative and referendum).

[67] *Id.*

[68] 7 Patrick J. Rohan, Zoning and Land Use Controls § 50.03[7] (1983).

conflict between concerned parties.[69] Rezonings can be controversial, as they are legal recognitions of a previously proscribed land use.[70]

The rezoning dispute, pitting affected citizens against developers, typically centers around the localized impacts of the new land use, as neighboring citizens and concerned landowners usually raise issues of increased traffic, unappealing aesthetics, and lowering of property values brought on by the new development. Because rezoning may represent a significant change in the character of the community, citizen opposition should be expected and is often vehement in character.[71] Depending on the jurisdiction, local voters can either seek to undo the rezoning by initiative or invalidate the local legislative body's rezoning measure by referendum.

a. "Spot Zoning" - Islands of Difference in Seas of Sameness

Site-specific rezoning must be made in accordance with the local comprehensive plan; otherwise the measure may be invalidated as 'spot zoning'. Technically, the term 'spot zoning' describes an invalid zoning amendment because it is not in accordance with the comprehensive plan. [72] However, it may also carry with it undertones of political favoritism between city council members and developers.[73] Regardless, spot zones represent a theoretical limitation on the power of the governing body to rezone because courts have recognized enabling acts as prohibiting the division of territory into small pieces or 'islands' which are incompatible with surrounding land uses.[74] However, because some courts defer to the discretion of the local

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[69] Caves, *supra* n. 7 at 31 (stating property owners tend to resent down-zoning because it results in the reduction in the value of their property).

[70] Nicolas M. Kublicki, *Land Use By, For, and Of the People* 99,113 Pepperdine L. Rev. Vol. 19 (1991).

[71] *See Fasano v. Board of County Commissioners,* 507 P.2d 23 (Or. 1972) In *Fasano,* landowner defendants sought to have their land rezoned from single-family residential to planned residential use in order to accommodate the land as a mobile home park. Plaintiffs, who owned neighboring land opposed the zoning change because they thought a mobile home park would have negative effects upon their property values. The trial court invalidated the rezoning on the grounds that the Board had not shown sufficient changes in the neighborhood to allow a rezoning. The appellate court affirmed, noting that the rezoning was inconsistent with the comprehensive plan, which designated the land as single-family residential. The Oregon Supreme Court affirmed and struck down the rezoning, stating it would be ignoring reality to rigidly view all zoning decisions by local governing bodies as legislative acts to be accorded full presumption of validity and thus shielded from less constitutional scrutiny by the theory of separation of powers.

[72] *Langer v. Planning & Zoning Com.*, 163 Conn 453, 313 A.2d 44 (1972). Spot zoning is further defined as the process of singling out a small parcel of land for a use classification totally different from that of the surrounding area, for the benefit of the owner of such property and to the detriment of other owners. *Jones v. Zoning Bd. of Adjustment*, 32 NJ Super 397, 108 A.2d 498 (1954).

[73] Kublicki, *supra* n. 69, at 114 (stating that "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"). *See* Robert H. Freilich & Dereck B. Guemmer, *Removing Artificial Barriers to Public Participation in Land-Use Policy: Effective Zoning and Planning by Initiative and Referenda,* 21 Urb. Law. 511, 514 (1989).

[74] *See Marshall v. Salt Lake County*, 141 P.2d 704 (Utah 1943).

governing bodies, invalidating a rezoning measure as a spot zone remains illusive in some jurisdictions.[75]

2. General Plan Amendments

Many jurisdictions are required to adopt a master or general plan. In many jurisdictions, development must be "consistent" with the plan and any changes in land use can occur only if the zoning and the plan are compatible. In such jurisdictions, land use decisions brought under initiative or referendum no longer focus solely on the zoning ordinance, but rather on amending the general plan. If, for example, local government allows a developer to rezone his land to accommodate a more intensive use and citizens pass a referendum overturning that rezoning decision, the opponents' efforts may be in vain if the resulting zoning is inconsistent with the general plan.[76] Therefore, it behooves the electorate and local governments to know the appropriate method for changing the zoning of a particular parcel, as those changes must be consistent with the general plan in such jurisdictions.

3. Automatic Referrals: "Closing the Door Behind Themselves"

These types of initiatives do not attempt to change the existing general plan or the municipality's zoning ordinances. Rather, the voters use the initiative to preserve and protect the current land use arrangements from future changes in local political leadership and community composition due to the influx of new voters. Typically, this type of initiative requires voter approval of significant changes to the existing zoning or the current general plan.[77] Although automatic referral initiatives validate current planning policies, they increase the state's election costs, and decrease the flexibility in local land use decision making, as landowners and developers must obtain the approval of both elected representatives and the voters before their proposed change is deemed valid.

III. Application of Initiatives and Referenda to the Zoning Process

Because initiatives and referenda are blunt instruments used to override traditional representative decision making, it should come as no surprise that limitations are imposed on their use, especially in the land use process. While each jurisdiction has its own tests to determine the validity of direct electoral decisions, generally, three requirements must be met before such decision is declared valid: (1) initiatives and referenda must be applied only to decisions that are 'legislative' in nature;[78] (2) initiatives and referenda must fulfill the procedural requirements of state zoning enabling acts; and (3) all zoning decisions must be made in accordance with the jurisdiction's comprehensive plan. Not surprisingly, the inability of initiative and referendum proponents to satisfy these general requirements spawn many difficult legal problems[79], often resulting in litigation.

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[75] *Id.*

[76] Selmi, *supra* n. 10 at 6 (citing *Fox v. Polk County Bd. of Supervisors,* 569 N.W. 2d. 503 (Iowa 1997).

[77] In respect to zoning, the automatic referral system was upheld by the Supreme Court in *City of Eastlake v. Forest City Enterprises, supra* n. 3.

[78] Rathkopf, *The Law of Zoning and Planning* §40.6, Vol. 3 (2001). *See also* Kublicki, *supra* n. 66, at 117 (1991).

[79] Problems resulting from the inability to satisfy these three requirements include (1) a deep jurisdictional split on what constitutes a legislative zoning act; (2) the potential inability of initiative and referenda to fulfill procedural requirements mandated by zoning enabling acts; (3) the lack of regard accorded to

Arguably, the largest hurdle initiative supporters face in validating their proposed measure is the requirement that initiatives and referenda be characterized as "legislative" in nature. Therefore, the remaining sections of this article focus on how state courts in the Rocky Mountain region, as well as California, determine the character of the initiative.

A. The Legislative Act Requirement: Generally

One of the principal issues in deciding whether a land use measure can be altered or reversed by initiative or referendum is determining its legislative or quasi-judicial character.[80] Stated simply, initiatives and referenda are applicable only to actions that are legislative in nature[81], as the initiative and referendum powers are reservations of legislative powers by the people.[82] On the other hand, initiatives and referenda may not be applied to government actions, which are administrative or adjudicative in nature, as these government actions must comply with procedural due process requirements, which land use initiatives inherently lack. However, while the national and state legislatures normally use only their legislative powers, local legislative bodies often undertake administrative or adjudicatory functions, such as issuing permits and licenses. Therefore, the division between legislative and administrative acts is blurred at the local level, underscoring the need to determine the character of the land use measure.[83]

The legislative-administrative distinction is the product of a line of Supreme Court cases beginning with Londoner v. City and County of Denver[84] and Bi-Metallic Investment Co. v. State Board of Equalization.[85] In Bi-Metallic, the Court ruled that decisions of legislative bodies that

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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. Kublicki, *supra* n. 66, at 117 (1991).

[80] David L. Callies, Nancy C. Neuffer, Carlito P. Caliboso, *Ballot Box Zoning: Initiative, Referendum and the Law,* 39 Wash. U.J. Urb. & Contemp. L. 78 (Spring 1991).

[81] 72 A.L.R.3d 991,*3. *See Fasano v. Board of County Commissioners*, 507 P.2d 23, 25-6 (Or. 1973) (stating "[a]ny meaningful decision as to the proper scope of judicial review of a zoning decision must start with the characterization of the nature of that decision. The majority of jurisdictions state that a zoning ordinance is a legislative act.")

[82] In *City of Eastlake v. Forest City Enterprises, Inc.* 426 U.S. 668, 672 (1976), the Court concluded 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."

[83] Kublicki, *supra* n. 69, at 118 (1991).

[84] 210 U.S. 373 (1908) In *Londoner*, the City of Denver was conferred power to make local improvements and to assess the cost on property benefiting from those improvements. A tax was levied against landowners for street paving because their property abutted the street. The issue was whether the failure to allow landowners an opportunity to be heard during the tax assessment proceedings was a violation of due process under the Fourteenth Amendment. The Court ruled that where the legislature authorizes another body to tax, due process applies and the taxpayer shall have an opportunity to be heard. Essentially, the government's action was an adjudicative decision involving a small number of people.

[85] 239 U.S. 441 (1915) In *Bi-Metallic*, a real estate owner challenged an order of the State Board of Equalization and the Colorado Tax Commission that would have increased the valuation of all taxable property in Denver by 40 percent. The real estate owner plaintiff complained that he was not afforded an opportunity to be heard, as the order would effectively take his property without due process of law, contrary to the Fourteenth Amendment. In denying the plaintiff's arguments, the Court reasoned that

affect "more than a few people" are exempt from procedural due process requirements.[86] In contrast, actions that impact only a few people are deemed administrative in nature and beyond the scope of initiative and referendum, as procedural due process is required.

Although the Court has distinguished between administrative rulemaking and adjudication[87], further guidance from the Court on applying this distinction to the zoning context has not been forthcoming. Arguably, the Supreme Court missed an excellent opportunity to set forth a uniform framework to guide states in their legislative-administrative characterizations of zoning acts in City of Eastlake v. Forest City Enterprises.[88] Rather than address this issue, the Court reinforced the split between the states by ruling that state law characterizations of legislative acts are binding.[89] Today, controversy exists in many states on whether a simple zoning amendment or rezoning is a legislative or administrative act.[90] In this regard, Justice Stevens' dissent in Eastlake is representative of the enormous present day jurisdictional split in determining the character of the local government's actions.[91] Justice Stevens, who along with Justice Brennan opposed the majority's reliance on Ohio's determination that rezoning constitutes a legislative act, wrote "I think it is equally clear that the popular vote is not an acceptable method of adjudicating the rights of individual litigants."[92] The issue has largely been left to the states to determine.

B. Individual State Tests Used to Determine Legislative or Administrative Character

Because the Court's guidelines in Bi-Metallic predate modern land use planning and zoning, states created a variety of tests to characterize a government action as either legislative or administrative in nature.[93] Generally, these tests fall into four categories; (1) the policy creation v. implementation test; (2) the permanent v. temporary distinction test; (3) blanket labeling of all zoning decisions as legislative; and (4) a combination of factors test.[94] However,

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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.

[86] *Id.*

[87] *See United States v. Florida East Coast Railway Co.*, 410 U.S. 224 (1973) (holding the Interstate Commerce Commission's denial of an oral hearing was rulemaking in nature rather than adjudicative because the Commission made a legislative type judgment...rather than adjudicating a particular set of disputed facts. Consequently, the "hearing" requirement did not necessarily include the right to present evidence orally or cross-examine witnesses.) *Califano v. Yamasaki,* 442 U.S.682 (1979). *See also,* Edward J. Sullivan, *Return of the Platonic Guardians: Nollan and Dolan and the First Prong of Agins,* 34 Urb. Law. 39, 61-67 (Winter, 2002).

[88] *Supra* n. 3.

[89] *Id.* at 673-74.

[90] Oregon has approached the issue with great judicial finesse by characterizing the adoption of comprehensive plans as legislative in nature, but characterizing the adoption of site-specific zonings as quasi-judicial, rather than legislative or administrative. *See Fasano v. Board of County Commissioners,* 507 P.2d at 26-27 (Or. 1972).

[91] 426 U.S. 668, 692 (1976) (Stevens, J. dissenting).

[92] *Id.* at 693 (Steven, J. dissenting).

[93] *Id.*

[94] Kublicki, *supra* n. 69, at 123 (1991).

as seen below, these tests are often used by states as components of a larger framework designed to determine the character of the government action.

Under the policy creation test, a government action that creates policy is deemed to be legislative in nature. If, however, the government's action merely implements policy, the state will characterize the action as administrative.[95] Under this test, the adoption of comprehensive plans is regarded as a legislative act because it involves the creation of land use policy, whereas the enactment of specific zoning or rezonings are administrative in nature because they implement the policies underlying the comprehensive plan.[96] Elements of the policy creation test can be seen in Utah's 'material variance' requirement, and the second prong of the Colorado framework. In a roundabout fashion, Arizona has also adopted the policy creation test as a way of determining whether rezonings are referable under a general plan.[97]

The permanent v. temporary distinction test is similar to the policy creation test, but relates to the permanency of the government action. If the government's action has a permanent impact on the community, such as the adoption of a comprehensive plan, it is characterized as legislative, but if the impact is temporary, that action is deemed to be administrative in nature.[98] Under the Colorado framework, considerations of the permanency of the government's action are found in the first prong of the state court's analysis.

Standing in stark contrast to the policy creation test and the permanency test discussed above is the blanket labeling test. Under this test, states, such as California, simply label all zoning acts as legislative in nature, regardless of whether the zoning action concerns a comprehensive plan amendment or site-specific rezoning.[99] Characterizing all zoning applications as legislative in nature makes the court's analysis much easier, as it obviates the need to apply complicated tests to a particular factual situation. However, there are problems with such an approach. First, some rezonings that may be truly administrative in nature, are

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[95] *Id.* at 125. The policy creation v. implementation test may be thought of as an extension of Holmes' *Bi-Metallic* test, as courts classify decisions that affect many people as policy decisions, whereas courts classify decisions that affect only a few people as decisions that simply implement laws.

[96] *Id.*

[97] *Fritz v. City of Kingman*, 191 Ariz. 337; 957 P.2d 337 (1998).

[98] Kublicki, *supra* n. 69, at 127 (1991).

[99] *See Arnel Development Co. v. City of Costa Mesa,* 620 P.2d 565 (Cal. 1980) (holding all zoning acts as legislative, apart from variances and special use permits).

inappropriately labeled as legislative for purposes of speeding up the legal process. Additionally, this approach leads to a pro-initiative stance by the courts in states that employ its use, which may, ironically, increase the burdens on the state.

Finally, some states, such as Colorado, combine elements of each test to create an analytical framework to determine the nature of the local legislature's actions. Such an approach avoids the arbitrariness of the blanket labeling test, but requires the courts to undertake an exhaustive search for truly legislative actions. As a result, legal certainty may be sacrificed in the process, if, for example, the results of the combined tests conflict.

Following is a brief table of the relevant tests and case law used to characterize such acts in Colorado, Utah, Arizona, and California.

Land Use Initiative and Referendum at a Glance

Colorado

INITIATIVE

General Status

-- Courts favor direct democracy participation. The State Assembly protects the initiative and referendum powers. See C.R.S. § 31-11-101

-- Colo. courts hold that while initiative actions do not dispense with the notice and hearing requirements of the 14th. Amdt., they meet them through the election campaign and debate of opposing opinions. (*Margolis v. District Court, 638 P.2d 297, 303 (Colo. 1981)).*

Distinguishing Features and Tests used by Colorado Courts

-- Three Pronged Test to determine Legislative v. Administrative Acts:

1. Actions that relate to subjects of permanent or general character are legislative, while those that are temporary in operation and effect are not. (See City of Idaho Springs v. Blackwell, 731 P.2d 1250, 1254 (Colo. 1987).
2. Acts necessary to carry out existing legislative policies and purposes are admin. in nature, while acts declaring public policy are deemed legis. in nature. (See Witcher v. Canon City, 716 P.2d 445, 449 (Colo. 1986).
3. If the original act was legislative in character, an amendment to the original act must also be legislative. (*Margolis v. District Court, 638 P.2d 297, 303 (Colo. 1981)).*

REFERENDUM

General Status

--The Referendum Process is available for use in the Land Use context.

Distinguishing Features of the Referendum Process

-- Conditional Use Permits

Conditional use permits are a legislative act subject to referendum. *(See Citizens for Quality Growth Petitioners' Committee v. City of Steamboat Springs, 807 P.2d 1197 (Colo. App. 1990)).*

-- Site and Development Plans

Site and development plans are not legislative in character, and not subject to initiative or referendum. (*See Committe of the Petitioners of the North Boulder Village Center v. City of Boulder, Case No. 96CV923, 96CV1567, Boulder County Dist. Court).*

Land Use Initiative and Referendum at a Glance

Utah

INITIATIVE

General Status

-- The Utah Courts do not allow land use initiatives. Because the exercise of municipal zoning authority must be preceeded by notice and public hearing, voters are prevented from initiating rezoning. *(See Wilson v. Manning, 657 P.2d 251, 253 (Utah 1982))*

REFERENDUM

General Status

-- Referendum of zoning issues is allowed, as notice and public hearing requirements are satisfied under the referendum process.

Distinguishing Features and Tests used by Utah Courts

-- Legislative v. Administrative Acts

General Purpose and Policy: Does the govt. action *create* policy or *implement* policy? (Create policy = legislative; Implements policy = administrative). *See Citizen's Awareness Now v. Marakis, 873 P.2d 1117 (1994).*

Material Variance: A material variation from the basic zoning law constitutes the making of new law, which is a legislative act. *See Citizen's Awareness Now v. Marakis, 873 P.2d 1117 (1994); Wilson v. Manning, 657 P.2d 251, 253 (Utah 1982).*

Appropriateness of Voter Participation: Provided the previous two elements are satisfied, the zoning change will nevertheless be ruled administrative if voter participation is deemed inappropriate. Two sub-factors:

a.) ***Issue Complexity***: Is the matter so complex that voters should be required to entrust the decision to their elected representatives?

b) ***Practical Exigencies of the City Govt.*** Every-day zoning changes are likely not appropriate for voter referenda, while rare or unusual changes that "significantly alter the basic nature of the community" are more likely to be proper referenda subjects.*See Citizen's Awareness Now v. Marakis, 873 P.2d 1117 (1994).*

Land Use Initiative and Referendum at a Glance

Arizona

INITIATIVE

General Status

-- Initiatives cannot be used in the land use context in Arizona. The Arizona courts hold the initiative process is in irreconciable conflict with the Due Process Clause of the 14th Amdt. Zoning by initiative also conflicts with state delegation of zoning powers under A.R.S. § 9-461 and the State Zoning Enabling Act.

REFERENDUM

General Status

-- The Arizona Constitution reserves the referendum power to the people. *Ariz. Const. Art. IV, § 1(8).* Therefore, a referendum is a proper vehicle in which to overturn a land use measure.

Distinguishing Features and Tests used by Arizona Courts

-- No specific test on legislative v. administrative acts.

-- Arizona courts consistently hold that zoning decisions are legislative acts subject to referendum. (*See Pioneer Trust Co. v. Pima County, 811 P.2d 22, 25 (1991); Wait v. City of Scottsdale, 618 P.2d 601, 602 (1980); City of Phoenix v. Oglesby, 537 P.2d 934 (1975).*

Rezonings Under a General Plan

-- The Arizona courts carefully scrutinize a municipalities general plan first in order to determine if subsequent govt. actions, which are based on the plan, are legislative or administrative in nature. *See Fritz v. City of Kingman*, 957 P.2d 337 (1998).

-- In *Fritz v. City of Kingman*, 957 P.2d 337 (1998), the Arizona Supreme Court ruled that the City's general plan was not legislation, as the Plan was too general, and lacked enough specificity, to be considered *the* legislative act that would render subsequent zoning decisions mere administrative implementations.

-- The Arizona Supreme Court is willing to scrutinize the municipality's general plan in an effort to fortify its determination that rezonings are legislative acts subject to referenda. In order to realize a general plan's policies and preferences, a municipality must undertake specific actions, adopt specific ordinances, and apply specific uses to properties.

-- Arizona's consistent determinations that rezonings are legislative acts subject to referenda is remarkably similar to California's 'blanket-labeling' test of initiative discussed *infra*, but with an added layer of scrutiny and analysis.

Land Use Initiative and Referendum at a Glance

California

INITIATIVE

General Status

-- Widespread use of direct democracy is an important tool in shaping land use policy. *See Anthony Saul and Kathline J. King, Ballot Box Planning: Land Use Planning Through the Initiative Process in California, 21 SW. U. L. Rev. 1 (1992).*

-- California affords great deference to initiatives, calling it 'one of the most precious rights of our democratic process' and declaring that 'if doubts can reasonably be resolved in favor of the use of this reserved power, our courts will preserve it.' *See Mervynne v.Acker, 189 Cal. App. 2d 558, 556 (1961); Associated Home Builders v. City of Livermore, 557 P.2d 473, 477 (1976).*

Distinguishing Features and Tests used by California Courts

No Notice and Hearing Requirements

-- In *Associated Home Builders v. City of Livermore, 557 P.2d 473, 477 (1976),* the court concluded the legislature did not intend the notice and hearing requirements of zoning law to apply to the use of zoning initiatives. The Court expressly separated the initiative power of the people from the procedural rules under which zoning regulations are adopted by the local government. More importantly, the court decided that the exercise of the initiative power must prevail over statute which purports to limit the use of initiatives because the initiative power emanates from the California Constitution, rather than from statute.

Rezonings of Individual Parcels

-- In *Arnel Development Co. v. City of Costa Mesa, 620 P.2d 565 (Cal. 1980),* the California Supreme Court emphatically held that zoning ordinances, regardless of parcel size, are legislative acts, and, thus, proper subjects of initiatives. The Court also issued a pragmatic, albeit rigid test, which distinguishes legislative from adjudicative acts. Simply, any matter which changes the zoning ordinance is deemed legislative in nature, without regard to parcel size or the number of people affected. Another official action, like a variance, or subdivision map approval, are deemed administrative, and not subject to a challenge by initiative

Limitations on the Use of Initiative in California

-- Generally - Initiatives must involve a local matter and cannot be preempted by state or federal law.

--Consistency with the Comprehensive Plan: California requires consistency between zoning changes adopted by the legislative body and those adopted through initiative and referenda. *See deBottari v. Norco City Council, 217 Cal. Rptr. 790 (Cal. Ct. App. 1985); Lesher Communications, Inc. v. City of Walnut Creek, 52 Cal. 3d 531 (1990); Marblehead v. City of San Clemente, 226 Cal. App. 3d. 1504 (1991).*

IV. Conclusion

Growing out of the pervasive distrust of corrupt local and state governments during the late nineteenth century, the direct democracy tools of initiative and referenda present challenging obstacles to local governments when they make land use decisions. The United States Supreme Court's Eastlake decision, while ratifying the use of referendum, did not provide a workable framework to guide subsequent state court decisions when confronted with electoral challenges to local zoning ordinances. Consequently, state courts have largely been left alone to deal with the application of direct democracy to land use decisions. As a result, the states remain greatly divided on whether direct democracy may be properly applied to rezonings.

The chasm between the states is especially large on the legitimacy of the zoning initiative. Because voter initiated legislation suffers from lack of due process, several states, such as Arizona and Utah, proscribe its use in the zoning process. In these states, direct democracy challenges must be made under the referendum process, showing a reluctance to compromise due process requirements in the land use context. Arizona goes a step further, prohibiting zoning by initiative not only because due process requirements are lacking, but also because direct legislation is incompatible with state zoning enabling statutes. Due to the growing body of case law in these jurisdictions, prohibitions against the use of initiatives in these jurisdictions remains firmly entrenched, and the possibility of contrary judicial interpretation is highly unlikely.

In other states, however, the use of initiative to undo unwanted local zoning ordinances is thriving. In these states, such as Colorado and California, the widespread use of initiatives has become a popular tool in shaping local land use policy. For a variety of reasons, these jurisdictions remain reluctant to impose procedural obstacles on the use of initiative. In sharp contrast to states that proscribe the use of initiatives because they fail to observe necessary due process requirements, court decisions in Colorado hold that due process requirements are met through the election campaign and debate of opposing opinions. Similarly, California courts hold that the initiative power is reserved by the people under the state's constitution and cannot be limited by statute, which effectively preserves and protects the initiative from control by the legislature. Under such liberal interpretations, the ability of the voters to initiate legislation in these two states arguably remains a legitimate and effective check against inappropriate land use decisions.

The Supreme Court's decision in Eastlake also reinforced the split between the states by ruling that state law characterizations of legislative acts are binding. The Court failed to set forth a uniform framework to guide states in their legislative-administrative characterizations of zoning actions. Consequently, numerous judicially created tests now exist to determine the nature of the local legislative body's actions. Some states, like California, approach this determination by designating any matter which changes the zoning ordinance as legislative in nature. Although such an interpretation arguably provides stability and certainty to the process, such a blanket approach may incorrectly deem some actions as legislative when in fact they are administrative in nature. Some states, such as Colorado and Utah, filter out administrative acts by employing a combination of factors test, which judge the government action using a number of different standards. Utah arguably goes the furthest in protecting government actions by analyzing the appropriateness of voter participation, determined by considering the complexity of the issue and any practical exigencies that played a role in the legislative body's decision. Because these tests vary widely, determining whether a local government action is truly legislative in nature has become a fact intensive inquiry, often resulting in inconsistent results from state to state.

Arguably, the Court in Eastlake missed an excellent opportunity to rectify these problems by providing a uniform framework.

However, the growing differences among the states on the use of direct democracy cannot be completely laid at the feet of the Supreme Court. Representative governments should bare their fair share of responsibility for failing to recognize the raw will of their constituents, which they arguably fail to do in a wide variety of situations. City Councils can, and should, take the voter's concerns into consideration, refine them through debate, and implement zoning ordinances that strike an appropriate balance between the needs and desires of the community. Likewise, self-interested initiative minded citizens can inflict damage upon the state's framework through initiative abuse and frivolous measures.

While the efficacy of allowing direct democracy to affect local land use policy remains controversial, its use significantly impacts our representative form of government. By installing the electorate as a check against unpopular decisions of our elected representatives, our local legislative bodies are relegated to the role of providing 'advisory' recommendations to the public at large which can then decide to ratify its decisions. In the process, planning expertise is supplanted, as the incentive for thorough project evaluation is obviated by subsequent electoral consideration. Regrettably, the long term effect of zoning by initiative or referendum may be to freeze the existing city zoning map, as changes must run the electoral gauntlet. Given its modern day complexities, it is difficult, if not impossible, to reconcile ballot box zoning with our American system of representative democracy, which is based on the idea that the unrestricted will of the people will make inferior and ineffective laws. Direct democracy in the land use context, unfortunately, produces such a result.