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Zoning -- Adjudication by Labels: Referendum Rezoning and Due Process

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little sense if the ultimate goal is to protect these plans and ensure their survival.

The issue in the *Williams* case is a close one and perhaps should receive specific congressional attention; in the absence of more illuminating congressional guidance, however, encouragement of pension and profit-sharing plans and the preservation of their integrity demand a judicial definition of "payment" that includes promissory notes within its ambit—a broader definition than that adhered to for almost thirty years by the Tax Court and, more recently, by the Seventh Circuit. Admittedly this result would have to be achieved at the expense of a strict statutory construction; however, this broader definition of "payment" would be tempered by an inquiry into the underlying worth of the notes as suggested by the *Slaymaker-Sachs* approach. This result would encourage more corporations to adopt or retain pension plans, which is, after all, the basic purpose of section 404(a).

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Zoning — Adjudication by Labels: Referendum Rezoning and Due Process

In recent years, the use of procedural devices providing for direct citizen participation[1] in land use planning decisions has proliferated.[2] The use of these devices to regulate change in land use patterns previously established by zoning ordinances[3] has given rise to due process

1. Popular participation is facilitated by the availability of two devices: the initiative and the referendum. The initiative permits citizens to legislate directly by having a proposed measure placed on the ballot and submitted to a popular vote. The referendum permits citizens to have measures already approved by a legislative body submitted to voter review. The operation of these devices is usually conditioned on the receipt of appropriate petitions requesting the particular initiative or referendum. Comment, *The Initiative and Referendum's Use in Zoning*, 64 CALIF. L. REV. 74, 74 nn.1 & 2 (1976).

2. *See, e.g.*, City of Scottsdale v. Superior Court, 103 Ariz. 204, 439 P.2d 290 (1968); San Diego Bldg. Contractors Ass'n v. City Council, 13 Cal. 3d 205, 529 P.2d 570, 118 Cal. Rptr. 146 (1974), *appeal dismissed*, 96 S. Ct. 3184 (1976); Associated Home Builders v. City of Livermore, 41 Cal. App. 3d 677, 116 Cal. Rptr. 326 (Ct. App. 1974); West v. City of Portage, 392 Mich. 458, 221 N.W.2d 303 (1974); Bird v. Sorenson, 16 Utah 2d 1, 394 P.2d 808 (1964).

3. Land use restrictions imposed by a local zoning ordinance can be altered by the use of three procedures. When the application of zoning restrictions to a particular

challenges attacking such popular participation as an arbitrary and unreasonable exercise of the police power. The United States Supreme Court had not addressed itself to this issue in almost fifty years,[4] and its early decisions did not provide a meaningful due process test. In *Eastlake v. Forest City Enterprises, Inc.*[5] the Court confronted the question whether the imposition of a mandatory[6] referendum process on those seeking amendment of a comprehensive zoning ordinance was such an unreasonable exercise.[7] In upholding the referendum requirement by relying on state law and by reciting rather than analyzing the relevant federal precedent, the Court failed to provide a more precise due process measure of constitutionality. The decision strongly suggests, however, that rezoning by referendum will be upheld against similar future challenges, even when there is little or no support in the record to justify community-wide decisionmaking.

Plaintiff[8] in *Eastlake* brought suit in the Ohio Court of Common Pleas to challenge the constitutionality[9] of a newly enacted provision

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parcel is unusually harsh, a variance may be obtained from a local administrative body to waive or alter the restriction. 5 N. WILLIAMS, AMERICAN PLANNING LAW § 129.02 (1975). Also, a local ordinance may provide that certain uses, while not permitted as of right, may be allowed by special permit upon the approval of a local administrative body. The administrative body must evaluate the proposal according to specified criteria not necessarily related to hardship. *Id.* § 148.01. In addition, the zoning ordinance itself may be amended. *Id.* § 147.01. The initiative and referendum cannot be utilized to affect the availability of variances or special permits. The grant or denial of a request for a variance or special permit is an administrative act; the initiative and referendum are restricted in application to powers vested in the legislative body. *See, e.g.*, note 20 *infra*.

4. Until this year, the Court's most recent statement was to be found in Washington *ex rel.* Seattle Title Trust Co. v. Roberge, 278 U.S. 116 (1928).

5. 96 S. Ct. 2358 (1976).

6. The referendum provision involved in *Eastlake* is atypical in that the requirement of voter review is applied to an entire class of legislation, thereby obviating the need for gathering petitions to combat a legislatively approved amendment. *See* note 12 *infra*.

7. 96 S. Ct. at 2362-63. The court below stated the claim as follows: "[A]ppellant's narrow claim is that Eastlake's charter provision constitutes a delegation of legislative power to the people, and *as such* violates the requirement that the police powers be exercised in a reasonable and unarbitrary fashion." Forest City Enterprises, Inc. v. City of Eastlake, 41 Ohio St. 2d 187, 191, 324 N.E.2d 740, 744 (1975) (emphasis added).

8. Plaintiff was an Ohio corporation and the owner of an eight acre parcel of land situated in the city of Eastlake, Ohio. 96 S. Ct. at 2360.

9. Challenges were made on both state and federal constitutional grounds. In addition to the fourteenth amendment claim, plaintiff asserted that the ordinance was in violation of the referendum provisions of OHIO CONST. of 1851, art. II, § 1(f) (1912). Plaintiff also challenged the requirement of 55% voter approval, the requirement of having to bear the costs of the referendum, and the applicability of the referendum provision (which had been incorporated into the city charter only after its application for rezoning) to his request. 96 S. Ct. at 2361 nn.2-4.

of the Eastlake city charter[10] that required that plaintiff's request for rezoning[11] its property be submitted to a city-wide referendum after city council approval of the proposed change.[12] Both the court of common pleas and the Ohio Court of Appeals sustained the validity of the ordinance against the due process challenge.[13]

The Ohio Supreme Court reversed. After finding that the type of rezoning requested by plaintiff was a legislative function under Ohio law,[14] the court interpreted a line of United States Supreme Court due process cases from the early 1900's[15] to mean that "[a] reasonable use of property, made possible by appropriate legislative action, may not be made dependent upon the potentially arbitrary and unreasonable whims of the voting public."[16] Applying this test, the court found that the charter provision "blatantly delegated legislative authority"[17] in contravention of the due process clause of the fourteenth amendment.[18]

On certiorari, the United States Supreme Court reversed,[19] upholding the constitutionality of the charter provision on three grounds.

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10. EASTLAKE, OHIO CHARTER art. VIII, § 3 (1971), *quoted in* 96 S. Ct. at 2368 n.8.

11. Plaintiff had requested that its parcel be rezoned from industrial to multi-family, high-rise residential use. 96 S. Ct. at 2360; 41 Ohio St. 2d at 187, 324 N.E.2d at 742.

12. The new ordinance provides in pertinent part:

> [A]ny change to the existing land uses or any change whatsoever to any ordinance, or the enactment of any ordinance referring to other regulations controlling the development of land . . . cannot be approved unless and until it shall have been submitted to the Planning Commission, for approval or disapproval. That in the event the city council should approve any of the preceding changes, or enactments . . . it shall not be approved or passed by the declaration of an emergency, and it shall not be effective, but it shall be mandatory that the same be approved by a 55% favorable vote of all votes cast of the qualified electors of the City of Eastlake . . . .

96 S. Ct. at 2368 n.8.

13. 41 Ohio St. 2d at 188, 324 N.E.2d at 742. The Court of Common Pleas struck the cost-bearing provision. Defendant did not appeal this holding to the state supreme court, and plaintiff did not appeal the rejection of its contention that the ordinance could not be applied to its particular request. *Id.*

14. *Id.* at 189-90, 324 N.E.2d at 743.

15. Washington *ex rel.* Seattle Title Trust Co. v. Roberge, 278 U.S. 116 (1928); Thomas Cusack Co. v. City of Chicago, 242 U.S. 526 (1917); Eubank v. City of Richmond, 226 U.S. 137 (1912). The latter two are discussed in text accompanying notes 31-42 *infra.*

16. 41 Ohio St. 2d at 195, 324 N.E.2d at 746.

17. *Id.* at 196, 324 N.E.2d at 746.

18. Assuming that the Ohio Supreme Court properly interpreted the due process line of cases cited in note 15 *supra,* the result it reached does not necessarily follow. Since the charter had been amended *before* the city council approved plaintiff's rezoning proposal, it is arguable that the council action never "made possible" the land use proposed, but rather that it only "made possible" the necessity of a referendum.

19. Justices Brennan, Powell and Stevens dissented.

First, Chief Justice Burger, writing for the Court, interpreted the Ohio Constitution as reserving, rather than delegating, to the citizens of Ohio the referendum power over legislative affairs.[20] There having been no delegation of power, the Court reasoned, there was no delegation in violation of the due process clause.[21] Second, the Court accepted as binding for the purpose of its due process analysis the finding of the Ohio court that the rezoning process at bar was legislative in nature[22] and summarily concluded that the only due process doctrine available to plaintiff was that of freedom from an unreasonable zoning classification, as opposed to freedom from an unreasonable procedure for obtaining a (new) classification.[23] Finally, the Court distinguished the "standardless delegation of power" struck down in the due process cases relied on by the Ohio court from the Eastlake referendum process and its concomitant virtues.[24] While borrowing language from two recent federal decisions[25] to support this latter distinction, the Court failed to provide any factual analysis to demonstrate comparability between the case at bar and the cases it cited.

In dissent, Justice Stevens[26] ignored the delegation of power issue entirely, arguing instead that the decision whether to rezone[27] a particular parcel of land is, absent some evidence in the record of a potential for community-wide impact, adjudicative in nature.[28] He

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20. OHIO CONST. art. II, § 1(f) provides in part: "The initiative and referendum are hereby reserved to the people of each municipality on all questions which such municipality may now or hereafter be authorized by law to control by legislative action . . . ."

21. 96 S. Ct. at 2363. Although the language of art. II, § 1(f), quoted in note 20 *supra*, does suggest this interpretation, *see* Note, *Mandatory Referendum for Zoning Amendments—Unlawful Delegation of Legislative Power—Denial of Due Process*, 9 AKRON L. REV. 175, 183 (1975), it is arguable that the Ohio Supreme Court implicitly rejected this conclusion in its finding that a delegation had occurred. 41 Ohio St. 2d at 196, 324 N.E.2d at 746.

22. 96 S. Ct. at 2362.

23. *Id.* at 2363 (citing Euclid v. Ambler Realty Co., 272 U.S. 365 (1926)).

24. 96 S. Ct. at 2364-65.

25. James v. Valtierra, 402 U.S. 137 (1971); Southern Alameda Spanish Speaking Org. v. Union City, 424 F.2d 291 (9th Cir. 1970). The latter is discussed in text accompanying notes 55-61 *infra*.

26. Justice Brennan joined with Justice Stevens in dissent. Justice Powell wrote a separate dissenting opinion.

27. Both Justice Stevens and the Chief Justice relied heavily on state court decisions to support their respective legislative/non-legislative dichotomies. 96 S. Ct. at 2362, 2366, 2370. The significant distinction between the two views is that Justice Stevens would categorize according to the prospective impact of the rezoning, *id.* at 2371, while Chief Justice Burger would take a formalistic approach, adopting as controlling the state law determination, *id.* at 2362.

28. "I have no doubt about the validity of the initiative or the referendum as an

asserted that this conclusion should result regardless of the "legislative" label affixed to the activity by the state court.[29] Justice Stevens concluded that as an adjudicative mechanism, the referendum is an inappropriate device for disposition of the rezoning request because of its inherent inability to afford the applicant requisite procedural safeguards.[30]

Plaintiff's due process claim arose out of a line of Supreme Court cases starting with *Eubank v. City of Richmond*.[31] In *Eubank* the Court invalidated a city ordinance that permitted a limited number of neighboring property owners to mandate, by petition, the establishment of a building line, a line beyond which the owner could not build, on a specific parcel.[32] The unreasonableness of the ordinance, the Court found, rested in the ability of a few persons to exercise unchecked "control" over the property rights of another, control that might be occasioned by selfishness or whimsy.[33] The transfer of land use planning authority to area residents was thus stricken because of the small number of residents who could selfishly impose restrictions—an arrangement that has been disparagingly termed "an expression of neighborhood preference for restraints."[34]

Five years after *Eubank*, the Court decided *Thomas Cusack Co. v. City of Chicago*,[35] which added another dimension to the due process analysis. In *Cusack* the Court upheld a city ordinance that permitted a percentage of neighboring property owners to waive a billboard ban previously imposed by another provision of that ordinance.[36] Responding to plaintiff's assertion that *Eubank* was controlling precedent, the Court distinguished the neighborhood imposition of land use prohibitions from the neighborhood removal (or waiver) of such prohibitions.[37]

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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 2371.

29. *Id.* at 2368.

30. These safeguards include a resolution "on the merits by reference to articulable rules" as well as an "impartial and qualified" decisionmaker. *Id.* at 2371.

31. 226 U.S. 137 (1912).

32. *Id.* at 141.

33. *Id.* at 144.

34. Southern Alameda Spanish Speaking Org. v. Union City, 424 F.2d 291, 294 (9th Cir. 1970).

35. 242 U.S. 526 (1917).

36. *Id.* at 527-28.

37. The former left the establishment of the building line untouched until the lot owners should act and then made the street committee the mere automatic register of that action and gave to it the effect of law. The ordinance in the case at bar absolutely prohibits the erection of billboards . . . but permits this

After *Cusack* then, both the nature of popular participation—waiver or imposition of restraints—and the number of persons allowed to participate are relevant due process concerns. Substantial tension exists, however, between these two factors. While the *Eubank* Court decried the potential for selfishness under the building line ordinance, the *Cusack* Court in upholding the billboard ordinance allowed such selfishness to prevail.[38] Furthermore, the ordinance in *Eubank* was viewed as an unreasonable exercise of the city's police power in part because of the city-wide inconsistency in land use policy that would result.[39] There is nothing to suggest less inconsistent results from the exercise of neighborhood power under the *Cusack* procedure.

Cusack may be seen as the pivotal case on the due process issue raised in *Eastlake*. To the extent that the imposition-waiver distinction drawn in *Cusack* is still good law,[40] it could be dispositive, since plaintiff in *Eastlake*, like plaintiff in *Cusack*, was arguably requesting the removal of a prohibition.[41] To the extent, however, that the *Cusack* Court contradicted *Eubank* by endorsing neighborhood land use policy-making *because* neighbors are those most affected, it suggests that a referendum on such a localized issue would be uniquely inappropriate: negotiation is impracticable and those who are affected in fact may not be able to control the decision.[42]

The vitality of *Eubank* and *Cusack*, however, has been drawn into question by another line of Supreme Court cases that applied the

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> prohibition to be modified with the consent of the persons who are to be most affected by such modification . . . . This is not a delegation of legislative power, but is . . . a familiar provision affecting the enforcement of laws and ordinances.

Id. at 531.

38. The concession by the Court that some land use planning decisions are most appropriately handled on an informal, neighborhood basis suggests that *Eubank* was wrongly decided. In both cases the relevant statutory schemes may be seen as providing a legal framework within which neighborhood negotiation may take place. *See* Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 709-10 (1973).

39. 226 U.S. at 144.

40. At least one commentator has questioned the vitality of the *Cusack* holding. *See* Comment, *supra* note 1, at 98-99. *See also* text accompanying notes 43-54 *infra*.

41. *See* note 18 *supra*.

42. Both the Ohio and United States Supreme Courts included Washington *ex rel.* Seattle Title Trust Co. v. Roberge, 278 U.S. 116 (1928), in the line of early due process cases. Although both courts treated *Roberge*, in essence, as an affirmance of the *Eubank* decision, it is questionable whether the *Roberge* Court believed itself to be confronted with a similar due process issue. The zoning ordinance challenged by plaintiff in *Roberge* was struck down as a denial of due process. 278 U.S. at 122 (citing *Eubank*). In support of its statement that the ordinance permits constitutionally infirm motives to enter into neighborhood decisionmaking, however, the Court relied on Yick

former decisions in analyzing due process challenges to congressional delegations of authority. In *Carter v. Carter Coal Co.*[43] the Court, citing *Eubank* as primary authority,[44] struck down as an unlawful delegation of legislative authority an act[45] that gave a portion of the employers and employees in a single industry and in a defined district unchecked authority to set wage and hour standards for the entire industry in that district by vote.[46] The administrative authority with oversight responsibility was required to accept the resulting standards.[47]

Three years later, in *Currin v. Wallace*,[48] the Court, citing *Cusack*, upheld an act[49] that also required industry participation in the regulatory process, but that permitted referendum proceedings on specific decisions only *after* they were approved by the administrative authority.[50] The Court dismissed *Carter* as precedent, stating: "This is not a case where a group of producers may make a law and enforce it upon a minority . . . ."[51] In likening the *Currin* scheme for participation to the scheme involved in *Cusack*, the Court attempted to distinguish the *Carter* provisions on the basis of *Cusack*'s imposition-waiver dichotomy.[52] But this distinction is unpersuasive since industry participation was related to imposing restraints on the subject industry in both *Carter* and *Currin*. Rather, the difference rests in the control by the administrative authority of the alternatives that may be selected by industry vote. In *Currin*, unlike *Carter*, industry participation is limited to the approval of alternatives previously adjudged to be reasonable.[53]

Wo v. Hopkins, 118 U.S. 356 (1886). The ordinance struck down in *Yick Wo* was held invalid on *equal protection* grounds. 118 U.S. at 374. That the Court in *Roberge* was in actuality concerned with the particularly harsh treatment accorded the plaintiff is further borne out by the language of the ordinance, which appears to single out plaintiff's particular use for harsher treatment than other uses with which it was grouped before the ordinance was amended. 278 U.S. at 120 (footnote).

43. 298 U.S. 238 (1936).

44. *Id.* at 311-12.

45. Bituminous Coal Conservation Act, ch. 824, sec. 4, 49 Stat. 991 (1935). One purpose of this Act was to "stabilize the . . . industry and promote its interstate commerce . . . ." 298 U.S. at 278.

46. *Id.* at 283-84.

47. *Id.*

48. 306 U.S. 1 (1939).

49. Tobacco Inspection Act, ch. 623, sec. 5, 49 Stat. 731 (1935) (current version at 7 U.S.C. §§ 511-517 (1970)). This Act was designed to bring stability into the interstate tobacco market and thereby protect producers. The Act conferred on the Secretary of Agriculture the power to designate warehouses for tobacco inspection. 306 U.S. at 5-6.

50. *Id.* at 6.

51. *Id.* at 15-16.

52. *Id.* at 15; *see* text accompanying notes 35-41 *supra.*

53. *Cf.* McManus v. CAB, 286 F.2d 414, 419 (2d Cir.), *cert. denied*, 366 U.S. 928

These cases suggest an alternative to the imposition-waiver due process analysis of *Cusack*: a "supervised participation," under which popular participation in land use planning is acceptable, even if use restraints result, as long as it is controlled to insure that the decisions reached are consistent with an externally established policy. The *Eastlake* case provided the Supreme Court with an excellent opportunity to rule on the applicability of supervised participation as an alternative due process approach in the area of land use decisionmaking and to delimit the minimum acceptable standards for such practices.[54]

In recent years the Supreme Court has twice considered the constitutionality of mandatory referenda.[55] Since both cases involved equal protection challenges, however, the Court, while speaking favorably of the referendum as a land use planning device, has not been required to confront squarely the due process claim raised by plaintiff in *Eastlake*. A similar claim did confront the Ninth Circuit Court of Appeals in *Southern Alameda Spanish Speaking Organization [SASSO] v. Union City*.[56] In *SASSO* plaintiffs challenged a permissive[57] referendum that nullified the rezoning of a parcel that would have permitted the construction of federally financed low income housing.[58] The circuit court upheld the validity of the nullifying referendum,[59] distinguishing in broad terms the referendum process from the neighborhood preference cases.[60] The court thus adopted the *Eubank* due proc-

(1961) (administrative authority to disapprove agreements made between industry members).

54. *Eastlake* provides an excellent test case. Under the ordinance, referenda do not occur until the city council has approved the request; there is thus found the element of supervision. Council control is limited, however, because the ordinance does not provide for relief from the referendum process when the present zoning status of the parcel has become unreasonable due to changed circumstances. Therefore it is *not* within the council's supervisory powers to prevent a referendum from defeating what it believes to be a constitutionally compelled approval of a rezoning request. 96 S. Ct. at 2363; *see* note 12 *supra*. *See also* Hunter v. Erickson, 393 U.S. 385, 392 (1969); Spaulding v. Blair, 403 F.2d 862, 864 (4th Cir. 1968).

55. James v. Valtierra, 402 U.S. 137 (1971); Hunter v. Erickson, 393 U.S. 385 (1969); *see* text accompanying notes 74-78 *infra*.

56. 424 F.2d 291 (9th Cir. 1970).

57. A permissive referendum, unlike its mandatory counterpart, requires the presentation of a petition, signed by a specified number of qualified persons, for each specific issue on which a referendum is desired. *See, e.g., id.* at 293 n.3. There may be significant differences in terms of due process between a permissive and a mandatory referendum procedure. *See* Comment, *supra* note 1, at 98. This distinction, however, was overlooked by the Supreme Court in the *Eastlake* decision.

58. 424 F.2d at 291.

59. Appellants in *SASSO* also mounted an unsuccessful equal protection challenge to the referendum. *Id.* at 295-96.

60. *Id.* at 294.

ess measure—the number of persons participating—but ignored the *Cusack* waiver-imposition distinction as well as the supervised participation approach from the *Carter* and *Currin* cases, under either of which the permissive referendum might not have fared so well.[61]

Against this backdrop of multiple, and arguably conflicting, due process tests for the constitutionality of direct citizen participation in land use planning, the majority opinion in *Eastlake* is analytically inconclusive. Chief Justice Burger placed primary reliance on his interpretation of the Ohio Constitution to dispose of the Ohio Supreme Court's contention that an unlawful delegation occured under the Eastlake ordinance.[62] This interpretation provided the Court with a vehicle for disposing of the case without delimiting the utility or vitality of the various available due process tests.

The concept of supervised participation was the first test with which the Court attempted to deal. Responding to the Ohio Supreme Court's contention that the ordinance provided for inadequate legislative (council) control,[63] Chief Justice Burger did take note of federal court decisions concerned with congressional delegations to other authorities.[64] However, the cases to which he turned did not involve statutory requirements that make the implementation of policy decisions subject to approval by non-governmental persons, as was the case in *Currin.* Rather, the cases cited dealt more narrowly with the ability of the delegate itself to prescribe policy within definable boundaries.[65]

The majority, however, did provide more relevant commentary that evinces a pessimistic perspective on the quality of legislative supervision that would ensue, were such supervision required. Stating that requiring supervision as a matter of due process "sweeps too broadly" because the legislative body and the voters are equally likely to misapply or ignore appropriate standards,[66] the Court appears to have elimi-

61. Since a permissive referendum is not operative until after the rezoning request is granted, it is more clearly an attempt to (re-)impose a land use restraint than a referendum that is attached by statute to any rezoning approval. *See* note 18 *supra.*

62. *See* text accompanying notes 14-21 *supra.*

63. Forest City Enterprises, Inc. v. City of Eastlake, 41 Ohio St. 2d 187, 196, 324 N.E.2d 740, 746 (1975).

64. 96 S. Ct. at 2363 (citing Yakus v. United States, 321 U.S. 414 (1944), and Amalgamated Meat Cutters v. Connally, 337 F. Supp. 737 (D.D.C. 1971)).

65. Yakus v. United States, 321 U.S. 414, 419-20 (1944); Amalgamated Meat Cutters v. Connally, 337 F. Supp. 737, 743, 746-47 (D.D.C. 1971).

66. "Except as a legislative history informs an analysis of legislative action, there is no more advance assurance that a legislative body will act by conscientiously applying consistent standards than there is with respect to voters." 96 S. Ct. at 2363 n.10.

nated the very rationale relied on by the 1939 Court in distinguishing the *Currin* procedure from that held unconstitutional in *Carter*.[67] Furthermore, since the *Currin* facts suggested judicial approval of the supervised imposition of restraints, the apparent removal of the supervision requirement with respect to a city-wide referendum procedure suggests that neither the imposition *nor* the waiver of land use restraints by referendum is constitutionally infirm. That is to say, the imposition-waiver distinction drawn in *Cusack* is overruled.[68]

The Court, however, did not overrule *Cusack*. Instead, the imposition-waiver distinction was recited,[69] with Chief Justice Burger concluding that plaintiff in *Eastlake*, like plaintiff in *Cusack*, was seeking the waiver of a preexisting restraint: "No existing rights are being impaired; new use rights are being sought from the City Council. Thus, this case involves an owner seeking approval of a new use free from the restrictions attached to the land when it was acquired."[70] *Cusack*, however, did not approve of *referenda* as appropriate devices for the removal of land use restraints, but only of neighborhood decisionmaking by "the persons who are to be most affected by such modification."[71] Acceptance of the *Cusack* holding *in toto*, therefore, would seemingly require that the *Eubank* criticism of "narrow" delegations (*i.e.*, neighborhood preferences) be held inapplicable to the *Eastlake* facts.

Instead, the majority distinguished the *Eubank* neighborhood preference concept in upholding the *Eastlake* referendum procedure.[72] The Court thus ignored not only the imposition-waiver distinction it had just drawn from *Cusack*, but also the interrelationship of the *Eubank* and *Cusack* rationales.

In support of the neighborhood preference-referendum dichotomy that it invoked from *Eubank* (despite the contrary language in *Cusack*),

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67. *See* text accompanying notes 43-53 *supra*.

68. *See* text accompanying notes 35-41 *supra*.

69. 96 S. Ct. at 2364 n.12; *see* text accompanying note 37 *supra*.

70. 96 S. Ct. at 2364 n.13. In his dissenting opinion, Justice Stevens implicitly attacked the vitality of *Cusack* by arguing that the requirements of due process attach to the rezoning process with equal force whether additional restraint or additional freedom is at issue. *Id.* at 2367. *See also* Note, *Zoning—Due Process—The Adjudicative Decision Inherent in Tract Rezoning Requires the Decision-Maker to Adhere to Standards of Minimal Due Process*, 8 GA. L. REV. 254, 262 (1973).

71. 242 U.S. at 531; *see* note 38 *supra*.

72. "[T]he standardless delegation of power to a limited group of property owners condemned by the Court in *Eubank* and *Roberge* is not to be equated with decisionmaking by the people through the referendum process." 96 S. Ct. at 2364.

the Court quoted first from *SASSO*,[73] and then from *James v. Valtierra*,[74] the latter as a confirmation by the Court of the Ninth Circuit Court of Appeals decision in *SASSO*.[75] In *Valtierra*, the United States Supreme Court upheld a provision of the California Constitution that required a referendum on all proposed low rent public housing projects.[76] However, the *Eastlake* Court's reliance on *Valtierra* is inappropriate, because plaintiffs in *Valtierra* challenged the California provision on *equal protection*, not due process, grounds. Furthermore, in so construing the *Valtierra* opinion the Court overlooked two important distinctions between the facts of *Eastlake* on the one hand and *Valtierra* on the other. The language in the latter case approving community-wide policy making was supported by a record demonstrating that the rezoning would have an economic impact on the community at large.[77] Furthermore, the mandatory referendum procedure challenged in *Valtierra* was limited to a certain class of projects.[78] The scope of the impact of plaintiff's rezoning request in *Eastlake* was not similarly supported in the record.[79] In addition, the *Eastlake* procedure was applicable to *all* requests for rezoning by amendment of the comprehensive plan.[80]

The majority nevertheless concluded that plaintiff's particular rezoning request "would likely" have an impact similar to that held sufficient to sustain the *Valtierra* referendum.[81] However, the Court neither explicitly required such a finding nor limited the operation of the referendum procedure to instances in which such a finding could be made.[82] The result is a circular due process analysis suggesting a judicial reverence not heretofore apparent for the use of referenda in land use planning: the referendum is held superior to the neighborhood preference concept because it provides for community-wide

73. " 'A referendum, however, is far more than an expression of ambiguously founded neighborhood preference. It is the city itself legislating through its voters . . . .' " *Id.* (quoting Southern Alameda Spanish Speaking Org. v. Union City, 424 F.2d 291, 294 (9th Cir. 1970)).

74. A referendum " 'ensures that *all the people* of a community will have a voice in a decision which may lead to large expenditures of local governmental funds for increased public services . . . .' " 96 S. Ct. at 2364 (quoting James v. Valtierra, 402 U.S. 137, 143 (1971)) (emphasis added by Court).

75. *See* note 73 *supra*.

76. 402 U.S. 137, 139 & n.2 (1971).

77. *Id.* at 143 n.4.

78. *Id.* at 139 n.2.

79. 96 S. Ct. at 2368 n.10 (dissent).

80. *See* note 12 *supra*.

81. 96 S. Ct. at 2362 n.7; *see* Note, *supra* note 21, at 178.

82. 96 S. Ct. at 2371 (dissent).

policy making, and since community-wide policy making is involved, the referendum is an appropriate device.

The missing logical step—that the particular question at hand is one amenable to community-wide policy making—is provided, the Court reasoned, by the Ohio court's determination that rezoning by amendment is "legislative" in nature.[83] This adherence to the label affixed by the state court was attacked by Justice Stevens as an abrogation of the Court's responsibility to pursue an independent analysis of the application of federal constitutional safeguards.[84] It has been suggested by others that the labelling of rezoning requests as "legislative," "administrative" or "adjudicative" by state courts is a matter of form that does not correspond with either the prospective impact of the requested rezoning or the kinds of information to which the decisionmaker should be exposed.[85] Indeed, the Court's reluctance to ignore the legislative label appears to be contrary to accepted methods of due process analysis in other contexts: "In the assessment, apportionment and collection of taxes upon property within their jurisdiction the Constitution of the United States imposes few restrictions upon the States. *In the enforcement of such restrictions as the Constitution does impose this court has regarded substance and not form.*"[86] The failure of the Court in *Eastlake* similarly to disregard form and analyze the primary activity involved, *i.e.*, rezoning by amendment of a comprehensive plan, leaves the protection afforded to individual property owners by the due process clause wholly dependent on the formalities of state zoning law.

The reluctance of the Court to come to grips with the due process problems associated with the use of mandatory referenda in land use planning is disappointing for two reasons. First, the *Eastlake* opinion leaves open the possibility of subsequent litigation of the same due process issue, particularly if the claim arises in a state whose constitution will not provide the judicial refuge so readily accepted in this case. Second, counsel who relitigate the *Eastlake* due process issue

83. *Id.* at 2362.

84. *Id.* at 2368 (dissent).

85. *See* Comment, *Zoning Amendments—The Product of Judicial or Quasi-Judicial Action*, 33 OHIO ST. L.J. 130, 133 (1972). *See generally* Comment, *supra* note 1.

86. Londoner v. Denver, 210 U.S. 373, 385 (1908) (emphasis added). For examples of similar analyses that look to the substance of the activity in question, see Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441, 445-46 (1915); Powelton Civic Home Owners Ass'n v. HUD, 284 F. Supp. 809, 829 (E.D. Pa. 1968). *See also* South Gwinnett Venture v. Pruitt, 482 F.2d 389 (5th Cir. 1973), *cert. denied*, 416 U.S. 901 (1974).

must again contend with the conflicting case law, having received little guidance from the Court.

Such litigation, however, may be ill advised. In failing to provide a clearer due process approach, the Court has left unscathed the separate due process tests already enumerated. In the broad approval of the *Eastlake* procedure by comparison to the procedure upheld in *Valtierra*, the Court has strongly suggested that, if required, one or more of the tests will be utilized to defeat such a challenge.

Litigation resources may be more fruitfully expended by challenging such referenda on state law grounds. One approach would be to challenge the characterization of rezoning by plan amendment as legislative. If a different characterization is adopted by the state court, the state constitution may prohibit the application of referenda. Alternatively, referenda may be attacked as contrary to the spirit of consistent decisionmaking, if not the letter of procedural requirements, found in state zoning enabling legislation.[87]

If federal law is to be invoked, the issue may perhaps be framed more appropriately in terms of the deprivation of a meaningful hearing when a referendum is required, rather than in terms of the reasonableness of the referendum provision as an exercise of the police power. It must be noted, however, that a Supreme Court majority recently decided *not* to hear an appeal in one case[88] that would have challenged rezoning by initiative as a denial of such procedural due process requirements.[89] Nevertheless, Justice White's desire to hear that appeal, together with the frequent allusions of the three dissenting Justices in *Eastlake* to deprivations of "fundamental fairness" and especially with the willingness of Justices Stevens and Brennan to declare tract rezoning an adjudicative function on federal law grounds, suggests that at least four members of the Court may be willing to reconsider a procedural due process claim when an appropriate case arises.

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87. *See, e.g.*, Township of Sparta v. Spillane, 125 N.J. Super. 519, 525-26, 312 A.2d 154, 157-58 (Super. Ct. App. Div. 1973); Elkind v. City of New Rochelle, 5 Misc. 2d 296, 301-02, 163 N.Y.S.2d 870, 876-77 (Sup. Ct. Spec. T. 1957), *aff'd per curiam*, 5 N.Y.2d 836, 181 N.Y.S.2d 509, 155 N.E.2d 404 (1958). *But see* Johnston v. City of Claremont, 312 P.2d 300, 304-05 (1957), *vacated on other grounds*, 49 Cal. 2d 826, 323 P.2d 71 (1958). *See generally* authorities cited note 85 *supra*.

88. San Diego Bldg. Contractors Ass'n v. City Council, 13 Cal. 3d 205, 529 P.2d 570, 118 Cal. Rptr. 146 (1974), *appeal dismissed*, 96 S. Ct. 3184 (1976) (Brennan, White, JJ., dissenting).

89. *See* 44 U.S.L.W. 3042 (1975) (summary of case and questions presented to the Court).

The Editors of the *North Carolina Law Review* dedicate this issue to Frank R. Strong, Cary C. Boshamer University Distinguished Professor, upon his retirement from teaching at the University of North Carolina School of Law.