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### Forest City Enterprises, Inc. v. City of Eastlake: Zoning Referenda and Exclusionary Zoning

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# FOREST CITY ENTERPRISES, INC. V. CITY OF EASTLAKE: ZONING REFERENDA AND EXCLUSIONARY ZONING

IN THE RECENT OHIO SUPREME COURT DECISION of *Forest City Enterprises, Inc. v. City of Eastlake*,<sup>1</sup> the court stated a new principle of law in the area of referendum zoning:

A municipal charter provision, which requires that any ordinance changing land use be ratified by the voters in a city-wide election, constitutes an unlawful delegation of legislative power, in violation of the due process clause of the Fourteenth Amendment to the United States Constitution.<sup>2</sup>

The court was, however, far from convincing either in terms of distinguishing the prior law of referendum zoning or in demonstrating the applicability of their conclusion to the specific facts of the case.

## I. FACTS OF THE CASE

The *Eastlake* scenario is not extremely complex. Forest City Enterprises, Inc. is a large Ohio developer which owns an eight acre parcel of land in the city of Eastlake, Ohio, a far-eastern suburb of Cleveland. On May 18, 1971, Forest City applied to the Eastlake City Planning Commission for the rezoning of their eight acre parcel from industrial to multifamily high rise use.<sup>3</sup> In the fall of 1971, the Eastlake city charter was amended, via initiative petition, to include a zoning referendum provision requiring that all ordinances passed by the city council affecting existing land use receive 55 percent voter approval in a city-wide election.<sup>4</sup> The Eastlake City Council amended the comprehensive zoning

<sup>1</sup> 41 Ohio St. 2d 187, 324 N.E.2d 740, cert. granted, 96 S. Ct. 185 (1975).

<sup>2</sup> *Id.* (syllabus at ¶ 2).

<sup>3</sup> A fact not mentioned in *Eastlake* by any of the justices was that the actual intent of the developer was to build housing for the elderly. See Cleveland Press, Dec. 31, 1975, § 4, at 4, col. 1. For a general discussion of "spot" zoning see R. ANDERSON, AMERICAN LAW OF ZONING §§ 5.04-.13 (1968). See also *Goodrich v. Town of Southampton*, 48 App. Div. 2d 921, 370 N.Y.S.2d 15 (1975).

<sup>4</sup> 41 Ohio St. 2d at 183 n.1, 324 N.E.2d at 742 n.1. The charter provision 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 and the selling or leasing or rental of parkways, playgrounds, or other citylands or real property, or the widening, narrowing, re-locating, vacating or changing the use of any public street, avenue, boulevard, or alley 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, whether approved or disapproved by the Planning Commission 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 at the next regular municipal election, if one shall occur not less than sixty (60) or more than one hundred and

ordinance as requested, after the Planning Commission approved the change of use by Forest City. In April 1972, however, a preliminary permit to commence building was denied by the Commission, since the proposed amendment had not been submitted to the voters as mandated by the charter referendum requirement.

Forest City sought relief in Lake County Court of Common Pleas requesting a declaratory judgment that the Eastlake charter provision requiring voter approval to effect a zoning change was a violation of both the due process clause of the fourteenth amendment and the referendum provisions of the Ohio constitution.<sup>5</sup> The mandatory referendum requirement was upheld by both the trial court and court of appeals.<sup>6</sup>

The Ohio Supreme Court reversed in a 5-2 decision finding that article VIII, section 3 of the Eastlake charter constituted "an unlawful delegation of legislative power, thereby denying appellant [Forest City Enterprises] due process of law."<sup>7</sup> The *Eastlake* court confined their

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twenty (120) days after its passage, otherwise at a special election falling on the generally established day of the primary election.

*Eastlake City Charter*, art. VIII, § 3 (1971). One writer has suggested that the current increased use of referenda is, at least in part, related to a general distrust and disenchantment with government, lawyers, and land developers. Kancler, *Litigating the Zoning Case in Ohio: Suggestions to Fill the Textbook Void*, 24 CLEVE. ST. L. REV. 33, 40 (1975). For a summary of procedures required by Ohio statutes to effect an initiative and/or referendum see Fordham & Leach, *The Initiative and Referendum in Ohio*, 11 OHIO ST. L.J. (1950); Fordham & Prendergast, *The Initiative and Referendum on the Municipal Level in Ohio*, 20 U. CIN. L. REV. 313 (1951). See also, Kancler, *supra* at 40-42.

The trial court did strike down one aspect of the mandatory referendum as burdensome. That provision required the rezoning applicant to bear the cost of the referendum election. The city of Eastlake did not dispute that ruling in subsequent appeal. 41 Ohio St. 2d at 183 n.2, 324 N.E.2d at 742 n.2.

<sup>5</sup> OHIO CONST. art. II, § 1f:

The initiative and referendum powers are hereby reserved to the people of each municipality on all questions which such municipalities may now or hereafter be authorized by law to control by legislative action; such powers shall be exercised in the manner now or hereafter provided by law.

<sup>6</sup> *Forest City Enterprises, Inc. v. City of Eastlake*, Civ. 72-0219 (Ohio C.P. 1972), *aff'd*, Dkt. No. 4-263 (Ohio Ct. App. 1973). Since application for rezoning by Forest City was made prior to passage of the Eastlake charter amendment, Forest City unsuccessfully contended at the trial court level the referendum requirement should therefore not be applied retroactively. This argument is supported by *Gibson v. City of Oberlin*, 171 Ohio St. 1, 167 N.E.2d 651 (1960), where it was held that whenever a building permit application has been filed a subsequent zoning change cannot be retroactively applied.

"[I]t is a fundamental principle of law that constitutional questions will not be decided until the necessity for their decision arises." *State ex rel. Lieux v. Village of Westlake*, 154 Ohio St. 412, 415, 96 N.E.2d 414, 415 (1951); *accord*, *Greenhills Home Owners Corp. v. Village of Greenhills*, 5 Ohio St. 2d 207, 212, 215 N.E.2d 403, 407, *cert. denied*, 385 U.S. 836 (1966); *Interstate Motor Freight Sys. v. Bowers*, 164 Ohio St. 122, 134, 128 N.E.2d 97, 104 (1955); *American Cancer Soc'y v. City of Dayton*, 160 Ohio St. 114, 121, 114 N.E.2d 219, 223 (1953). Hence, it can also be argued that the issues decided by the Ohio Supreme Court should never have been reached. Forest City, however, failed to assign this as error at the intermediate court level. Thus, based upon the record before the Ohio Supreme Court, the retroactivity argument could not have been properly considered. See, e.g., *State v. Abrams*, 39 Ohio St. 2d 53, 313 N.E.2d 823 (1974); *State v. Wallen*, 25 Ohio St. 2d 45, 266 N.E.2d 561 (1971); *State ex rel. Babcock v. Perkins*, 165 Ohio St. 185, 134 N.E.2d 839 (1956); *Union Ins. Co. v. McGokey*, 33 Ohio St. 555 (1878); *Wolfson v. Horn*, 94 Ohio App. 530, 116 N.E.2d 151 (1953).

<sup>7</sup> 41 Ohio St. 2d at 198, 324 N.E.2d at 747.

holding to the constitutionality of the charter provision. It neither decided whether the original zoning of Forest City's property for industrial use was reasonable<sup>8</sup> nor whether Eastlake had engaged in "exclusionary zoning" to exclude low and moderate income housing.<sup>9</sup>

## II. THE EASTLAKE MAJORITY OPINION: A SURFACE THEME<sup>10</sup>

### A. *The Ohio Zoning and Referendum Framework*

As a prelude to the majority opinion, Justice Paul W. Brown summarized existing Ohio zoning law. Initially considered by the majority<sup>11</sup> was the landmark United States Supreme Court zoning decision, *Village of Euclid v. Ambler Realty Co.*<sup>12</sup>

Since *Euclid v. Ambler Realty Co.* . . . , the constitutionality of zoning has not been questioned. Modern authorities agree that some restrictions on the use of land are essential to orderly community development. But because the power to zone infringes upon the individual use of private property, the exercise of such authority has been carefully hedged with procedural and substantive safeguards. To be sustained as valid, a zoning ordinance must be comprehensive in nature, must bear a reasonable relationship to the public health, safety, welfare, or morals, and must provide for the amelioration of unnecessary hardships imposed upon the owners of specific property.<sup>13</sup>

Justice Brown then concluded from an analysis of several cases, including *Donnelly v. City of Fairview Park*,<sup>14</sup> that "the power to zone or rezone, via passage or amendment of a comprehensive zoning ordinance, is clearly a legislative function."<sup>15</sup> Then, as if in passing, Justice Brown seemingly

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<sup>8</sup> *Id.*

<sup>9</sup> *Id.* Four of the seven Justices, a majority, did reach this issue in the concurring opinion.

<sup>10</sup> Judicial opinions have perhaps been assuming the nature of a fugue. A fugue, one may define for the benefit of those made tone deaf by years of listening to legal jargon, is a musical form in which one theme appears on the surface but quite another is subtly going on below.

Lasky, *Observing Appellate Opinions From Below the Bench*, 49 CALIF. L. REV. 831, 839 (1961).

<sup>11</sup> Justice Paul Brown was joined by Chief Justice O'Neill and Justices Herbert, Stern and William Brown. Justices Corrigan and Celebreeze dissented.

<sup>12</sup> 272 U.S. 365 (1926).

<sup>13</sup> 41 Ohio St. 2d at 189, 324 N.E.2d at 743 (citation omitted). Justice Stern's concurring opinion also began with an analysis of *Ambler Realty*. *Id.* at 198, 324 N.E.2d at 748. Justices Paul Brown and Stern were quick to point out the "reasonableness" restrictions upon the police power, but there is little doubt that the intent of the Supreme Court in *Ambler Realty* was to create a presumption in favor of the constitutionality of a zoning law. 272 U.S. 365.

<sup>14</sup> 13 Ohio St. 2d 1, 3, 233 N.E.2d 500, 501 (1968).

<sup>15</sup> 41 Ohio St. 2d at 189, 324 N.E.2d at 743.

adopted the rule of *Hilltop Realty v. City of South Euclid*,<sup>16</sup> that "[t]he zoning or rezoning of property is subject to the referendum process."<sup>17</sup>

The source for zoning power in Ohio is the "home rule" provision of the Ohio constitution:

Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations as are not in conflict with general laws.<sup>18</sup>

Eastlake has a duly-adopted charter thereby enabling the municipality to adopt its own zoning scheme instead of conforming to the state statutory procedure.<sup>19</sup> Moreover, there is a strong presumption in Ohio that zoning

<sup>16</sup> 110 Ohio App. 535, 164 N.E.2d 180 (1960), *appeal dismissed*, 170 Ohio St. 585, 166 N.E.2d 924 (1960); *accord*, *Johnston v. City of Claremont*, 49 Cal. 2d 826, 323 P.2d 71 (1958); *Stadle v. Township of Battle Creek*, 346 Mich. 64, 77 N.W.2d 329 (1956); *Denny v. City of Duluth*, 295 Minn. 22, 202 N.W.2d 892 (1972).

<sup>17</sup> 41 Ohio St. 2d at 189-90, 325 N.E.2d at 743. The initiative and referendum powers are derived from the OHIO CONST. art. II, § 1f. The referendum power is the power of the electors of municipalities to require that ordinances passed by council be approved by the people prior to becoming effective. Not all measures, however, are subject to referendum. *See* OHIO REV. CODE ANN. §§ 731.29-.30 (Page 1954). Initiative, in contrast, is the power of the people to propose and adopt legislative measures.

There are three different types of referenda: An optional referendum involves a petition by the people to require submission of the measure to popular vote. A voluntary referendum occurs when the legislature decides to have a proposed measure submitted to the people for approval prior to it becoming effective. A mandatory (compulsory, automatic) referendum absolutely requires voter approval for certain measures to take effect. *Fordham & Leach, supra* note 4, at 495-96. *Eastlake* involved a mandatory referendum whereas in *Hilltop Realty* it was optional.

A referendum petition in Ohio must be in compliance with statutory procedure or it may be subject to attack. A petition must be filed within thirty days following submission of an ordinance to the mayor. If vetoed, it must be filed within thirty days after council overrides the mayor. Delays are fatal. Additionally, the petition must include the signatures of 10 percent of the qualified electors. OHIO REV. CODE ANN. § 731.29 (Page 1954); *see* *Kancler, supra* note 4, at 40-41. For a more comprehensive discussion of referenda *see* 3 J. FARRELL, OHIO MUNICIPAL CODE §§ 4.12 *et seq.* (11 ed. 1962).

<sup>18</sup> OHIO CONST. art. XVIII, § 3. For decisions holding the power to zone to be a proper exercise of the police power *see, e.g., Bauman v. State ex rel. Underwood*, 122 Ohio St. 269, 171 N.E. 336 (1930); *Pritz v. Messer*, 112 Ohio St. 628, 149 N.E. 30 (1925); *Smith v. Troy*, 18 Ohio L. Abs. 476 (Ct. App. 1834). *See also* the dissenting opinion of Judge Wanamaker in *City of Cleveland v. Public Util. Comm'n*, 102 Ohio St. 341, 353-54, 131 N.E. 714, 718 (1921) for a very broad interpretation of local self-government.

<sup>19</sup> *See, e.g., Pritz v. Messer*, 112 Ohio St. 628, 149 N.E. 30 (1925); OHIO REV. CODE ANN. § 713.14 (Page 1954); *see also* OHIO CONST. art. XVIII, §§ 3, 7.

Although the "home rule" provision of the Ohio constitution authorizes all municipalities to adopt "police" regulations, including zoning regulations, it is necessary to examine sections 2 and 7 of the same article to determine how these powers may be exercised. Section 2 of article XVIII grants to the General Assembly the power to provide the form of government in municipalities. Section 7 of article XVIII, however, allows for the adoption of a municipal charter wherein the form of government and the procedures for exercise of section 3 powers are provided. Thus, noncharter municipalities or charter municipalities that fail to incorporate procedures for exercise of section 3 powers must conform to state statutory procedure.

The only restriction upon the scope of such state prescribed procedures is that they cannot limit the home rule powers of the municipalities under the guise of procedural guidance. 3 J. FARRELL, OHIO MUNICIPAL CODE § 1.27(c),(d) (11 ed. 1962). Therefore:

Where a municipality has a city charter and the city charter sets forth a procedure governing the steps necessary to effect a change in existing zoning classifica-

provisions of charter municipalities are valid, particularly when they are alleged to be in conflict with state provisions.<sup>20</sup> The state statutes which dictate the applicable procedures for enacting zoning regulations apply only to noncharter Ohio municipalities, unless, of course, the municipal charter specifically provides for their use. Consequently, the absence of a mandatory zoning referendum provision in the Ohio Municipal Code, alone, does not prohibit Eastlake or any other Ohio charter municipality from enacting such a provision. Hence, if viewed as an exercise of the right of a municipality to establish by charter the procedures for administering its zoning power, the Eastlake charter appears valid.

### B. *The Nature of Rezoning by City Council*

The right to hold a referendum upon rezoning actions seems to be the clearly established law in Ohio under *Hilltop Realty* and was impliedly affirmed by the *Eastlake* majority. In *Hilltop Realty*, plaintiff realtors acquired land which was zoned for single-family use. They received approval from the South Euclid, Ohio City Council for rezoning to multi-family use. Passed over a mayoral veto by council, the zoning ordinance then fell subject to an initiative petition calling a referendum election. The trial court granted an injunction to prevent the election,<sup>21</sup> but the court of appeals reversed, specifically rejecting the contention that the rezoning action was an administrative act.<sup>22</sup> The court held that amending a zoning ordinance was a legislative act included within the Ohio constitution<sup>23</sup> as a proper subject for a referendum.<sup>24</sup>

Although *Eastlake* and *Hilltop Realty* are arguably distinguishable because in the former the referendum was mandatory and in the latter it was not, a dominant rationale of the *Eastlake* decision was that the charter referendum did not provide the citizenry with sufficient voting guidelines.<sup>25</sup> Yet in *Hilltop Realty*, the people of South Euclid were not subject to any greater standards in exercising their vote in the zoning referendum. In both cases, the merits of the zoning change were evaluated by city planning agencies and council, and the choice of the voters was simply one of approval or disapproval.

tions, to a different zoning classification, the procedure set forth in such city charter will govern.

Vito v. City of Garfield Heights, 200 N.E.2d 501, 503 (Ohio C.P. 1962), *quoted in* 1 R. ANDERSON, AMERICAN LAW OF ZONING § 3.08, at 137 (1968).

<sup>20</sup> Curtis v. City of Cleveland, 170 Ohio St. 127, 163 N.E.2d 682 (1959); Baker v. City of Beachwood, 184 N.E.2d 608 (Ohio Ct. App. 1962); State *ex rel.* River Grove Park v. City of Kettering, 118 Ohio App. 143, 193 N.E.2d 547 (1962); Beachland Glass Co. v. Woodmansee, 230 N.E.2d 360 (Ohio C.P. 1967).

<sup>21</sup> Forest City Enterprises, Inc. v. City of Eastlake, Civ. 72-0219 (Ohio C.P. 1972).

<sup>22</sup> Forest City Enterprises, Inc. v. City of Eastlake, Dkt. No. 4-263 (Ohio Ct. App. 1973).

<sup>23</sup> The initiative and referendum powers are hereby reserved to the people of each municipality on all questions which such municipalities may now or hereafter be authorized by law to control by legislative action; such powers shall be exercised in the manner now or hereafter provided by law.

OHIO CONST. art. II, § 1f.

<sup>24</sup> 110 Ohio App. at 539-40, 164 N.E.2d at 183; *cf.* Witkin Homes, Inc. v. City & County of Denver, 31 Colo. App. 410, 504 P.2d 1121 (1972).

<sup>25</sup> 4 Ohio St.2d 394, 1975.2d at 746.

Theoretically, the citizens of South Euclid or any Ohio municipality may petition for a referendum upon every rezoning action by council, and accomplish the same purpose as that served by the Eastlake referendum provision.<sup>26</sup> One commentator has suggested that the Ohio Supreme Court would presumably approve the use of a permissive zoning referendum in Eastlake.<sup>27</sup> "[T]here would be no problem of delegation of legislative authority as the change in zoning would be legislatively final . . . ."<sup>28</sup> A popular vote upon the rezoning would be dependent upon an initiative petition to call an election.<sup>29</sup> This view is consistent with the fact that the *Eastlake* majority did not decry nor expressly overrule *Hilltop Realty*. Nevertheless, neither *Eastlake* nor any other decision either explains or mandates a distinction between a referendum called by initiative petition as opposed to one required by a city charter provision.

The court's analysis continued with a reference to *Myers v. Schiering*.<sup>30</sup> In that case, the city of Fairfield, Ohio zoned a particular area as heavy industrial, pursuant to a zoning ordinance which specifically provided that the city council could grant a special permit to landowners in that area to create a dump or landfill.<sup>31</sup> The Ohio Supreme Court ruled in *Myers* that the granting of such a permit by city council was an administrative action and therefore not subject to referendum.<sup>32</sup>

Both *Myers* and *Eastlake* involved an application of the test distinguishing administrative and legislative action by a city council set forth in *Donnelly v. Fairview Park*.<sup>33</sup> An administrative action by a legislative body as defined in *Donnelly* is "executing or administering a law, ordinance or regulation already in existence," whereas legislative action involves "enacting a law, ordinance or regulation."<sup>34</sup>

Thus, under *Donnelly*, the council action in *Myers* was administrative in nature, since it consisted of granting a special permit for industrially-related purposes in an area already zoned for industrial use. This is similar to a variance, which is the modification of the use of property due to some hardship, but substantially complying with the existing use classification and restrictions under the comprehensive zoning ordinance.<sup>35</sup> The council action in both *Hilltop Realty* and *Eastlake*, however, consisted of rezoning — enacting new use classifications through new zoning laws. These actions were clearly legislative in nature.

<sup>26</sup> See note 17 *supra*.

<sup>27</sup> AMERICAN SOCIETY OF PLANNING OFFICIALS, 27 LAND USE L. & ZONING DIGEST NO. 7, at 14 (1975).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> 27 Ohio St. 2d 11, 271 N.E.2d 864 (1971).

<sup>31</sup> *Id.* at 13, 271 N.E.2d at 866.

<sup>32</sup> *Id.* at 14, 271 N.E.2d at 866.

<sup>33</sup> 13 Ohio St. 2d 1, 233 N.E.2d 500 (1968) (syllabus at ¶ 1, 2).

<sup>34</sup> *Id.* (syllabus at ¶ 2).

<sup>35</sup> A variance is a form of administrative relief which allows for the use of land prohibited by ordinance. In cases of unnecessary hardship strict application of the literal terms of zoning regulations is waived. A special permit or exception, in contrast, does not require a showing of hardship. Whereas a variance involves a departure from the terms

While *Myers* was approved in *Eastlake*, Justice Brown's reference to it can only be seen as part of the zoning law background he provided as an introduction to his subsequent detailed analysis of "consent requirements." *Myers* is of no real import to *Eastlake* and the opinion only serves to confuse the issues by its reference. This confusion is evidenced by respondent Forest City's brief to the United States Supreme Court in opposition to certiorari.<sup>36</sup> Argument I of the brief suggests that the Ohio Supreme Court based *Eastlake* in part on the status of the charter provision as a delegation of administrative power.<sup>37</sup> But the language of the *Eastlake* majority is clear: "[A] municipal charter provision, which requires that any ordinance changing land use be ratified by the voters in a city-wide election, constitutes . . . [a] delegation of legislative power . . . ."<sup>38</sup> Moreover, since the *Eastlake* majority reached the basic constitutional issue that the *Eastlake* referendum requirement was an unlawful delegation of legislative power in violation of the fourteenth amendment due process clause, they must have concluded that *Myers* was not dispositive of the case.

The precise issue in *Eastlake* was the reasonableness of a zoning procedure whereby every rezoning action by a city council is subject to voter approval. There is really no problem in defining the nature of such councilmanic action. Forest City Enterprises sought the change of the zoning classification of its eight acre parcel to multifamily, high rise usage from that of industrial usage. Their use change application, therefore, made necessary the enactment of a new zoning classification law by the city council, not a mere variance of existing usage.<sup>39</sup> This was legislative not administrative action. Thus, under *Hilltop Realty*, such an action was properly subject to referendum. This point was not refuted by the *Eastlake* majority. Rather, they merely side-stepped *Hilltop Realty*, used *Myers* as a smokescreen, and quickly delved into the main focus of their opinion — consent requirements.

### C. The Consent Requirement Conundrum

The court next discussed whether a mandatory referendum applied to legislative land-use changes was a denial of due process of law to aggrieved landowners in the position of Forest City Enterprises. This was the basis of the majority's decision and revolved around three United States Supreme Court decisions: *Eubank v. City of Richmond*,<sup>40</sup>

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of the ordinance, an exception contemplates a use allowable under the ordinance contingent upon a showing that the conditions are met. Rezoning or zoning amendments are changes in existing legislation creating entirely different use classifications. For a more detailed discussion of variances see 2 R. ANDERSON, *AMERICAN LAW OF ZONING* §§ 14.01 *et seq.* (1968).

<sup>36</sup> Respondent's Brief in Opposition to Certiorari, *City of Eastlake v. Forest City Enterprises, Inc.*, 96 S. Ct. 185 (1975).

<sup>37</sup> *Id.* at 3.

<sup>38</sup> 41 Ohio St. 2d at 187, 324 N.E.2d at 740 (syllabus at ¶ 2) (emphasis added). Note also a similar statement at 41 Ohio St. 2d 198, 324 N.E.2d at 747.

<sup>39</sup> See note 35 *supra*.

<sup>40</sup> 226 U.S. 187 (1912).



*Thomas Cusack Co. v. City of Chicago*,<sup>41</sup> and *Washington ex rel. Seattle Title Trust Co. v. Roberge*.<sup>42</sup> These three cases all involved "consent requirements," a land-use control device whereby a property owner is required by law to solicit the permission of neighboring parcel owners before he may effect any change in the use of his land.<sup>43</sup>

In *Eubank*, plaintiff requested and received a building permit from the city of Richmond, Virginia, but was later prevented by the city from commencing construction. A petition had been filed, pursuant to a city ordinance, signed by two-thirds of the property owners on the same block, requiring the Richmond City Council Committee on Streets to establish a building line in conformity with neighboring buildings.<sup>44</sup> In *Roberge*, a Seattle ordinance permitted the building of a home for the elderly when the builder first obtained the written consent of two-thirds of the property owners in the area.<sup>45</sup> Justice Brown was correct in stating that these consent requirements were held to be invalid by the United States Supreme Court as unreasonable and arbitrary exercises of the police power.<sup>46</sup>

In *Cusack*, the construction of a billboard in the City of Chicago was prohibited by ordinance. The ban could be waived, however, if the written consent of a majority of the landowners with property frontage on both sides of the street surrounding the billboard site was obtained.<sup>47</sup> The rationale for this requirement was that extensive evidence indicated that billboards could become a public nuisance or a potential danger.<sup>48</sup> The United States Supreme Court found this to be a reasonable regulation for the preservation of the public health, safety, morals, and welfare and upheld the ordinance.<sup>49</sup>

The distinctions to be drawn between these three decisions, though somewhat clouded by the *Eastlake* majority, are twofold. First, the emphasis in *Eubank* and *Roberge* was placed on the reasonableness of the means of control.<sup>50</sup> That distinction can be inferred from Justice Brown's comparison of the cases.<sup>51</sup> Secondly, the *Eubank* and *Ro-*

<sup>41</sup> 242 U.S. 526 (1917).

<sup>42</sup> 278 U.S. 116 (1928).

<sup>43</sup> See 3 R. ANDERSON, *AMERICAN LAW OF ZONING* § 15.15 (1968). Consent requirements are generally imposed in the area of special permits to protect neighboring landowners from troublesome uses. See discussion in note 35 *supra*.

<sup>44</sup> 226 U.S. at 141-42.

<sup>45</sup> 278 U.S. at 118.

<sup>46</sup> 41 Ohio St. 2d at 195, 324 N.E.2d at 746.

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.

<sup>47</sup> 242 U.S. at 527-28.

<sup>48</sup> *Id.* at 529-30.

<sup>49</sup> *Id.* But see *City of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Nectow v. Cambridge*, 277 U.S. 183 (1928).

<sup>50</sup> See, e.g., *Washington ex rel. Seattle Trust Co. v. Roberge*, 278 U.S. 116, 122 (1928).

<sup>51</sup> 41 Ohio St. 2d at 193, 324 N.E.2d at 745.

In *Eubank*, a reasonable use of property was prohibited by arbitrary fiat; in *Cusack*, an unreasonable use of property was prohibited by valid legislative action, subject to said prohibitions being lifted by those affected.

berge ordinances enabled the property owners to use their land in the desired manner, reserving an option for their neighbors to exercise a veto upon such usage. In *Cusack*, the property owner was prohibited from a particular use of his property by law, with a provision that the prohibition could be lifted.<sup>52</sup>

The majority's reliance on these cases required them to accept the premise that a consent requirement from owners of adjacent property is synonymous with a mandatory referendum among all the citizens of a community.<sup>53</sup> *Southern Alameda Spanish Speaking Organization (SASSO) v. Union City*,<sup>54</sup> however, refused to accept that premise. The Ninth Circuit Court of Appeals considered the consent requirement cases to be inapplicable to a referendum situation since in the former the due process argument succeeds because the permit is granted by an administrative board and thus no prior legislative determination has been made relative to the public interest.<sup>55</sup> As set forth in SASSO:

A referendum, however, is far more than an expression of ambiguously founded neighborhood preference. It is the city itself legislating through its voters — an exercise by the voters of their traditional right through direct legislation to override the views of their elected representatives as to what serves the public interest.<sup>56</sup>

Nevertheless, the *Eastlake* majority viewed the question differently and attempted a due process analysis of zoning referenda based upon consent requirements.

If consent requirements are to be analogized with zoning referenda as the *Eastlake* court assumed, then the holding in *Cusack* is most applicable. Forest City Enterprises, like Thomas Cusack Co., acquired property that was already subject to the prohibitions of the city zoning code against a particular use.<sup>57</sup> In applying for rezoning, Forest City, as did Cusack Co. in seeking consent, sought to have such prohibitions removed. The procedure required by the city of Eastlake, however, was an amendment to the city zoning code. Thus, the "consent requirement" in Eastlake was the entire process of amending the zoning code by enacting a law through councilmanic action and voter approval. This may be described as a "telescoped" consent requirement which includes a referendum. Without referendum ap-

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Another writer has made the same distinction in a slightly different context. Comment, *Voter Zoning: Direct Legislation and Municipal Planning*, 1969 LAW & SOCIAL ORDER 453, 462 n.44 (1969).

<sup>52</sup> Cf. *Norton Theatre, Inc. v. Gribbs*, 373 F. Supp. 363, 369 (E.D. Mich. 1974).

<sup>53</sup> 41 Ohio St. 2d at 191-95, 324 N.E.2d at 744-46.

<sup>54</sup> 424 F.2d 291 (9th Cir. 1970).

<sup>55</sup> *Id.* at 294.

<sup>56</sup> *Id.*

<sup>57</sup> See also *Old Dearborn Co. v. Seagrams-Distillers Corp.*, 299 U.S. 183, 194 (1936).

"[T]he restriction already imposed with the knowledge of appellants [landowners], ran with the acquisition and conditioned it."

proval, the ordinance amending the zoning code would be ineffective and Forest City would be left in no worse position than when they first purchased the realty.<sup>58</sup> The imposition of a use restriction is readily open to charges of arbitrariness, as seen in *Eubank* and *Roberge*. Within the limited factual setting of *Cusack*, however, a waivable land use prohibition is not as subject to attack.<sup>59</sup>

#### D. *May Policymaking be Left to the Public?*

##### 1. *Can the Public be Trusted?*

The majority opinion concluded by acknowledging that the basic problem with the Eastlake scheme was that it allowed the people to vote without any objective standards.<sup>60</sup> In *Hilltop Realty*, however, there were no standards to guide the people in their referendum vote, yet that procedure was upheld. Further, the *Eastlake* majority failed to suggest standards that might have eliminated the deficiency.

The court, moreover, cited *McGautha v. California*<sup>61</sup> for the principle that fundamental policy choices must be articulated by some responsible organ of government.<sup>62</sup> In *McGautha*, a convicted murderer was sentenced to death in a separate proceeding following trial. He appealed on the grounds that his constitutional rights were infringed because the jury was free to condemn him without any objective

<sup>58</sup> "He who is not injured by the operation of a law or ordinance cannot be said to be deprived by it of either constitutional right or of property." *Thomas Cusack Co. v. City of Chicago*, 242 U.S. 526, 530 (1917); *accord*, *State ex rel. Standard Oil Co. v. Combs*, 129 Ohio St. 251, 194 N.E. 875 (1935) (syllabus at ¶ 3):

An ordinance requiring written consents of fifty-one percent of the property owners in a residential district within a radius of six hundred feet from a filling station, as a prerequisite to its installation, is not a delegation of legislative power . . . and such consent provisions are not repugnant to our state or federal constitutions . . . .

<sup>59</sup> Justice Brown used as support for the *Eastlake* decision:

If the existence of the law depends upon the vote or act of the people it is an unconstitutional delegation of legislative power, but if the law is complete in and of itself the fact that it provides for the removal or modification of its prohibition by the act of those most affected thereby, does not make it a delegation of legislative power.

41 Ohio St. 2d at 195, 324 N.E.2d at 746, *quoting* *Myers v. Fortunato*, 12 Del. Ch. 374, 375, 110 A. 847, 848 (Sup. Ct. 1920). A relatively recent Delaware case, however, thoroughly analyzed *Fortunato*, and placed that decision in its proper perspective:

This Court [in *Myers v. Fortunato*] thereby drew the well-recognized distinction between an ordinance permitting neighbors to remove a use restriction and one permitting neighbors to *impose* a use restriction . . . .

*Marta v. Sullivan*, 248 A.2d 608, 611 (Del. 1968) (emphasis in original).

<sup>60</sup> 41 Ohio St. 2d at 196, 324 N.E.2d at 746.

<sup>61</sup> 402 U.S. 183, 256, 270 (1971) (Brennan, J., dissenting).

<sup>62</sup> 41 Ohio St. 2d at 196, 324 N.E.2d at 746. Justice Brown recognized the importance of protecting the citizenry from arbitrary exercise of municipal authority by providing that policy choices, which are at the root of that authority, be made by responsible organs of government. Justice Stern, concurring, seemed to acknowledge Justice Brown's position adding, however, that zoning changes involve property in which most voters have no interest because of its distance from their homes. To allow them to make decisions upon such voting changes would be government by caprice. Justice Stern's position supports Justice Brown's by example. It is a weak one, however, and moreover, only significant in large cities.

standards.<sup>63</sup> Contrary to the aforementioned "principle" delineated by Justice Brown, the United States Supreme Court in *McGautha* found "it quite impossible to say that committing to the untrammelled discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution."<sup>64</sup>

Although such a holding clearly does not condemn the Eastlake referendum procedure, it should be noted that in *Eastlake* the interest at stake was not of as great a consequence as the interest in *McGautha*. Furthermore, whether required or not, there are certain preliminary standards used by Eastlake in changing an existing land use. The proposal is given a hearing before the City Planning Commission under predetermined guidelines set forth in the zoning code. It is then examined under those guidelines and voted upon by city council. Ultimately, the people vote in an open election.<sup>65</sup> The reasons for the Ohio Supreme Court's awkward reliance upon *McGautha* in their discussion of unrestrained, arbitrary enforcement of the law are unclear. There is stronger precedent in this vein — most notably, the landmark case *Yick Wo v. Hopkins*.<sup>66</sup>

In *Yick Wo*, an ordinance of the city and county of San Francisco provided that it was unlawful to engage in the laundry business within the city or county limits without the Board of Supervisors' permission, unless located in a brick or stone building.<sup>67</sup> It was shown, however, that this regulation was not uniformly applied. The Supervisors enforced it against launderers of Chinese origin, but not against native Americans.<sup>68</sup> Thus, the United States Supreme Court found that such a rule conferred upon the Board of Supervisors a naked, arbitrary power to give or withhold consent, making all those engaged in the laundry business the tenants at will under the Board of Supervisors.<sup>69</sup>

One writer has attempted to distinguish *Yick Wo* from *McGautha* upon the theory that there is a long tradition of faith in the jury system in this country.<sup>70</sup> When applied to *Eastlake*, however, *Yick Wo* fails to be supportable. There is an equally long tradition of referenda in this coun-

<sup>63</sup> 402 U.S. at 185.

<sup>64</sup> *Id.* at 207.

<sup>65</sup> The notion that a planning commission might subject the zoning proposal to objective standards (the city building and zoning codes), and then submit the proposal to city council and voter approval, can be analogized to a trial court's use of criminal code objective standards to judge guilt before a sentencing hearing ever takes place. Cf. Comment, *Capital Sentencing*, 45 TEMP. L.Q. 610, 630 n.49 (1972). The United States Supreme Court has ruled, in a similar context, that one hearing, at whatever stage, can serve to satisfy due process. *Opp Cotton Mills v. Administrator*, 312 U.S. 126, 152-53 (1941). The concept that the above hearing should take place by way of open, public debate was accepted in *Dwyer v. City Council of Berkeley*, 200 Cal. 505, 253 P. 932 (1927). See also *San Diego Bldg. Contractor's Ass'n v. City Council of San Diego*, 13 Cal. 3d 205, 529 P.2d 570, 118 Cal. Rptr. 146, appeal filed, 44 U.S.L.W. 3042 (U.S. May 20, 1975) (No. 74-1459).

<sup>66</sup> 118 U.S. 356 (1886).

<sup>67</sup> *Id.* at 357.

<sup>68</sup> *Id.* at 359.

<sup>69</sup> *Id.* at 373-74.

<sup>70</sup> Note, *Capital Sentencing by a Standardless Jury*, 50 N.C.L. Rev. 118, 126 n.44 (1971).  
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try. This is borne out by the significant Supreme Court decision in *James v. Valtierra*<sup>71</sup> which was accorded little weight by the *Eastlake* majority.

## 2. *Valtierra and the Exercise of Democratic Decisionmaking*

Consistent with their questionable positions regarding *Hilltop Realty*, *Cusack*, and *McGautha*, the *Eastlake* court declined to accept the clear holding of *Valtierra*. A provision of the California constitution<sup>72</sup> required a mandatory referendum as a condition precedent to the construction of low rent housing. The Court upheld the mandatory referendum, placing special emphasis throughout the opinion upon the long tradition of referendum usage in California.<sup>73</sup>

The decision in *Valtierra* has been criticized by several writers.<sup>74</sup> Although these critics have divined discriminatory motives in the case,<sup>75</sup> it is significant that none have attempted to criticize the California mandatory referendum as an unconstitutional delegation of legislative power. The great import of *Valtierra* can be summarized:

When a mandatory referendum is authorized, the Court must presume, as it did in *Valtierra*, that "referendums demonstrate devotion to democracy, not to bias, discrimination, or prejudice."<sup>76</sup>

One writer has emphasized that *Valtierra* represents the ultimate triumph of Justice Black's belief in the high priority of voters' rights in the scheme of other federally recognized rights.<sup>77</sup>

<sup>71</sup> 402 U.S. 137 (1971).

<sup>72</sup> CAL. CONST. art. XXXIV, § 1:

No low rent housing project shall hereafter be developed, constructed or acquired in any manner by any state public body until, a majority of the qualified electors of the city, town, or county, as the case may be, in which it is proposed to develop, construct, or acquire the same, voting upon such issue, approve such project by voting in favor thereof at an election to be held for that purpose, or at any general or special election.

<sup>73</sup> 402 U.S. at 141-43. Despite the holding in *Valtierra*, the referendum was not without early roadblocks in California. See, e.g., *Ex parte Wall*, 48 Cal. 279 (1874).

<sup>74</sup> Note, *Mandatory Referendum on Low-Income Housing*, 13 B.C. IND. & COM. L. REV. 603 (1972); Note, *Discrimination Through Exclusionary Housing Referenda: James v. Valtierra*, 5 LOYOLA U.L.A.L. REV. 368 (1972); Note, *Mandatory Referendum: Equal Protection Anomaly?* 1971 UTAH L. REV. 553; Note, *Public Housing for Low Income Families — Mandatory Referendum Requirement*, 1972 WIS. L. REV. 268.

<sup>75</sup> The facts of the case, however, led Justice Black to comment:

[T]he record here would not support any claim that a law seemingly neutral on its face is in fact aimed at a racial minority.

402 U.S. at 141.

<sup>76</sup> Note, *The Application of the Equal Protection Clause to Referendum-Made Law: James v. Valtierra*, 1972 U. ILL. L. FORUM 408, 427 (1972), quoting *James v. Valtierra*, 402 U.S. 137, 141 (1971).

<sup>77</sup> Lefcoe, *The Public Housing Referendum Case, Zoning, and the Supreme Court*, 59 CALIF. L. REV. 1384, 1393 (1971), quoting *Hunter v. Erickson*, 393 U.S. 385, 397 (1969) (Black, J., dissenting).

Just consider that for a moment. In this Government, which we boast is "of the people, by the people, and for the people," conditioning the enactment of a law on a majority vote of the people condemns that law as unconstitutional in the eyes of the Court!

Justice Brown attempted to avoid *Valtierra* by stating that it concerned low rent public housing, not zoning.<sup>78</sup> This seems an insignificant, if not erroneous, distinction, particularly since Forest City Enterprises intended to build multifamily housing for the elderly. Moreover, at least one court has interpreted *Valtierra* as encompassing zoning referenda.<sup>79</sup>

The emphasis in *Valtierra* was upon the long history of referenda in California.<sup>80</sup> It is clear, however, that California has not enjoyed a monopoly on the referendum process.<sup>81</sup> Ohio legislatures and courts have explored and long approved referenda and referendum-type procedures.<sup>82</sup> In his dissenting opinion in *Eastlake*, Justice Corrigan con-

<sup>78</sup> 41 Ohio St. 2d at 197, 324 N.E.2d at 747.

<sup>79</sup> *City of Coral Gables v. Carmichael*, 256 So. 2d 404, 409 (Fla. Ct. App. 1972), cert. discharged, 268 So. 2d 1 (Fla. 1972).

<sup>80</sup> Justice Black noted the presence of a referendum provision in the 1849 California constitution. 402 U.S. at 141. Article VIII of that constitution set a \$300,000 state debt limit and made any exception subject to a mandatory referendum. Other mandatory referendums noted by Justice Black included: state constitutional amendment removal; issuance of long-term bonds; territorial annexations; and alienation of park property. 402 U.S. at 142.

<sup>81</sup> See generally E. OBERHOLTZER, *THE REFERENDUM IN AMERICA* (1893). The referendum concept in the United States was borrowed from the Swiss where certain cantons had provisions for compulsory referenda on all appropriations of money. *Id.* at 11. In America, the celebrated New England town meeting had been in operation before 1643. *Id.* at 25. The eminent nineteenth century jurist, Judge Thomas M. Cooley, traced the works of several early American writers concluding that

the constitution has been adopted in view of a system of *local government* [and] . . . the liberties of the people have generally been supposed to spring from, and be dependent upon that system.

*People v. Hurlbut*, 24 Mich. 43, 98 (1871) (emphasis added). See also Judge Wanamaker's powerful dissent in *State ex rel. City of Toledo v. Lynch*, 88 Ohio St. 71, 126, 102 N.E. 670, 681 (1913), where he emphasized that "[t]he cornerstone of American government is found in that fundamental principle: 'All political power is inherent in the people.'"

Various state constitutions were approved via referenda with provisions that the constitutions be periodically resubmitted to public vote. *State ex rel. Nolan v. Clendering*, 93 Ohio St. 264, 278, 112 N.E. 1029, 1033 (1915). The referendum concept was also used in a variety of areas throughout the nineteenth century: Maine (1820, apportionment), OBERHOLTZER, *supra* at 62; Pennsylvania (1836, whether to establish schools), *id.* at 65; Rhode Island (1842, governmental expenditures), *id.* at 55; Texas (1845, annexation to United States), *id.* at 54; Wisconsin (1885, women's suffrage), *id.* at 61; Wyoming (1889, location of state colleges), *id.* at 53. Finally, several early decisions upheld laws against claims that the referendum procedure was not republican. *Wales v. Belcher*, 20 Mass. (3 Pick.) 508, 510-11 (1826) ("Why may not the legislature make the existence of any act depend on the happening of any future event? Constitutions themselves are so made . . . . We see no impropriety, certainly no unconstitutionality, in giving the people the opportunity to accept or reject such provisions."). *People v. Reynolds*, 10 Ill. (5 Gilm.) 1, 15 (1848) ("[T]he legislature may delegate authority, either to individuals or to bodies of people, to do many important legislative acts . . . ."). See also *Burgess v. Pue*, 27 Md. 9, 14-15 (1844).

<sup>82</sup> Under the 1802 Ohio constitution, a constitutional convention could not be called for purposes of amending the constitution without a majority of the popular vote. OHIO CONST. art. VII, § 5 (1802). The 1851 constitution was adopted by referendum, *Id.* Schedule, § 17 (1851), and it provided that constitutional amendments must be approved by public vote. *Id.* art. XVI, § 1. In 1912, initiative and referendum procedure was adopted, OHIO CONST. art. II, §§ 1-1g (1912).

It is significant that in adopting the referendum procedures, the constitutional convention was concerned with the experience of California with her then recently adopted provisions. See *Proceedings and Debates of the Constitutional Convention of the State of California*, 1896, at 659 (1912).

cluded that an examination of Ohio legislation indicated that "submission of zoning resolutions to electors by referendum is not an innovative concept."<sup>83</sup> More importantly, there are several examples of laws subject to mandatory referendum under the Ohio Revised Code.<sup>84</sup>

The legitimacy of the voters' interest in zoning was addressed by the Supreme Court in *Valtierra*: "[T]his procedure 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 and to lower tax revenues."<sup>85</sup> Furthermore, *Valtierra* should not be limited to its facts. As stated in *Johnston v. City of Claremont*:

The right of referendum with respect to zoning ordinances is essential for the protection of the rights of the electors of each city. A zoning ordinance can and does have a more direct and lasting effect upon property values and property owners within a city than almost any other type of ordinance. What is done with respect to one piece of property of necessity has an effect, good or bad, upon adjacent or nearby property.<sup>86</sup>

The Ohio Supreme Court decision of *Cook-Johnson Realty Co. v. Bertolini*,<sup>87</sup> which upheld referendum zoning in a township, seems consistent with the long Ohio history of referenda. Moreover, the Ohio law prior to *Eastlake* appeared to be settled that the existence of charter provisions regulating specific, mandatory referenda were not in conflict with state code provisions.<sup>88</sup>

A most interesting case which involved issues analogous to those in *Eastlake* was *Columbia Gas & Fuel Co. v. City of Columbus*,<sup>89</sup> in which the city charter provided that any change in utility rates would be inoperative without voter approval.<sup>90</sup> In consonance with the referenda

Additionally, under article II, section 30, any proposal to alter county boundary lines must receive referendum approval. OHIO CONST. art. XVII, § 8. Finally, creation of an Ohio municipal charter commission or adoption of a charter both require referendum approval. *Id.*

<sup>83</sup> 41 Ohio St. 2d at 206, 324 N.E.2d at 752 (Corrigan, J., dissenting).

Adoption of zoning in Ohio counties or townships is subject to mandatory referendum proceedings, OHIO REV. CODE ANN. §§ 303.11, 519.11 (Page 1953), and referendum petitions may be submitted upon any amendment or supplements. *Id.* §§ 303.12, 519.12 (Page Supp. 1974).

<sup>84</sup> See, e.g., OHIO REV. CODE ANN. § 133.16 (Page Supp. 1974) (majority approval required at general election; 60 percent at special election); *id.* § 133.17 (majority approval required); *id.* § 139.02 (Page 1969) (65 percent approval required); *id.* § 306.32 (Page Supp. 1974) (majority approval of voters in affected region required); *id.* § 306.49 (majority approval required); *id.* § 718.01 (majority approval required); *id.* § 1515.04 (65 percent approval required); *id.* § 5705.19 (Page 1973) (majority approval required at general election; 55 percent at special election).

<sup>85</sup> 402 U.S. at 143.

<sup>86</sup> 49 Cal. 2d 826, 837 P.2d 71, 78 (1958). See also *Forest City Enterprises, Inc. v. City of Eastlake*, 41 Ohio St. 2d 187, 205, 324 N.E.2d 740, 751 (1975).

<sup>87</sup> 15 Ohio St. 2d 195, 239 N.E.2d 80 (1968). See text accompanying note 221 *infra*.

<sup>88</sup> See *State ex rel. Bramblette v. Yordy*, 24 Ohio St. 2d 147, 265 N.E.2d 273 (1970); accord, *Dillon v. City of Cleveland*, 117 Ohio St. 258, 158 N.E. 606 (1927); see also *State ex rel. Conn v. Noble*, 165 Ohio St. 564, 138 N.E.2d 302 (1956).

<sup>89</sup> 42 F.2d 379 (6th Cir. 1930).

<sup>90</sup> *Id.* at 380.

tradition in Ohio and the reasoning of *Valtierra*, the referendum was upheld:

The constitutional referendum provision was inserted for the protection and benefit of the people of the municipalities; not for that of the utilities. Neither the city nor its inhabitants are complaining. In their wisdom, the people of Columbus saw fit to further limit the power of council by requiring a referendum in every case of franchise grant and rate regulation. They were not content to leave this to the vigilance of individual citizens. This was a matter, we think, properly subject to charter provision under the Home Rule Amendment (Const. Ohio art. 18), and in no wise inconsistent with the lesser protection afforded by the Constitution . . . . The constitutional provision for referendum is not made inoperative; the people have but limited, in their control of the local government, the possibly broader powers of council without such limitation. This certainly violates no constitutional right . . . .<sup>91</sup>

### III. THE CONCURRING OPINION: THE THEME BELOW

In Justice Stern's concurrence in *Eastlake* he addressed what he considered the broader issues raised by the case.<sup>92</sup> His arguments were directed toward finding the Eastlake charter zoning referendum invalid based on its burdensome nature, and the resultant exclusion of persons of low and middle income — so called "exclusionary zoning."<sup>93</sup>

#### A. *Mandatory Referendum Zoning: Is it a Burden Upon too Many Interests?*

Justice Stern commenced his analysis with a consideration of *Village of Euclid v. Ambler Realty Co.*<sup>94</sup> as did Justice Brown for the majority, but the concurring opinion instead placed emphasis on the strong dictum of Justice Sutherland:

If it be a proper exercise of the police power to relegate industrial establishments to localities separated from residential sections, it is not easy to find a sufficient reason for denying the power because the effect of its exercise is to divert an industrial flow from the course which it would follow, to the injury of the residential public if left alone, to another course where such injury will be obviated. *It is not meant by this, however, to exclude the possibility of cases where the general public interest would so far outweigh the interest of the municipality that the municipality would not be allowed to stand in the way.*<sup>95</sup>

<sup>91</sup> *Id.* at 381-82.

<sup>92</sup> 41 Ohio St. 2d at 198-201, 324 N.E.2d at 748-49.

<sup>93</sup> *Id.* at 199, 324 N.E.2d at 749.

<sup>94</sup> 272 U.S. 365 (1926).

<sup>95</sup> Engage v. Sutherland, 199, 324 N.E.2d at 748, quoting 272 U.S. at 389-90 (emphasis in 15



Thus, Justice Stern set the stage for an examination of whether the Eastlake charter referendum provision was a reasonable and proper function of the police power to zone, or whether it was an abuse of such power.<sup>96</sup> He adopted an equal protection test of "weighing . . . the general public interest against the interests of a municipality."<sup>97</sup> When applied to *Eastlake*, however, this balancing test is inadequate.

The interests of the property owner and the interests of a municipality are at stake and thus properly subject to consideration. Equally at issue are the interests of neighboring landowners. Justice Stern alluded to this, but appeared to equate the neighboring landowners' interests in maintaining the existing zoning with those of the municipality.<sup>98</sup> The City of Eastlake Planning Commission and city council, however, approved Forest City's application for rezoning. Therefore, members of the neighboring community desiring no land use change to occur (who would have likely voted against rezoning in the mandatory referendum) did not share all of the same interests with the municipality.<sup>99</sup>

If *Eastlake* is to turn upon a balancing of interests, then a tripartite methodology ought to be employed. The equation would include a full acknowledgment and consideration of all interests at stake: the interest of a landowner to rezone and use his property more profitably; the interest of a municipality in planning proper land usage for community needs; and the various interests of the neighboring community affected by rezoning. Justice Stern equated the interests of the municipality and

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original). In *Nectow v. Cambridge*, 277 U.S. 183 (1928), the United States Supreme Court, per Justice Sutherland, applied this emphasized admonition to find a municipal zoning classification clearly unreasonable and therefore an unlawful taking of property without due process of law. In *Nectow*, petitioner landowner sought to have his property rezoned from residential to industrial usage, since the surrounding neighborhood land uses were primarily industrial.

<sup>96</sup> See text accompanying notes 18-19 *supra*.

<sup>97</sup> 41 Ohio St. 2d at 199, 324 N.E.2d at 748. See generally Comment, *Constitutional Law: Equal Protection — An Emerging Standard of Review*, 13 WASHBURN L.J. 106 (1974).

<sup>98</sup> Lawyers for Housing argued that these status quo interests were intended to curb growth under a "prevailing ethic that 'no growth is good growth'." Brief for Lawyers for Housing as Amicus Curiae at 12, *Forest City Enterprises, Inc. v. City of Eastlake*, 41 Ohio St. 2d 187, 324 N.E.2d 740 (1975).

<sup>99</sup> It may be argued that the Eastlake Planning Commission and city council approved Forest City's use-change application only because they were certain it would be disapproved by the voters in the referendum. But does such a view accord with common sense? If a city in Ohio desires to prevent a use-change application from succeeding, tying it up in the courts by denying the application and then litigating the matter upon appeal seems a better route than taking the chance that the voters will disapprove it. See generally Kancler, *supra* note 4. Five years of litigation culminated with *United States v. City of Black Jack*, 508 F.2d 1179 (8th Cir. 1974), *cert. denied*, 95 S. Ct. 2656 (1975), where it was held that the zoning out by the city of a planned multifamily housing development had a racially discriminatory effect and was thus invalid. The *Black Jack* court thus ordered the city to permit construction of the housing project. This was a hollow victory, however, for fair-housing advocates, since inflation had raised construction costs and interest rates to the extent that the project would never be built. N.Y. Times, Jan. 14, 1976, at 24, col. 1. Legal fees amounting over a period of years are most certainly another drain on the funds of groups promoting low income housing, and therefore serve to quell incentive to build such housing when protracted

the neighboring community, thereby overlooking the interests of the latter group.

The concurring opinion focused upon the third and last element of the reasonableness test for zoning ordinances outlined by Justice Brown for the *Eastlake* majority: "[A] zoning ordinance . . . must provide for the amelioration of unnecessary hardships imposed upon the owners of specific property."<sup>100</sup> Justice Stern viewed the actual purpose of the *Eastlake* charter provision to be the obstruction of land use change by "rendering such change so burdensome as to be prohibitive."<sup>101</sup> The provision was regarded by him as imposing, rather than ameliorating, unnecessary hardships upon the owners of specific property.

Justice Stern implied that the charter referendum provision was adopted under questionable circumstances while Forest City's rezoning application was pending before the *Eastlake* Planning Commission and city council.<sup>102</sup> He further gave little weight to the charter provision requirement of a 55 percent affirmative vote in the mandatory referendum for any proposed use change.<sup>103</sup> Also mentioned was the cost of the mandatory zoning referendum which fell upon the use-change applicant, whether or not his request met voter approval, such cost not being specified in the *Eastlake* charter.<sup>104</sup> Justice Stern then abruptly concluded that "[t]here is no subtlety to this; it is simply an attempt to render change difficult and expensive under the guise of popular democracy."<sup>105</sup>

Considering the charter provision apart from the harsher provisions, Justice Stern advanced a public policy argument that a city-wide mandatory referendum places the fate of a property owner's use-change application with voters who have neither knowledge of nor interest in the property.<sup>106</sup> He illustrated his point by analogizing to the situation that would be presented if a large city like Cleveland were to adopt a similar referendum provision. In his view this would be "government by caprice, and would certainly dilute the private ownership of property."<sup>107</sup>

Certainly, there are serious problems underlying the *Eastlake* rezoning procedure. It appears to render useless the presumably careful

<sup>100</sup> 41 Ohio St. 2d at 189, 324 N.E.2d at 743, adopting the view taken in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). The other two elements of this test are the comprehensiveness of the zoning ordinance and the zoning provision's reasonable relationship to the public health, safety, welfare, or morals.

<sup>101</sup> 41 Ohio St. 2d at 199, 324 N.E.2d at 748.

<sup>102</sup> *Id.* See note 6 *supra* for the proposition that the *Eastlake* charter amendment should not have applied retroactively to Forest City's use change application.

<sup>103</sup> *Id.* Thus, he impliedly approved Forest City's argument that 46 percent of the voters may thwart simple majority approval of rezoning. See Respondent's Brief in Opposition to Certiorari at 8-9, *City of Eastlake v. Forest City Enterprises, Inc.*, 96 S. Ct. 185 (1975).

<sup>104</sup> 41 Ohio St. 2d at 199-200, 324 N.E. 2d at 748. As set forth at note 4 *supra*, the lower court struck down this cost requirement and *Eastlake* did not dispute the ruling in its subsequent appeals. At least one state, however, provides that use-change applicants bear some of the costs of a zoning referendum. ARIZ. REV. STAT. ANN. § 19-124 to -141 (1956).

<sup>105</sup> *Id.* at 200, 324 N.E.2d at 748.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

land-use considerations of planning commissions, zoning boards, and city councils. Thus, municipal planning interests are seemingly thwarted along with private property interests. As one writer has commented, the mandatory referendum "seems obviously inconsistent with the concept of representative government."<sup>108</sup> It also appears to make land-use changes very time consuming to achieve.

Justice Stern saw no "proper public purpose" to justify the Eastlake procedure; there are, however, community interests which should allow the mandatory referendum to stand. Foremost is the substantial, legitimate interest of the community in voting on local land-use issues, highly regarded by the Court in *James v. Valtierra*.<sup>109</sup> Justice Stern considered the general public to be uninformed upon zoning matters and thus, unworthy of being entrusted with such judgments. Yet it should be realized that the public is not necessarily less knowledgeable concerning zoning matters than with other issues commonly subject to the elective process.<sup>110</sup>

Another factor disregarded by Justice Stern was the peculiar and disturbing rule in Ohio that a zoning ordinance passed as an emergency measure by council of a chartered municipality precludes a referendum election called by initiative petition.<sup>111</sup> The community interest in ensuring that a large land developer does not influence local officials to grant rezoning through overbearing or improper methods thus seems far from being unfounded. At least one writer has attributed this interest as a major factor in the development of the mandatory zoning referendum.<sup>112</sup>

Justice Stern's analogy to the problem presented by thousands of people voting upon proposed land-use changes miles from their neighborhoods, which would ensue if a large city like Cleveland was to zone via mandatory referendum, is a valid public policy consideration. The

<sup>108</sup> Kancler, *supra* note 4, at 40.

<sup>109</sup> 402 U.S. 137 (1971). *Accord*, Southern Alameda Spanish Speaking Orgs. (SASSO) v. Union City, 424 F.2d 291 (9th Cir. 1970); Ranjel v. City of Lansing, 417 F.2d 321 (6th Cir. 1969); Spaulding v. Blair, 403 F.2d 862 (4th Cir. 1968); State *ex rel.* Bramblette v. Yordy, 24 Ohio St. 2d 147, 165 N.E.2d 273 (1970); Cook-Johnson Realty Co. v. Bertolini, 15 Ohio St. 2d 195, 239 N.E.2d 80 (1968). See text accompanying notes 72-91 *supra*. Zoning changes can in some instances have a tremendous impact on local taxes. E.g., *James v. Valtierra*, 402 U.S. 137 (1971); Brief for the Cities of Euclid, Kirtland, Willoughby Hills, and Willowick as Amicus Curiae at 12, City of Eastlake v. Forest City Enterprises, 96 S. Ct. 185 (1975).

<sup>110</sup> Admittedly, an Ohio referendum zoning question is rather vaguely worded, much like the following: "Shall Permanent Parcel No. 123-45-678 be changed from 'x' use classification to 'Y' use classification?" Arizona and Oregon have a more informative approach. They provide for the publication of the land-use measure to be voted upon in pamphlet form with the inclusion of supporting and opposing arguments. ARIZ. REV. STAT. ANN. § 19-141(B), (C) (1956); ORE. REV. STAT. § 254.130 (1968). In Arizona, the pamphlets are paid for by the city or town, except that the proportionate costs of the paper and printing are chargeable to those submitting arguments. The pamphlets are distributed to every registered voter within the municipality at least eight days prior to the election. ARIZ. REV. STAT. ANN. §§ 19-124 to -141 (1956). See also Comment, *supra* note 51, at 459.

<sup>111</sup> Partain v. City of Brooklyn, 101 Ohio App. 279, 133 N.E.2d 616 (1956). This is not true, however, for a noncharter municipality. *Morris v. Roseman*, 162 Ohio St. 447, 123 N.E.2d 419 (1954).

<sup>112</sup> Kancler, *supra* note 4, at 40.  
<https://engagedscholarship.csuohio.edu/clevstlrev/vol24/iss4/4>

city of Eastlake, however, is not greatly populated.<sup>113</sup> It appears reasonable to say that the citizens of a small municipality are better informed of and are more directly affected by land-use changes than is the populace of a large city. Therefore, the analogy cannot be said to be completely dispositive of the matter when consideration is limited to Eastlake or other small municipalities. Additionally, the concurring opinion failed to address the competing interests of all the parties concerned with mandatory zoning referenda. It is serious analytical flaw to consider only the interests of private landowners.

### B. *Exclusionary Zoning and Zoning Referenda*

Justice Stern next addressed the additional considerations mandating the invalidity of the Eastlake charter zoning referendum. In concluding that the referendum provision improperly excluded persons of low and middle income,<sup>114</sup> he clearly implied that the Eastlake provision also excluded persons on the basis of race. Thus, Justice Stern indicated that the city of Eastlake, through its charter zoning referendum, was engaged in unlawful exclusionary zoning. This issue was not presented by the parties to the suit, Forest City and the city of Eastlake, but rather was injected into the proceedings before the Ohio Supreme Court by Lawyers for Housing as *amicus curiae*.<sup>115</sup> Justice Stern regarded the underlying "motive" of the Eastlake charter referendum to be that of excluding minorities and the poor which would have the "inevitable effect" of perpetuating class and racial divisions in our society.<sup>116</sup>

#### 1. *Exclusionary Zoning*

##### a. *Defined*

Exclusionary zoning has been a burgeoning aspect of zoning litigation in the past decade.<sup>117</sup> This concept can be described as zoning which

<sup>113</sup> The city is populated by approximately 20,000 people. Cleveland Press, Dec. 29, 1975, at A-4, col. 2.

<sup>114</sup> 41 Ohio St.2d at 201, 324 N.E.2d at 749. In *James v. Valtierra*, 402 U.S. 137, 145 (1971), Justice Marshall, dissenting, argued that classification on the basis of income is suspect and therefore requires close judicial scrutiny.

<sup>115</sup> Brief for Petitioners at 17 n.13, *City of Eastlake v. Forest City Enterprises, Inc.*, 96 S. Ct. 185 (1975). See Brief for Lawyers for Housing as Amicus Curiae, 41 Ohio St. 2d 187, 324 N.E.2d 740 (1975). An amicus curiae appears as a friend of the court either at the court's invitation or by grant of its request to appear. Accordingly, the amicus curiae is not a party to the action. *Board of Comm'rs v. Cooper's Unknown Heirs*, 75 N.E.2d 84 (Ohio Ct. App. 1947), *appeal dismissed*, 152 Ohio St. 202, 88 N.E.2d 293 (1949). He must accept the case as he finds it with the issues presented by the parties. 3A C.J.S. *Amicus Curiae* § 7, at 430 (1973).

<sup>116</sup> 41 Ohio St. 2d at 200-01, 324 N.E.2d at 749.

<sup>117</sup> Commentary upon this topic is quite extensive. Recent analyses include: R. BABCOCK & F. BOSSELMAN, *EXCLUSIONARY ZONING: LAND USE REGULATION AND HOUSING IN THE 1970's* (1973) [hereinafter cited as BABCOCK & BOSSELMAN]; E. BERGMAN, *ELIMINATING EXCLUSIONARY ZONING* (1974); 3 N. WILLIAMS, *AMERICAN LAND PLANNING LAW* §§ 66.01-.52 (1974); Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 STAN. L. REV. 767 (1969); Symposium: *Exclusionary Zoning*, 22

results in racial or economic segregation rather than the promotion of the health, safety, morals, or general welfare of a community. The term "exclusionary zoning" is actually redundant as virtually all zoning excludes, in some manner, certain types of land uses from particular areas.<sup>118</sup> Land usage is restricted through exclusionary zoning, however, to so-called "desirable" persons of a certain color or economic status, under the guise of constitutional zoning laws.

Traditional zoning cases have been basically of two types. The first involves suits by landowners which challenge zoning restrictions that prevent them from using their land most profitably, generally alleging that such property is being "taken" by the local government without due process of law.<sup>119</sup> The second embraces actions by aggrieved neighboring landowners in cases where a developer has been granted a variance by the local zoning board, permitting him to modify the use of his land, because the rigid zoning code imposes an unusual hardship on him.<sup>120</sup>

The exclusionary zoning cases of recent years differ in a number of respects from tradition. Plaintiffs in such cases are often low income persons, minorities, or organizations that represent their interests.<sup>121</sup>

SYRACUSE L. REV. 465 (1971); Note, *Exclusionary Zoning and Equal Protection*, 84 HARV. L. REV. 1645 (1971); Note, *Snob Zoning: Must a Man's Home be a Castle?*, 69 MICH. L. REV. 339 (1970); Note, *Exclusionary Zoning: A Question of Balancing Due Process, Equal Protection, and Environmental Concerns*, 8 SUFFOLK L. REV. 1190 (1974). For a good overview and summary of many recent exclusionary land use decisions, see NATIONAL COMMITTEE AGAINST DISCRIMINATION IN HOUSING AND URBAN LAND INSTITUTE, *FAIR HOUSING & EXCLUSIONARY LAND USE* (1974) [hereinafter cited as U.L.I. RESEARCH REPORT 23].

<sup>118</sup> Annot., 48 A.L.R.3d 1210, 1212 (1973).

<sup>119</sup> Sloane, *Overview*, in National Committee Against Discrimination in Housing, *Exclusionary Land Use Litigation: Policy and Strategy for the Future* 1, 3 (1974) [hereinafter cited as Sloane]. For a thorough history and study of traditional land use problems across the nation see F. BOSSELMAN, D. CALLIES & J. BANTA, *THE TAKING ISSUE* (1973). And for a wide-ranging overview of judicial approaches to said traditional line see Feiler, *Zoning: A Guide to Judicial Review*, 47 J. URBAN L. 319 (1969).

<sup>120</sup> Sloane, *supra* note 119. For instance, the local zoning code may require a house to be set back 40 feet from a street. But a developer desirous of building a house finds this impossible because a stream cuts through his lot 39 feet from the street. Thus, he applies to the appropriate municipal agency, such as a zoning board, for a "variance" to permit him to "vary" from the local comprehensive 40 foot setback requirement so that he can build the house closer to the street. If the city refuses the application, the developer will invariably argue that such action is a "taking" of his property without due process of law since the setback requirement has worked to render his property useless without the variance.

<sup>121</sup> *Id.* at 3-4. But see *Warth v. Seldin*, 95 S. Ct. 2197 (1975), where the Supreme Court denied standing to low income residents of Rochester, New York, relative to a bias attack on the comprehensive zoning ordinance of Penfield, New York, a Rochester suburb. The town allocated 98 percent of its vacant land to single family detached housing. The Court felt that the plaintiffs did not allege specific, concrete facts showing that Penfield's zoning scheme harmed them personally. The Court concluded that Rochester's minorities were excluded from Penfield because of the economics of the area's housing market rather than the zoning law in question. The Court also denied standing to taxpayers from Rochester, local fair housing groups, and a building trade association. The import of *Warth* is being swiftly realized as the Court subsequently vacated the Sixth Circuit's reinstatement of a housing discrimination suit by inner city residents against a suburb, and remanded the case to that court for reconsideration in light of *Warth*. City of Parma v. Cornelius, 95 S. Ct. 2673 (1975), *vacating and remanding mem.*, 507 F.2d 1400 (6th Cir. 1974), *vacating and remanding mem.*, 374 F. Supp. 730 (N.D. Ohio 1974).

Most exclusionary zoning cases are brought in federal rather than state court and involve charges of illegal exclusion against local governments under the United States Constitution and federal laws,<sup>122</sup> as opposed to the traditional zoning plea of an unlawful "taking" of property without due process.<sup>123</sup>

### b. *Exclusionary Land Use Practices and Devices*<sup>124</sup>

One would be hard-pressed to find a modern zoning ordinance so crudely drawn as to overtly exclude a particular group or class of persons.<sup>125</sup> Zoning on explicit racial lines was held unconstitutional by the Supreme Court over five decades ago in *Buchanan v. Warley*.<sup>126</sup> For about thirty years afterwards, most efforts to promote racial segregation in housing shifted to the use of racial covenants.<sup>127</sup> Such covenants generally took the form of restrictions upon the conveyance, rental, or lease of real property to persons of various racial minority groups. These restrictive covenants were struck down in the landmark case of *Shelley v. Kraemer*<sup>128</sup> as a denial of equal protection under the fourteenth amendment. Also considered unconstitutional are alien land laws, legislation designed to forbid the ownership of land by aliens ineligible for naturalization.<sup>129</sup>

After the invalidation of racial covenants in *Shelley*,<sup>130</sup> zoning has been increasingly employed as a device for the exclusion of minorities

<sup>122</sup> Sloane, *supra* note 119, at 4. Exclusionary zoning cases are frequently brought under the due process and equal protection clauses of the fourteenth amendment, Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §§ 3601, *et seq.*, 42 U.S.C. §§ 1982, 1983 (1970), and the right to travel. See Note, *The Equal Protection Clause and Exclusionary Zoning After Valtierra and Dandridge*, 81 YALE L.J. 61, 65 n.16 (1972). Professor Norman Williams, Jr. argues that state courts provide a better forum for exclusionary zoning suits than federal courts, since the former are more experienced in zoning litigation than the latter, and appear to take a more critical view of exclusionary land-use controls. Williams, *Anti-Exclusionary Litigation — In What States?*, in National Committee Against Discrimination in Housing, *Exclusionary Land Use Litigation: Policy and Strategy for the Future* 40 (1974). See, e.g., *Joseph Skillken & Co. v. City of Toledo*, P-H EQUAL OPP. IN HOUSING ¶ 13,736 (6th Cir. Dec. 29, 1975); *Southern Burlington County NAACP v. Township of Mt. Laurel*, 67 N.J. 151, 336 A.2d 713 (1975).

<sup>123</sup> See generally, F. BOSSELMAN, D. CALLIES & J. BANTA, *THE TAKING ISSUE* (1973). Lower income persons normally have no property to be "taken" since they are alleging exclusion from a community in the first place, hence the resort to federal remedies. But such lack of ownership appears to preclude standing to bring suit. See note 121, *supra*; *Warth v. Seldin*, 95 S. Ct. 2197, 2216 (1975) (Brennan, J., dissenting).

<sup>124</sup> For a good overview of early discriminatory housing practices see 2 N. WILLIAMS, *AMERICAN LAND PLANNING LAW* §§ 59.01-61.02 (1974).

<sup>125</sup> AMERICAN SOCIETY OF PLANNING OFFICIALS, *Exclusionary Zoning and Equal Protection*, 1971 LAND USE CONTROLS ANNUAL 196.

<sup>126</sup> 245 U.S. 60 (1917).

<sup>127</sup> WILLIAMS, *supra* note 124, § 59.07, at 576.

<sup>128</sup> 334 U.S. 1 (1948). See also *Barrows v. Jackson*, 346 U.S. 249 (1953) (racial covenants could not be enforced indirectly by damage suits against those who convey, rent, or lease to racial minorities in breach of such covenants).

<sup>129</sup> WILLIAMS, *supra* note 124, §§ 61.01-02.

and the poor,<sup>131</sup> often assuming a variety of forms. The prevalent land-use controls alleged to constitute such exclusionary zoning are the subject of the following discussion.

i. *Exclusionary Action by Local Governmental Officials*

Although not exclusionary zoning per se, discriminatory governmental action is as much a violation of equal protection as is such action effected through zoning. For instance, the exercise of discretionary power by local officials in withholding building permits for low cost housing was held to be a discriminatory, exclusionary tactic in *Kennedy Park Homes Association v. City of Lackawanna*.<sup>132</sup> There the Court of Appeals for the Second Circuit affirmed a district court ruling which ordered building permits to be issued for construction of a Federal Housing Administration sponsored public housing project in a predominantly white residential area. The city of Lackawanna unsuccessfully sought to justify its action on the grounds that the project would severely burden its sewer system and that the site was needed for a public park.<sup>133</sup> The city's action was held to be violative of equal protection and the Civil Rights Act of 1968.<sup>134</sup>

The denial of funding by local government for a proposed middle and low income housing project was at issue in *Citizens Committee for Faraday Wood v. Lindsay*.<sup>135</sup> In *Lindsay*, no denial of equal protection was found by the Second Circuit Court of Appeals in New York City's decision not to proceed with a proposed housing project and its consequent refusal to process applications for financing construction of the project. The court held that the city's action was rational and that it could not be compelled to build a specific housing project merely because it commenced to plan such a project.<sup>136</sup> In reaching its decision the court clearly distinguished its prior decision in *Lackawanna*. It noted that in *Lackawanna* the housing project was designed exclusively for low income persons, a disproportionate number of whom were nonwhite; eighty percent of the housing units in *Lindsay*, however, were reserved for middle income persons.<sup>137</sup> Also, in *Lackawanna* the city's action prevented a private developer from building, whereas in *Lindsay* the city initiated the housing project, was responsible for financing it, and made the ulti-

<sup>131</sup> See generally U.L.I. RESEARCH REPORT 23, *supra* note 117.

<sup>132</sup> 318 F. Supp. 669 (W.D.N.Y. 1970), *aff'd*, 436 F.2d 108 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971).

<sup>133</sup> Such defenses are common among government-defendants in public housing cases. See, e.g., *Morales v. Haines*, 486 F.2d 880 (7th Cir. 1973); *Crow v. Brown*, 322 F. Supp. 382 (N.D. Ga. 1971), *aff'd per curiam*, 457 F.2d 788 (5th Cir. 1972).

<sup>134</sup> 18 U.S.C. §§ 241 *et seq.* (1968).

<sup>135</sup> 507 F.2d 1065 (2d Cir. 1974), *cert. denied*, 421 U.S. 948 (1975).

<sup>136</sup> *Id.* at 1071. A finding similar to *Lindsay* was made in *Acevedo v. Nassau County*, 500 F.2d 1078 (2d Cir. 1974). In this class action by low income blacks and Puerto Ricans, the county's abandonment of a planned low income housing project did not constitute racially-discriminatory treatment. *Contra*, *Southern Burlington County NAACP v. Township of Mt. Laurel*, 67 N.J. 151, 336 A.2d 713 (1975).

mate decision not to proceed.<sup>138</sup> Likewise it was shown in *Lackawanna* that the action of the city was prompted by improper racial considerations and that the city had a history of discrimination in its land-use planning.<sup>139</sup> These facts were conspicuously absent in *Lindsay*.

In *Gautreaux v. Chicago Housing Authority*<sup>140</sup> local governmental officials were shown to have selected sites for lower income housing in areas that were either all white or all black, resulting in racially segregated communities. The Seventh Circuit ordered the housing authority to construct new integrated public housing units on sites scattered throughout Chicago in accordance with a strict ratio and timetable.<sup>141</sup>

The holding in *Gautreaux* that deliberate racial segregation in public housing was a violation of the fourteenth amendment is not particularly startling. In the landmark case of *Brown v. Board of Education*<sup>142</sup> it was clearly established that governmentally enforced or sanctioned segregation is an unconstitutional infringement of equal protection. This principle has been uniformly applied to governmental programs of public housing since *Brown* by every court in which such cases have been brought.<sup>143</sup> What is significant in the above land-use cases is that courts will often look beyond seemingly neutral governmental conduct for a discriminatory pattern or effect.<sup>144</sup>

## ii. Zoning to Keep Multifamily or Low Cost Housing Out of the Community

The allegation that the city of Eastlake was engaged in exclusionary zoning by employing a zoning referendum to prevent Forest City Enterprises from building multifamily housing is not a unique development in zoning litigation. Various zoning devices, including referenda, have been subject to recent allegations of exclusionary zoning when such de-

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 1070.

<sup>140</sup> 480 F.2d 210 (7th Cir. 1973), *cert. denied*, 414 U.S. 1144 (1974).

<sup>141</sup> *Contra*, Joseph Skillken & Co. v. City of Toledo, P-H EQUAL OPP. IN HOUSING ¶ 13,736 (6th Cir. Dec. 29, 1975). *But see* Metropolitan Housing Dev. Corp. v. Village of Arlington Hts., 517 F.2d 409 (7th Cir.), *cert. granted*, 96 S. Ct. 560 (1975). *See also* Otero v. New York City Housing Auth., 354 F. Supp. 941 (S.D.N.Y. 1973); Banks v. Perk, 341 F. Supp. 1175 (N.D. Ohio 1972), *aff'd in part, rev'd in part*, 473 F.2d 910 (6th Cir. 1973); Blackshear Residents Org. v. Housing Authority, 347 F. Supp. 1138 (W.D. Tex. 1971).

<sup>142</sup> 347 U.S. 483 (1954).

<sup>143</sup> U.L.I. RESEARCH REPORT 23, *supra* note 117, at 29. *See, e.g.*, Heyward v. Public Housing Admin., 238 F.2d 689 (5th Cir. 1956); Detroit Housing Comm. v. Lewis, 226 F.2d 180 (6th Cir. 1955).

<sup>144</sup> In *United Farm Workers v. City of Delray Beach*, 493 F.2d 799 (5th Cir. 1974), the court found a racially-discriminatory effect resulting from the refusal of the city to extend city-owned sewer and water systems to planned public housing sites for migrant workers located in an unincorporated tract adjacent to Delray Beach. The city had no initial obligation at law to extend such services outside its borders, but was shown to have previously done so for white applicants. Thus the city was essentially estopped from refusing like treatment to all applicants. *Accord*, Metropolitan Housing Dev. Corp. v. Village of Arlington Hts., 517 F.2d 409 (7th Cir. 1975), *cert. granted*, 96 S. Ct. 560 (1975). *But see* Joseph Skillken & Co. v. City of Toledo, P-H EQUAL OPP. IN HOUSING ¶ 13,736 (6th Cir. Dec. 29, 1975).



vices work to preclude the construction of multifamily or low cost housing, since lower income housing usually is built in multifamily form.<sup>145</sup>

In *Sisters of Providence v. City of Evanston*,<sup>146</sup> the district court, though ultimately ruling on a procedural issue,<sup>147</sup> stated that a city is not required to rezone when the subject property cannot carry a higher usage density, but "it cannot use arbitrary land use criteria and refuse to rezone for black projects where under the same circumstances it would have granted a variance to an all-white project."<sup>148</sup> The case arose out of the refusal of the Evanston city council to rezone a nine acre parcel from a maximum density of 157 units to a higher density designation which would have permitted the construction of a 360 unit public housing development. Significantly, the court pointed out in *Evanston* that "proof of purpose and effect may establish racial discrimination despite the seeming neutrality of the statute or ordinance."<sup>149</sup>

In two important recent cases, the outright prohibition of multifamily housing was found to have a discriminatory effect. In *United States v. City of Black Jack*<sup>150</sup> it was held that such an enactment by city council, excluding a planned housing facility, had a racially discriminatory effect which could be justified only upon a showing of a compelling governmental interest. The city's interest in road and traffic control, prevention of devaluation of adjacent single-family homes, and prevention of school overcrowding was not a compelling interest when there was no factual basis for the assertion that any such interest was furthered by the ordinance.<sup>151</sup>

In *Southern Burlington County NAACP v. Township of Mt. Laurel*<sup>152</sup> the New Jersey Supreme Court unanimously invalidated an ordinance permitting only single-family detached dwellings. The court found that the township's zoning provisions were so restrictive in their minimum lot area, lot frontage, and building size requirements that multifamily housing was precluded, and therefore the township's zoning was contrary to the general welfare and beyond the scope of the zoning power.<sup>153</sup>

<sup>145</sup> For a discussion of the exclusionary zoning cases involving referendums see text accompanying notes 178-209 *infra*.

<sup>146</sup> 335 F. Supp. 396 (N.D. Ill. 1971).

<sup>147</sup> A claim for relief alleging exclusionary zoning practices could properly be sustained under the fourteenth amendment as well as the United States Fair Housing Act of 1968, 42 U.S.C. §§ 3601 *et seq.* (1968).

<sup>148</sup> 335 F. Supp. at 404. *Contra*, *Joseph Skillken & Co. v. City of Toledo, P-H EQUAL OPP. IN HOUSING* ¶ 13,736 (6th Cir. Dec. 29, 1975).

<sup>149</sup> 355 F. Supp. at 403.

<sup>150</sup> 508 F.2d 1179 (8th Cir. 1974).

<sup>151</sup> For background on the *Black Jack* case see Pratter, *Dispersed Subsidized Housing and Suburbia: Confrontation in Black Jack*, in AMERICAN SOCIETY OF PLANNING OFFICIALS, 1971 LAND-USE CONTROLS ANNUAL 147. It is interesting to note that *Black Jack* is one of the "planned communities" which have been totally developed in the past decade from the ground up. Compare the situation of Columbia, Maryland, another such community, in *Comorrow, It Pays to Stay When Blacks Move In*, MONEY, Nov., 1973, at 65.

<sup>152</sup> 67 N.J. 151, 336 A.2d 713 (1975). *Accord*, *Berenson v. Town of New Castle, P-H EQUAL OPP. IN HOUSING* ¶ 15,049 (N.Y. Ct. App. Dec. 15, 1975).

<sup>153</sup> The *Mt. Laurel* court carefully confined its decision to state constitutional requirements. By so doing it may have precluded review by the Supreme Court. See D.

Perhaps of greater significance than the *Mt. Laurel* holding with regard to the multifamily housing issue was the court's wide-ranging conclusions on the larger questions of the right of developing municipalities (like Eastlake) to limit kinds of housing. Central to these conclusions was a determination whether such municipalities are under any obligation to make available a variety and choice of living accommodations. The language of Justice Frederick Hall for the court in *Mt. Laurel* provides a succinct answer:

We conclude that every such municipality must, by its land use regulations, presumptively make realistically possible an appropriate variety and choice of housing. More specifically, presumptively it cannot foreclose the opportunity of the classes of people mentioned for low and moderate income housing and in its regulations must affirmatively afford that opportunity, at least to the extent of the municipality's fair share of the present and prospective regional need therefor. These obligations must be met unless the particular municipality can sustain the heavy burden of demonstrating peculiar circumstances which dictate that it should not be required so to do.<sup>154</sup>

At least one court has thus recognized that developing municipalities have an affirmative duty to plan and provide, by their land-use regulations and with the regional needs in view, for housing that meets the requirements and resources of all persons who may desire to live within their boundaries.<sup>155</sup>

*Mt. Laurel* apparently also strikes down such allegedly exclusionary multifamily zoning devices as restrictions on the maximum number of bedrooms where multifamily housing is allowed,<sup>156</sup> the imposition of a percentage ratio whereby multifamily units may not exceed single-family

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CURRIE, FEDERAL COURTS 184-212 (2d ed. 1975); H. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 470-526 (2d ed. 1973).

<sup>154</sup> 67 N.J. at 174, 336 A.2d at 724-25 (footnote omitted). For a forceful counterargument to the advisability of a regional approach to zoning see Burchell, Listokin & James, *Exclusionary Zoning: Pitfalls of the Regional Remedy*, 7 URBAN LAWYER 262 (1975). The authors of that article conclude that a regional approach would tend to reinforce existing exclusionary zoning practices and would also work to cut down the supply of housing for those of modest income.

<sup>155</sup> The *Mt. Laurel* court summarized its position as follows:

As a developing municipality, Mount Laurel must, by its land use regulations, make realistically possible the opportunity for an appropriate variety and choice of housing for all categories of people who may desire to live there, of course including those of low and moderate income. It must permit multi-family housing, without bedroom or similar restrictions, as well as small dwellings on very small lots, low cost housing of other types and, in general, high density zoning, without artificial and unjustifiable minimum requirements as to lot size, building size and the like, to meet the full panoply of these needs. Certainly when a municipality zones for industry and commerce for local tax benefit purposes, it without question must zone to permit adequate housing within the means of the employees involved in such uses.

67 N.J. at 187, 336 A.2d at 731-32.

<sup>156</sup> Such restrictions typically take the form of absolute proscriptions against units with more than two bedrooms or percentage ratios limiting the units in a multifamily development to one or two bedrooms. U.L.I. RESEARCH REPORT 23 *supra* note 117, at 39.

residences within a community,<sup>157</sup> and perhaps the prohibition of mobile homes.<sup>158</sup> The mix of housing types mandated by *Mt. Laurel* would also presumably invalidate the practice of excessive zoning for industrial and commercial uses which could thereby preclude the availability of sites for multifamily, low income housing.<sup>159</sup> It is clear in *Mt. Laurel* that the municipality must zone to permit adequate housing for the workers involved in such uses, enabling them to reside in the community in which they work and contribute payroll taxes.<sup>160</sup>

### iii. Other Exclusionary Zoning Devices

Of primary concern are the exclusionary zoning issues just discussed and those cases involving referenda yet to be discussed since such issues are most applicable to the *Eastlake* fact situation. Other zoning practices alleged to be exclusionary warrant some discussion, however, since most litigation involving these devices has been directed at developing "bedroom communities" similar in suburban styling to the city of Eastlake.

#### aa. Exclusive Zoning

The basic feature common to most "exclusive" land-use devices is that they ensure, in varying degrees, that those who move into the community can well afford it. In other words, such zoning imposes legal requirements that necessarily add to housing costs, and thus has the effect of limiting or altogether excluding housing for lower income persons.

One prevalent device is large lot zoning whereby only the well-to-do can afford such sizeable parcels. In *National Land & Investment Co. v. Kohn*,<sup>161</sup> the Pennsylvania Supreme Court struck down a zoning ordinance prescribing a four acre minimum residential lot size. To that court, such a zoning scheme was outwardly exclusionary, and therefore an unreasonable and unlawful use of zoning power. Shortly thereafter, the Pennsylvania Supreme Court also invalidated two and three acre minimum lot size requirements in *In re Appeal of Kit-Mar Builders, Inc.*,<sup>162</sup> utilizing a similar rationale. In *Ybarra v. City of Town of Los*

<sup>157</sup> *Id.*

<sup>158</sup> See 67 N.J. at 202, 336 A.2d at 740 (1975) (Pashman, J., concurring). Although not multifamily housing per se, mobile homes are usually of the low cost variety and situated on lots of high usage density. See e.g., *Green v. Township of Lima*, 40 Mich. App. 655, 199 N.W.2d 243 (1972); *Bristow v. City of Woodhaven*, 35 Mich. App. 205, 192 N.W.2d 322 (1971).

<sup>159</sup> See 67 N.J. at 202, 336 A.2d at 740 (1975) (Pashman, J., concurring).

<sup>160</sup> See Note, *Exclusionary Zoning and Equal Protection*, 84 HARV. L. REV. 1645, 1663-64 (1971), for the proposition that exclusionary zoning may restrict social mobility by limiting opportunities for employment. Support for such proposition is found in the contention that the trend of industrial migration from city to suburb combined with the lack of adequate low cost housing in the suburbs has caused many blue-collar workers to be confronted with a choice between incurring the expense of commuting to work or doing without work. The end result, according to the commentator, is a heightening of the unemployment problem in urban areas which may become permanent.

<sup>161</sup> 419 Pa. 504, 215 A.2d 597 (1965).

<sup>162</sup> 439 Pa. 466, 268 A.2d 765 (1970).

See also *Schere v. Township of Freehold*, 119

*Altos Hills*,<sup>163</sup> however, a one acre minimum lot size requirement was upheld as rationally related to the legitimate governmental interest in preserving the town's rural environment.

Other "expense-oriented" zoning includes regulations that add to the cost of multifamily housing by requiring such items as underground electrical lines, air-conditioning, tennis courts, and swimming pools,<sup>164</sup> regulations that add to the cost of a single family housing by establishing minimum interior floor size requirements<sup>165</sup> or minimum frontage requirements,<sup>166</sup> and regulations requiring improvements to dwellings that are excessively costly and practically unnecessary, forming a maintenance burden that only the wealthy can bear.<sup>167</sup> This last exclusionary device is, of course, to be distinguished from local zoning measures concerning necessary housing upkeep reasonably related to the public health, safety, and welfare.

#### bb. "Status Quo" Zoning

In *Village of Belle Terre v. Boraas*<sup>168</sup> a local zoning provision limiting occupancy of one family dwellings to "traditional" families, or to groups of not more than two unrelated persons was attacked as an infringement of the rights to travel and privacy. The Supreme Court in upholding the ordinance failed to find any fundamental right involved, and applied the minimum scrutiny equal protection test to the ordinance, that is, whether the law was "reasonable, not arbitrary" and bore "a rational relationship to a [permissible] state objective."<sup>169</sup> The Court found Belle Terre's ordinance valid under such test, reaffirming the traditional *Euclid*-based justifications for zoning promoted by the ordinance, such as family values and protection of the environment.<sup>170</sup>

In a sense, one has trouble fitting *Belle Terre* into the typical exclusionary zoning mold. The aggrieved parties under the town ordinance were not minority group members, but a homeownership couple and their six college student lessees who were ordered by Belle Terre to remedy the ordinance violation. Also, the use of the word "family" seems not of itself exclusionary, unless perhaps, it can be shown that minorities and the poor form "voluntary" families of more than two unrelated persons

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N.J. Super. 433, 292 A.2d 35 (1972) (40,000 sq. ft. minimum lot size requirement invalidated).

<sup>163</sup> 503 F.2d 250 (9th Cir. 1974).

<sup>164</sup> U.L.I. RESEARCH REPORT 23, *supra* note 117, at 39. See *e.g.*, *Molino v. Borough of Glassboro*, 116 N.J. 195, 281 A.2d 401 (1971).

<sup>165</sup> BABCOCK & BOSSELMAN, *supra* note 117, at 11.

<sup>166</sup> U.L.I. RESEARCH REPORT 23, *supra* note 117, at 39. See also, *Southern Burlington County NAACP v. Township of Mt. Laurel*, 67 N.J. 151, 336 A.2d 713 (1975).

<sup>167</sup> BABCOCK & BOSSELMAN, *supra* note 117, at 11-12.

<sup>168</sup> 416 U.S. 1 (1974). Accord, *Town of Durham v. White Enterprises, Inc.*, P-H EQUAL OPP. IN HOUSING ¶ 15,050 (N. H. Jan. 12, 1976).

<sup>169</sup> 416 U.S. at 8, quoting *Reed v. Reed*, 404 U.S. 71, 76 (1971). See also 23 CLEVE. ST. L. REV. 354 (1974).

more frequently than other groups and consequently such ordinance is discriminatory in effect.<sup>171</sup>

Zoning to exclude "traditional" families is arguably irrelevant to the public health, safety, and welfare since it only serves to impose social preferences and cannot be sustained merely on such basis.<sup>172</sup> Further, maintaining the "status quo" with a "traditional family" standard ensures that persons of lower income will not join together to pool resources enabling themselves to purchase and live in an expensive one family dwelling.

Another prevalent "status quo" zoning method alleged to be exclusionary is restrictions upon the residential use of land over time — time controls. In *Golden v. Planning Board of Town of Ramapo*<sup>173</sup> this device was upheld by the New York Court of Appeals as founded upon a rational basis. The town comprehensive zoning ordinance was designed to pace town development and withhold building permits for up to eighteen years until schools, sewers, and other town services could be established in accordance with its growth. The *Ramapo* court found such phased growth reasonable since the existing physical and financial resources of the community were inadequate to furnish the essential governmental services and facilities necessitated by a substantial increase in population.

Critics of *Ramapo* contend that "time controls" are actually "status quo" exclusionary land devices masquerading as measures to preserve the environment and like considerations.<sup>174</sup> Furthermore, "staged growth" of a community through "time controls" and other "status quo" land use devices is an arguable restriction on the right to travel,<sup>175</sup> and seems inapposite to the regional fair share doctrine of housing "mixes" promoted by decisions like *Mt. Laurel*.<sup>176</sup>

It is worthy to note that the record in *Ramapo* was absent any racial or economic discriminatory pattern or effect. Further, the town's ordi-

<sup>171</sup> See 23 CLEVE. ST. L. REV., 354, 359 (1974). See also *James v. Valtierra*, 402 U.S. 137, 145 (1971) (Marshall, J., dissenting); *Village of Belle Terre v. Boraas*, 416 U.S. 1, 12 (1971) (Marshall, J., dissenting).

<sup>172</sup> *Boraas v. Village of Belle Terre*, 476 F.2d 806, 816 (1973), *rev'd*, 416 U.S. 1 (1974). See Note, *Excluding the Commune from Suburbia: The Use of Zoning for Social Control*, 23 HASTINGS L. J. 1459 (1972).

<sup>173</sup> 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138, *appeal dismissed*, 409 U.S. 1003 (1972).

<sup>174</sup> See e.g., Bosselman, *Can the Town of Ramapo Pass a Law to Bind the Rights of the Whole World?*, 1 FLA. ST. U. L. REV. 234 (1973).

<sup>175</sup> *Construction Industry Assn. v. City of Petaluma*, 375 F. Supp. 574 (N.D. Calif. 1974), *rev'd*, 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 44 U.S.L.W. 3473 (U.S. Feb. 24, 1976). See also *Ybarra v. City of Town of Los Altos Hills*, 503 F.2d 250 (9th Cir. 1974); *Brief for Lawyers for Housing as Amicus Curiae* at 11-20, *Forest City Enterprises v. Eastlake*, 41 Ohio St. 2d 187, 324 N.E.2d 740 (1975).

<sup>176</sup> The *Mt. Laurel* court, in discussing *Ramapo*, merely stated that such a plan would not be utilized as a tool to exclude all development and must include low income housing, which is precisely what the *Ramapo* Court set forth. *Southern Burlington County NAACP v. Township of Mt. Laurel*, 67 N.J. 151, 188 n.20, 336 A.2d 713, 732 n.20 (1975); *Golden v. Planning Bd. of Town of Ramapo*, 30 N.Y.2d 359, 378, 285 N.E.2d 291, 302, 334 N.Y.S. 138, 152 (1972). See also *Berenson v. Town of New Castle*, 419 F.2d 1011, 1014 n.4, 134-1 App. Dec. 15, 1975).

nance served to pace development of the urban sprawl reaching out from New York City, not to preclude any particular type of housing. The ordinance was not mere verbiage, as the town had committed itself to planned growth through a capital budget plan. The glare of neon lights up and down suburban main streets, and backed-up sewers in "dream" split-levels lead one to believe that the *Ramapo* plan was not exclusionary zoning, but perhaps common sense.<sup>177</sup>

## 2. *Is There Exclusionary Zoning in Eastlake?*

### a. *Motivational Analysis of Zoning Referendums*

Justice Stern, in the *Eastlake* concurrence, leveled a serious charge at municipalities which have zoning referenda in their charters:

Zoning provisions such as that in Eastlake's charter have a *single motive*, and that is to exclude, to build walls against the ills, poverty, racial strife, and the people themselves, of our urban areas.<sup>178</sup>

The view of the concurrence that the city of Eastlake's referendum was founded upon discriminatory motives amounts to an allegation of bad faith against local governments and their citizens.<sup>179</sup> Ascribing unconstitutional motivations to a law, however, particularly one involving referendum voting,<sup>180</sup> makes an inordinate amount of judicial guess-

<sup>177</sup> The rationale for such belief was cogently expressed by one individual as follows:

Why should any thinking and intelligent person welcome increased tax burdens upon himself and a reduction in the worth of his home? This is what he has sweated and toiled against: substandard zoning, low income housing, and other governmental subsidy programs that take bread from his pocket. This is not racism or moral irresponsibility, this is common sense upon his part. Most of the affluent suburbs that I know are having difficulty in keeping their heads above the water of financial difficulty. Won't these and other gentlemen understand that our views are not racist or moral irresponsibility, but only our American heritage of striving to keep a decent, respectable way of life?

Letter to the Editor, Racism in Mahwah is Denied, Bergen (New Jersey) Record, Mar. 2, 1971, quoted in Burchell, Listokin & James, *Exclusionary Zoning: Pitfalls of the Regional Remedy*, 7 URBAN LAWYER 262, 263-64 (1975).

<sup>178</sup> 41 Ohio St. 2d at 200, 324 N.E.2d at 749 (emphasis added).

<sup>179</sup> Allegations that local governmental land-use decisions are racially or otherwise constitutionally motivated entail numerous problems. Perhaps the most serious problem is that of proof since direct evidence of discriminatory motivations is rare. Rather, inferences must be drawn from all the circumstances of a particular decision. The conclusion that some unconstitutional motivation prompted the land-use decision of necessity involves a leap of faith by the court. Sager, *Troubled Waters: Litigation in the Federal Courts Against Exclusionary Land Use Restraints*, in National Committee Against Discrimination in Housing, *Exclusionary Land Use Litigation Policy and Strategy for the Future* 20, 21-22 (1974).

<sup>180</sup> It is important to note that exclusionary zoning controversies involving initiatives and referenda have generally been regarded as distinct from other exclusionary zoning cases. The element of voting rights in the former distinguishes them from the latter. Such distinction was recognized in *Sisters of Providence v. City of Evanston*, 335 F. Supp. 396 (N.D. Ill. 1971), an exclusionary zoning case which did not involve referenda. The court stated that the presence of voting rights in referendum cases adds a constitutional dimension not found in pure zoning cases resulting in a greater willingness on the part of the courts to uphold a referendum rather than interfere with the fun-

work necessary.<sup>181</sup> And the practical uselessness of judicial scrutiny of such motivations underlying initiatives and referenda was cogently pointed out by the Sixth Circuit in *Ranjel v. City of Lansing*,<sup>182</sup> in its rejection of the district court's examination of motives underlying a zoning referendum:

In holding that the referendum was motivated by racial factors, the District Court necessarily had to reach the conclusion by searching the minds of 15% of the electorate who signed the referendum petition, and the remaining 85% who were enjoined from voting, none of whom were called as witnesses to testify in the case . . . .<sup>183</sup>

The Supreme Court has also considered possible unconstitutional motives underlying state action. In *Gomillion v. Lightfoot*<sup>184</sup> the Court invalidated the Alabama legislature's redrawing the boundary lines of the city of Tuskegee, changing its shape from a square to an "uncouth twenty-eight sided figure." This legislative act effectively gerrymandered all but a handful of black voters out of the city limits. There is little doubt that such blatant action by the legislature was racially discriminatory in nature. As Justice Frankfurter stated for the Court in *Gomillion*, "[a]cts generally lawful [redistricting] may become unlawful when done to accomplish an unlawful end."<sup>185</sup>

Such language implied that the Supreme Court would examine underlying motivations if the opportunity were presented. Thus, *Gomillion* was at first interpreted to apply to legislative intent and motivation in four subsequent Supreme Court decisions involving the constitutionality of Sunday closing laws,<sup>186</sup> and in the landmark decision prohibiting mandatory prayer in public school classrooms, *Abington School District v. Schempp*.<sup>187</sup> In *United States v. O'Brien*,<sup>188</sup> however, the Court explained that *Gomillion* was a greatly misunderstood case, standing for the proposition that "the inevitable effect of a statute on its face may render it unconstitutional," and not for the premise that legislative motive is an appropriate basis for rendering it so.<sup>189</sup>

<sup>181</sup> See generally Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970).

<sup>182</sup> 417 F.2d 321 (6th Cir. 1969), cert. denied, 397 U.S. 980 (1970).

<sup>183</sup> *Id.* at 323.

<sup>184</sup> 364 U.S. 339 (1960).

<sup>185</sup> *Id.* at 347, quoting *United States v. Reading Co.*, 226 U.S. 324, 357 (1912).

<sup>186</sup> *McGowan v. Maryland*, 366 U.S. 420 (1961); *Braunfield v. Brown*, 366 U.S. 599 (1961); *Two Guys v. McGinley*, 366 U.S. 582 (1961); *Gallagher v. Crown Koshier Market*, 366 U.S. 617 (1961).

<sup>187</sup> 374 U.S. 203 (1963). The court observed that "to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion." *Id.* at 222.

<sup>188</sup> 391 U.S. 367 (1968).

<sup>189</sup> *Id.* at 384. As the Court explicitly set forth in *O'Brien*, quoting *McCray v. United States*, 196 U.S. 27, 56 (1904):

The decisions of this Court from the beginning lend no support whatever to the proposition that motives which are not within the exercise of lawful power on the

One writer has suggested that the motivational analyses of state action by the Supreme Court are nothing but a confusing morass.<sup>190</sup> It is apparent, however, that the Supreme Court put to rest the question of whether or not to weigh legislative and voter motivations underlying mandatory land-use referenda by not doing so in *James v. Valtierra*.<sup>191</sup> In other words, the question of motivation for such a referendum is not appropriate for judicial inquiry:

If the voters' purpose is to be found here, then, it would seem to require far more than a simple application of objective standards. If the true motive is to be ascertained not through speculation but through a probing of the private attitudes of the voters, the inquiry would entail an intolerable invasion of the privacy that must protect an exercise of the franchise.<sup>192</sup>

### b. "Effect" Analysis of Zoning Referenda

The unconstitutional effects of a law enacted through the initiative and referendum process are often readily observable and thus open for exacting inquiry, unlike the abstract and indefinite myriad of personal motivations underlying the law's passage, which are practically impossible to ascertain.<sup>193</sup> As seen earlier, racially-discriminatory effects of specific state action can be readily detected. Therefore, unconstitutional effects of a law enacted by referendum may be scrutinized by a court,<sup>194</sup> on a case by case basis.<sup>195</sup>

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assumption that a wrongful purpose or motive has caused the power to be exerted.

*Id.* at 383.

<sup>190</sup> If only logical tidiness hung in the balance, bemusement might be a satisfactory response to all this. But the rights of individuals are at stake. The Court should stop pretending it does not remember opinions on which the ink is barely dry and try to formulate principles for deciding on what occasions and in what ways the motivation of legislators or other government officials is relevant to constitutional issues.

Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1211-12 (1970).

<sup>191</sup> 402 U.S. 137 (1971). In upholding the California constitutional provision mandating referendum approval of any low rent housing project, the Court found that the record would not justify a claim that the law, neutral on its face, was actually directed at a racial minority. To lend support to its finding the court cited *Gomillion*.

<sup>192</sup> *Southern Alameda Spanish Speaking Orgs. v. Union City*, 441 F.2d 291, 295 (9th Cir. 1970); *accord*, *Spaulding v. Blair*, 403 F.2d 862 (4th Cir. 1968).

<sup>193</sup> As set forth in *Metropolitan Housing Dev. Corp. v. Village of Arlington Hts.*, 517 F.2d 409, 413 (7th Cir. 1975), *cert. granted*, 96 S. Ct. 560 (1975):

[r]egardless of the Village [Zoning] Board's motivation, if . . . alleged discriminatory effect exists, the decision [of the zoning board in refusing to rezone property for low income housing] violates the Equal Protection Clause unless the Village can justify it by showing a compelling interest.

*Contra*, *Joseph Skillken & Co. v. City of Toledo*, P-H EQUAL OPP. IN HOUSING ¶ 13,736 (6th Cir. Dec. 29, 1975), where a "rational basis" test was employed in a fact situation similar to the *Arlington Heights* case.

<sup>194</sup> *Southern Alameda Spanish Speaking Orgs. v. Union City*, 421 F.2d 291, 295 (9th Cir. 1970).



Thus, in *Reitman v. Mulkey*<sup>196</sup> and *Hunter v. Erickson*,<sup>197</sup> the effects of housing laws passed by the electorate pursuant to referenda were found by the Supreme Court to be racially discriminatory. Both in *Reitman* and *Hunter*, those affected by the referendum provisions were all or almost all members of a racial minority, and the discriminatory harm was clearly demonstrated. In *Hunter*, an Akron, Ohio city charter provision required that any fair housing ordinance be submitted to a vote of the electorate before it became effective. This was seen by the Court to contain "an explicitly racial classification treating racial housing matters differently from other racial and housing matters."<sup>198</sup> The discriminatory effect found in *Reitman* stemmed from a provision in the California State constitution which prevented the state from prohibiting private racial discrimination in housing by forbidding the state to deny or abridge the right of any person to decline to sell, lease, or rent real property to those persons the property owner chose in his absolute discretion.<sup>199</sup>

In the *Eastlake* concurrence, Justice Stern argued that a racially and economically discriminatory effect was readily discernible in the action of the city of Eastlake and many neighboring communities:

In the suburbs surrounding the city of Cleveland, the requirement of mandatory referendums for approval of zoning changes has been adopted by over a dozen communities; some of these communities have provisions which specifically apply to any zoning change to permit multi-family or low-income housing. The inevitable effect of such provisions is to perpetuate the de facto divisions in our society between black and white, rich and poor.<sup>200</sup>

The facts in *Eastlake*, however, actually take on more the appearance of the "traditional" zoning case of a developer challenging restrictions which prevent him from more profitably using his land, rather than the "typical" exclusionary zoning action brought by aggrieved minority group members zoned out of a community.<sup>201</sup> The *Eastlake* charter provision has no explicit racial effect. *Eastlake's* mandatory zoning referendum affects all zoning law changes made by the city council upon any type of land use — not merely those pertaining to housing or a particular type of housing.<sup>202</sup> Also, no direct parties in *Eastlake* were "excluded" minority

<sup>196</sup> *Id.*

<sup>197</sup> 393 U.S. 385 (1969).

<sup>198</sup> *Id.* at 389.

<sup>199</sup> 387 U.S. 371 n.2.

<sup>200</sup> 41 Ohio St. 2d at 200-01, 324 N.E.2d at 749.

The communities surrounding Cleveland which have enacted mandatory zoning referenda total nineteen: Bay Village, Broadview Heights, Eastlake, Euclid, Garfield Heights, Highland Heights, Independence, Kirtland, Mayfield Village, Middleburg Heights, Moreland Hills, North Ridgeville, Parma, Pepper Pike, Seven Hills, Strongsville, Westlake, Willoughby Hills, Willowick. It should be noted that most of the above provisions were enacted subsequent to the Supreme Court decision in *James v. Valtierra*, 402 U.S. 137 (1971), which upheld a mandatory referendum provision in the California constitution relative to low income housing projects.

<sup>201</sup> See notes 119-23, *supra*, and accompanying text.

<sup>202</sup> As predicted only by the Supreme Court in *James v. Valtierra*, 402 U.S. at 140-41:

group members;<sup>203</sup> and no blatant discriminatory purpose is evident. Likewise, Forest City Enterprises alleged no economic or racial discrimination and any effect the charter referendum has had upon it is reflected solely in the company's financial position.<sup>204</sup>

As indicated above, many suburbs which surround Cleveland utilize mandatory land-use referenda.<sup>205</sup> Furthermore, most of these communities in Cuyahoga County, Lake County, and Summit County, Ohio contain virtually no low income or minority residents.<sup>206</sup> As set forth in the brief for Lawyers for Housing as amicus curiae:

Cuyahoga County is a racially segregated county. The population of Cuyahoga County in 1970 was 1,721,300; 328,419 (19.1%) of whom were Negro. 87% of these 328,419 Negroes reside in Cleveland. Of the 40,578 who reside outside of Cleveland but within Cuyahoga County, 80% live in three eastern suburbs . . . . [A]t present, Cuyahoga County has the racial shape of a donut, with the Negroes in the hole and with mostly whites occupying the ring.<sup>207</sup>

The city of Eastlake is in Lake County, Ohio, but near the eastern fringes of Cuyahoga County. The position of Justice Stern and the arguments of amicus curiae suggest that referendum zoning is being employed effectively by Cleveland-area suburbs to bar access to low income and minority group members. Certainly, the demographic statistics set forth above are strong evidence that something is keeping many Cleveland-area suburbs segregated. There is, however, no clear evidence in amicus curiae's brief, Justice Stern's analysis, or any other known source that referendum zoning in particular is or has excluded blacks and the poor from Eastlake, Ohio, or any other community.

Racial disparity alone does not amount to racial discrimination.<sup>208</sup>

The Court [in *Hunter v. Erickson*, 393 U.S. 385 (1969)] held that the amendment [to the Akron, Ohio city charter, requiring submission of all fair housing ordinances to a popular vote] created a classification based upon race because it required that laws dealing with racial housing matters could take effect only if they survived a mandatory referendum while other housing ordinances took effect without any special election.

<sup>203</sup> See *Warth v. Seldin*, 422 U.S. 490 (1975), for exclusionary zoning standing requirements. See also note 121 *supra*.

<sup>204</sup> See *Warth v. Seldin*, 422 U.S. 490 (1975), and note 121 *supra*, for the distinction between racial and economic effects in exclusionary housing matters, and criteria for standing to sue upon the basis of the unconstitutionality of racial or economic exclusion from a community.

<sup>205</sup> 41 Ohio St. 2d at 200-01, 324 N.E.2d at 749. See note 200 *supra*.

<sup>206</sup> See Brief for Lawyers for Housing as Amicus Curiae at 1-7 *Forest City Enterprises, Inc. v. City of Eastlake*, 41 Ohio St.2d 187, 324 N.E.2d 740 (1975).

<sup>207</sup> *Id.* at 9-10, quoting *Mahaley v. Cleveland Metropolitan Housing Authority*, 355 F. Supp. 1257, 1259 (N.D. Ohio 1973). The three eastern suburbs where a substantial number of the blacks living outside Cleveland reside are East Cleveland, Cleveland Heights, and Shaker Heights, none of which have provisions for mandatory zoning referenda. One suburb, however, which has a charter referendum provision, Garfield Heights, has a substantial black population.

<sup>208</sup> *Metropolitan Housing Dev. Corp. v. Village of Arlington Hts.*, 517 F.2d 409 (7th Cir. 1975). See also *Joseph Skillken & Co. v. City of Toledo*, P-H EQUAL OPP. IN HOUSING ¶ 13,736 (6th Cir. Dec. 29, 1975).

A clear-cut pattern of specific, direct, discriminatory zoning action must exist before the serious charge of exclusionary zoning is to be accorded weight for equal protection purposes.<sup>209</sup> From the record of *Eastlake* no such action is evident. It is not contended that Justice Stern and the other concurring Justices are wrong in alleging that exclusionary zoning is unconstitutionally promulgated by some local governmental entities through land-use control methods. The exclusionary zoning cases discussed earlier are testament to such a possibility. It appears, however, that such allegations are unconvincingly applied to the city of Eastlake's charter referendum, and other local governmental provisions that neutrally provide for mandatory referenda upon all zoning law changes.

#### IV. THE EASTLAKE DISSSENT

The concise dissent of Justice Corrigan<sup>210</sup> served three functions. The first was his allusion to the applicability of *Thomas Cusack Co. v. City of Chicago*,<sup>211</sup> as opposed to *Eubank v. City of Richmond*,<sup>212</sup> or *Washington ex rel. Seattle Title Trust Co. v. Roberge*,<sup>213</sup> upon the issue in *Eastlake* involving the reasonableness of controlling the rezoning of Forest City Enterprises' eight acre parcel through the consent of the neighboring community in a referendum election.<sup>214</sup>

As previously discussed, the situation in *Eastlake* is more akin to *Cusack* than either *Eubank* or *Roberge*. That is, the Eastlake referendum concerned the removal of existing zoning restrictions rather than their imposition.<sup>215</sup> This distinction was summarized by the dissent:

While the *Cusack* decision has been criticized . . . , it has been generally followed. And, even though it is impossible to lay down a hard-and-fast rule, we conclude that if an ordinance permits a certain percentage of the property owners to impose or create a restriction upon their neighbors' property by the devise [sic] of consent provisions, such limitation constitutes an invalid delegation of legislative power, but if the consent provision merely waives or modifies a lawful and reasonable legislative restriction or prohibition, it is within constitutional limitations.<sup>216</sup>

<sup>209</sup> See generally Warth v. Seldin, 422 U.S. 490 (1975); Joseph Skillken & Co. v. City of Toledo, P-H EQUAL OPP. IN HOUSING ¶ 13,736 (6th Cir. Dec. 29, 1975); Metropolitan Housing Dev. Corp. v. Village of Arlington Hts., 517 F.2d 409 (7th Cir. 1975); United States v. City of Black Jack, 508 F.2d 1179 (8th Cir. 1974); Citizens Comm. for Faraday Woods v. Lindsay, 507 F.2d 1065 (2d Cir. 1974); United Farmworkers v. City of Delray Beach, 493 F.2d 799 (5th Cir. 1974); Sisters of Providence v. City of Evanston, 335 F. Supp. 396 (N.D. Ill. 1971); Kennedy Park Homes Ass'n v. City of Lackawanna, 318 F. Supp. 669 (W.D.N.Y. 1970).

<sup>210</sup> 41 Ohio St. 2d at 202-07, 324 N.E.2d at 749-53. Justice Celebrezze joined in the dissent.

<sup>211</sup> 424 U.S. 526 (1912).

<sup>212</sup> 226 U.S. 137 (1912).

<sup>213</sup> 226 U.S. 116 (1912).

<sup>214</sup> 41 Ohio St. 2d at 202-04, 324 N.E.2d at 749-51. See text accompanying notes 40-59 *supra*, for a more detailed discussion of this issue.

<sup>215</sup> *Id.*

<sup>216</sup> 41 Ohio St. 2d at 203, 324 N.E.2d at 750-51, quoting *Valkanet v. City of Chicago*, 31

Justice Corrigan's second point was the great weight accorded the long tradition of statutory referendum in Ohio.<sup>217</sup> This reliance was well taken, if for only the fact that the Supreme Court used similar reasoning in *James v. Valtierra*.<sup>218</sup> As Justice Corrigan noted, other Ohio municipal referenda with provisions similar to Eastlake's were upheld in the recent Ohio Supreme Court decisions of *Cook-Johnson Realty Co. v. Bertolini*,<sup>219</sup> and *State ex rel. Bramblette v. Yordy*.<sup>220</sup>

In *Cook-Johnson*, a township permissive referendum upon a zoning question called by initiative petition pursuant to section 519.12 of the Ohio Revised Code was deemed fully constitutional. Upheld in *Bramblette* was a municipal charter provision excluding referenda upon local revenue raising ordinances, although such referenda were mandatory under state statute. As pointed out by Justice Corrigan, the adoption of a charter frees a municipality from many state code procedures, and such municipal corporation may be more or less restrictive as to the use of referenda.<sup>221</sup> Thus he concluded that the referendum provisions of the Eastlake city charter were not invalid under such provisions of the Ohio constitution.<sup>222</sup>

Justice Corrigan's third argument was that the citizens of a community have a legitimate interest in a zoning change.<sup>223</sup> The majority opinion used consent requirements as a basis for striking down the Eastlake referendum;<sup>224</sup> the concurrence viewed *Eastlake* as primarily an exclusionary zoning case.<sup>225</sup> The dissent, however, distinguished both in favor of the overwhelming concern of electoral decisionmaking,<sup>226</sup> finding the Eastlake referendum not violative of due process.<sup>227</sup>

Justice Corrigan based his due process conclusions upon a case similar to *Eastlake* — *Southern Alameda Spanish Speaking Organizations (SASSO) v. Union City*.<sup>228</sup> In *SASSO* the city council rezoned a particular tract of land to allow multifamily residential use.<sup>229</sup> The ordinance, however, was repealed by a voter referendum held via initiative

Ill. App. 2d 268, 272, 148 N.E.2d 767, 770 (1958). *Accord*, *State ex rel. Standard Oil v. Combs*, 129 Ohio St. 251, 194 N.E. 875 (1935), *cited in* 41 Ohio St. 2d at 203, 324 N.E.2d at 751.

<sup>217</sup> 41 Ohio St. 2d at 206-07, 324 N.E.2d at 752-53. See the detailed discussion of such tradition in the text accompanying notes 72-91 *supra*.

<sup>218</sup> 402 U.S. 137 (1971).

<sup>219</sup> 15 Ohio St. 2d 195, 239 N.E.2d 80 (1968), *cited in* 41 Ohio St. 2d at 206, 324 N.E.2d at 752. See text accompanying note 87 *supra*.

<sup>220</sup> 24 Ohio St. 2d 147, 265 N.E.2d 272 (1970), *cited in* 41 Ohio St. 2d at 207, 324 N.E.2d at 752. See note 88 *supra*.

<sup>221</sup> *Id.*

<sup>222</sup> 41 Ohio St. 2d at 207, 324 N.E.2d at 752. The Ohio constitutional provision referred to is art. II, § 1f, which is set forth in note 5 *supra*.

<sup>223</sup> 41 Ohio St. 2d at 204-05, 324 N.E.2d at 751-52, *quoting* *Southern Alameda Spanish Speaking Orgs. v. Union City*, 424 F.2d 291 (9th Cir. 1970).

<sup>224</sup> See text accompanying notes 40-59 *supra*.

<sup>225</sup> See text accompanying notes 178-209 *supra*.

<sup>226</sup> 41 Ohio St. 2d at 204, 324 N.E.2d at 751-52.

<sup>227</sup> *Id.* at 206, 324 N.E.2d at 752.

<sup>228</sup> 424 F.2d 291 (9th Cir. 1970).

<sup>229</sup> *Id.* at 292.

petition under California law.<sup>230</sup> The Southern Alameda Spanish Speaking Organization, which had an option to purchase the particular tract for low rent housing, brought suit, alleging the referendum to be violative of their rights under the due process and equal protection clauses of the fourteenth amendment.<sup>231</sup>

The Ninth Circuit Court of Appeals affirmed the denial of a preliminary injunction and the convening of a three-judge court, having found that neither the zoning process nor the effect upon the organization was a denial of due process.<sup>232</sup> By relying on SASSO, Justice Corrigan forcefully rebutted the approaches of his colleagues in the *Eastlake* majority and concurring opinions. SASSO also seems consistent with Supreme Court decisions suggesting that the right to vote is the essence of democracy since it is preservative of all other rights.<sup>233</sup>

## V. CONCLUSION

The *Eastlake* majority interpreted mandatory zoning referenda as granting a city council the power to rezone and the people the power to invalidate council's zoning law change. The Ohio Supreme Court found this two-step process to be arbitrary, capricious, and therefore unconstitutional. This finding, however, does not totally eliminate a charter zoning referendum provision. The lesson of *Thomas Cusack Co. v. City of Chicago*<sup>234</sup> is that a zoning provision which entirely prohibits a particular use, but allows for removal of that prohibition, is not unconstitutional. This is a rather thin line for future charter writers to walk, but it nevertheless exists.

Consistent with this "Cusack line" is a zoning provision which promotes present zoning stability and allows for rezoning by referendum. Above all, the provision must make it absolutely clear that any action by city council to amend the zoning code and to approve rezoning is only preliminary to the final approval by the people in a referendum election. In other words, any future referendum provision in an Ohio municipal charter will have to describe the complete zoning amendment process as one large "consent requirement" — a one-step process.

Although exclusionary zoning does not appear to exist in *Eastlake*,

<sup>230</sup> *Id.* The initiative provision was CAL. ELECTION CODE § 4052 (West 1975) which provides in pertinent part:

If the legislative body does not entirely repeal the ordinance against which the petition is filed, the legislative body shall submit the ordinance to the voters, either at a regular municipal election . . . or at a special election . . . . The ordinance shall not become effective until a majority of the voters voting on the ordinance vote in favor of it. If the legislative body repeals the ordinance or submits the ordinance to the voters and a majority of the voters voting on the ordinance do not vote in favor of it, the ordinance shall not again be enacted by the legislative body for a period of one year after the date of its repeal by the legislative body or disapproval by the voters.

<sup>231</sup> 424 F.2d at 292.

<sup>232</sup> *Id.* at 294.

<sup>233</sup> *Harman v. Forssenius*, 380 U.S. 528, 537 (1965). *Accord*, *Reynolds v. Sims*, 377 U.S. 533 (1964), and cases cited therein.

<sup>234</sup> 242 U.S. 526 (1971).

this land-use practice can develop through the implementation of mandatory zoning referenda. As discussed previously, a discriminatory effect which is violative of equal protection may result from a prior pattern of discrimination through the imposition of land-use controls that only affect racial minorities or the poor. Thus the use of mandatory zoning referenda must be closely monitored.

The apparent impracticalities of mandatory referendum zoning must not be overlooked. A general election upon every community zoning change seems unwieldy at best. Moreover, a persuasive argument may be made that the larger the community becomes, the less valid is the interest of a voter on the east side of a metropolis in a zoning change on the west side. In terms of *Euclid*, such zoning may bear little rational relationship to the public health, safety, or welfare, and may be outwardly unreasonable. If *Eastlake* rested upon such basis, it would be a more palatable decision and more constitutionally justifiable. Instead, the Ohio Supreme Court chose to confront the right to referendum "head on." In doing so, a dangerous precedent concerning democratic initiative and referendum procedures, whether or not related to zoning, has been introduced into Ohio law.

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