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Mandatory Referendum for Zoning Amendments; Unlawful Delegation of Legislative Power; Denial of Due Process; Forest City Enterprises, Inc. v. Eastlake

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MUNICIPAL ZONING

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

IN 1971 FOREST CITY ENTERPRISES applied to the Planning Commission of Eastlake, Ohio, to rezone its property, an eight-acre parcel of land, from industrial to multi-family high-rise use. After the application was filed, initiative petitions were circulated proposing the adoption of an amendment to the Eastlake city charter. The proposed amendment provided for mandatory voter approval[1] of any ordinance changing the city's existing comprehensive zoning plan. An amendment to this effect was adopted in November, 1971.[2]

Subsequent to this amendment, the Planning Commission approved appellant's rezoning application, and the Eastlake City Council effected the zoning change. In April, 1972, Forest City applied to the Planning Commission for parking and yard approval. This request was denied since the council's rezoning amendment had not yet been approved in a general election.

The election was held in May, 1972, and the rezoning ordinance failed to receive the necessary 55% of the votes cast. Forest City then sought a declaratory judgment asserting denial of due process and violation of the referendum provisions of the Ohio Constitution. The court of common pleas found the charter amendment valid, and the court of appeals affirmed.

The Supreme Court of Ohio reversed.[3] In reaching its decision the court utilized two distinct analytical approaches. The majority opinion is based on a due process argument which examines the criteria established by the United States Supreme Court to determine whether the property rights of individuals have been unconstitutionally curtailed by municipalities through the exercise of zoning restrictions. The second approach, adopted by the concurring opinion, is essentially an equal protection analysis which weighs the general public interest against the interest of a municipality. The concurrence views the mandatory referendum as an exclusionary tool intended to deny the urban poor access to housing within suburban municipalities.

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[1] Any change must be approved by 55% of the votes cast in a city-wide election. EASTLAKE, OHIO CHARTER art. VIII, § 3 (1971).

[2] The amendment provided that the cost of the amendment was to be borne by the party seeking the change. This was held unconstitutional by the common pleas court and affirmed by the court of appeals. No cross appeal on this issue was filed so it was not under consideration.

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

Since the majority and concurring opinions represent a substantial portion of the court,[4] neither analysis should be presumed to represent the definitive position of the Ohio supreme court in this area of the law. Each opinion represents a fundamentally different approach; therefore each will be examined separately.

The majority opinion holds that a municipal charter provision requiring a mandatory referendum for all amendments to a comprehensive zoning plan constitutes an unlawful delegation of legislative power, and as such, a denial of due process of law. The argument supporting this result is couched as a somewhat rigid due process rationale, which looks neither to the reasonableness of the proposed land use nor to the municipality's purpose in adopting the mandatory referendum procedure.[5] In reaching its conclusion, the majority utilized several substantive determinations of Ohio law. First, the power to rezone by ordinance is a legislative function[6] and as such is subject to referendum.[7] The court in citing with approval *Hilltop Realty v. South Euclid*[8] affirmed a lower court holding that a rezoning ordinance is subject to referendum under section 1(f), article II of the Ohio constitution.[9] This provision of the constitution limits the availability of the referendum specifically to legislative action by a municipality.

Recognizing this, the majority found that to the extent the charter provision "purports to mandate a referendum as to an administrative determination, it is clearly invalid."[10] After limiting the affect of the ultimate holding to a mandatory referendum, as applied to acts of council in its legislative capacity, the majority opinion proceeds to determine whether such a mandatory referendum denied appellant due process of law.

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[4] Five justices joined in the majority opinion; four joined in the concurrence and two joined in the dissent.

[5] 41 Ohio State 2d at 198, 324 N.E.2d at 747 (1975).

[6] Berg v. Struthers, 176 Ohio St. 146, 198 N.E.2d 48 (1964). *See* Mobil Oil Corp. v. Rocky River, 38 Ohio St. 2d 23, 309 N.E.2d 900 (1974); Myers v. Schiering, 27 Ohio St. 2d 11, 271 N.E.2d 864 (1971); Donnelly v. Fairview Park, 12 Ohio St. 2d 1, 230 N.E.2d 344 (1968); Remy v. Kimes, 175 Ohio St. 197, 191 N.E.2d 837 (1963); *Cf.* Tuber v. Perkins, 6 Ohio St. 2d 155, 216 N.E.2d 877 (1966) (Where the parties stipulated that rezoning is legislative and therefore non-appealable so dismissed for lack of subject matter jurisdiction). *Contra,* Kelly v. John, 162 Neb. 319, 75 N.W.2d 713 (1956). The criteria were first expressed in Kelly v. John, 162 Neb. 319, 75 N.W.2d 713 (1956).

[7] Hilltop Realty v. South Euclid, 110 Ohio App. 535, 164 N.E.2d 180 (1960), *appeal dismissed,* 170 Ohio St. 585 (1960). *See also* Storegard v. Board of Elections, 22 Ohio Misc. 5, 255 N.E.2d 880 (C.P. 1969).

[8] 110 Ohio App. 535, 164 N.E.2d 180 (1960).

[9] OHIO CONST. art. II, § 1(f) provides in part: "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. . . ."

[10] 41 Ohio St. 2d at 191, 324 N.E.2d at 744.

Seeking guidelines, the majority turned to a prominent series of cases handed down by the United States Supreme Court since 1912, *Euclid v. Ambler Realty,*[11] *Eubank v. Richmond,*[12] *Washington ex rel. Seattle Title Trust Co. v. Roberge*[13] and *Thomas Cusack Co. v. Chicago.*[14] In the first of these, *Euclid v. Ambler Realty,* the United States Supreme Court held that the power of a municipality to zone real property arose from the police powers granted by state legislatures (generally through enabling legislation or home rule provisions).[15] As an exercise of the state's police power, a zoning ordinance that is "clearly arbitrary and unreasonable, having no relation to the public health, safety, morals, or general welfare"[16] will be held unconstitutional.

In addition, as a police power, zoning is inalienable and non-delegable.[17] Since the power to zone requires restriction of the use of private property for the welfare of the general public, it was decided in *Eubank v. Richmond*[18] that the exercise of this power cannot be delegated to the potentially arbitrary discretion of the narrow interests of any segment of the public. This concept was further developed in *Washington ex rel. Seattle Title Trust Co. v. Roberge.*[19] In that case a requested zoning change was subjected to the consent "of the owners of two-thirds of the property within four hundred (400) feet. . . ."[20] Such a delegation was deemed unlawful as a denial of due process.

These cases must be distinguished, however, from *Thomas Cusack Co. v. Chicago,*[21] in which a municipal ordinance was sustained that required a majority of property owners to consent in writing to the erection of billboards in predominately residential districts. In its decision, the United States Supreme Court specifically looked to the reasonableness of the use proposed, concluding that the ordinance was constitutional as prohibiting only an *unreasonable* use of property—absent consent of a majority of adjoining property owners.[22] In none of the cases relied upon in this opinion did the United States Supreme Court address itself to the functioning of the voting public in its lawmaking

[11] 272 U.S. 365 (1926). [12] 226 U.S. 137 (1912).

[13] 278 U.S. 116 (1928). [14] 242 U.S. 526 (1917).

[15] OHIO CONST. art. XVIII, §§ 3, 7. *See* Pritz v. Messer, 112 Ohio St. 628, 149 N.E. 30 (1925).

[16] 272 U.S. at 395. A valid ordinance must bear a substantial relationship to the public health, safety, morals or general welfare. *See also* Chicago, B & Q Ry. Co. v. Illinois, 200 U.S. 561, 592 (1906); State *ex rel.* Kling v. Neilson, 103 Ohio App. 60, 144 N.E.2d 278 (1957).

[17] Northern Pacific Ry. Co. v. Duluth, 208 U.S. 583 (1908), which stated that police power when delegated to a municipal corporation may not be contracted away or otherwise limited, diminished, divided or delegated. *See generally* 6 E. MCQUILLAN, MUNICIPAL CORPORATIONS § 24.41 (3d ed. 1969) for a compilation of cases supporting this proposition [hereinafter cited as MCQUILLAN].

[18] 226 U.S. 137 (1912). [19] 278 U.S. 116 (1928).

[20] *Id.* at 118. [21] 242 U.S. 526 (1917).

[22] *Id.* at 527.

capacity. Yet, the majority in *Eastlake* distinguishes *Cusack* from *Eubank* and *Roberge* by stating that: "A reasonable use of property, made possible by appropriate legislative action, may not be made dependent upon the potentially arbitrary and unreasonable whims of the voting public."[23]

In further support of this contention[24] the majority cites *Myers v. Fortunato*.[25] On its facts, the *Myers* decision does not support such a conclusion. It provided, similar to *Cusack*, that the consent of adjoining property owners to allow erection of a garage otherwise forbidden by law is not an unconstitutional delegation of legislative power. The "vote" referred to by the Delaware supreme court was that of adjoining property owners, not the public.

Although the United States Supreme Court did not address the effect of a referendum in any of the foregoing cases, it did so in *James v. Valtierra*.[26] The main issue in *Valtierra* was whether a state law requiring referendum approval of low-rent housing projects violated the equal protection clause of the fourteenth amendment.[27] The referendum was upheld by the Supreme Court[28] as giving the community "a voice in decisions that will affect the future development of their own community."[29] The majority opinion distinguished *Valtierra* on two grounds: first, it did not concern a zoning change; secondly, it was a decision "involving large expenditures of public funds."[30]

However, the results of the change sought in the present case—multi-family high-rise use—would have much the same effect as low-rent public housing,[31] and consequently the interests of the community as a whole may be equally at issue. The required procedures in both fact patterns are nearly parallel—both referendum provisions being mandatory. The *Valtierra*

[23] 41 Ohio St. 2d at 195, 324 N.E.2d at 746.

[24] McGautha v. California, 402 U.S. 183 (1971). The case dealt with the untrammeled discretion of a jury to pronounce life or death sentences without established definitive standards and held such discretion did not constitute a violation of the fourteenth amendment due process requirements. The dissent argued that when federally protected rights are involved, state procedures require a fair hearing, opportunity for review, and that "fundamental choices among competing state policies are resolved by a responsible organ of state government." *Id.* at 256. Clearly taken from context, this cannot be authoritative for the proposition advanced by the majority.

[25] Myers v. Fortunato, 12 Del. Ch. 374, 110 A. 847 (1920).

[26] James v. Valtierra, 402 U.S. 137 (1971).

[27] The plaintiff alleged discrimination against a racially defined class. *See* Ranjel v. Lansing, 417 F.2d 321 (6th Cir. 1969); Annot., 15 A.L.R. Fed. 613 (1973) (where additional cases relating racial discrimination and public referendum are compiled.) *See also* Comment, *The Equal Protection Clause and Exclusionary Zoning After Valtierra and Dundridge*, 81 YALE L.J. 61 (1971).

[28] Marshall dissenting, joined by Brennan and Blackmun with Douglas taking no part.

[29] 402 U.S. at 143.

[30] 41 Ohio St. 2d at 197, 324 N.E.2d at 747.

[31] The effect is seen in terms of increased density, traffic, school enrollment, utilities required and physical character of neighborhoods.

Court specifically addressed the mandatory nature of the California statute which was alleged to be both a roadblock directed at public housing and a denial of equal protection. The Court did not find the provision to be onerous.[32]

In *Coral Gables v. Carmichael*,[33] a Florida appellate court found *Valtierra* controlling. Plaintiff, a landowner, sought to block an initiative petition providing for a referendum on a zoning change as a deprivation of due process of law. The Florida appellate court held that the property owner was not deprived of due process of law[34] and further stated that "in the absence of demonstrated illegality the legislative process of the state . . . may not be impeded or prevented by the courts."[35]

In limiting the availability of the referendum procedure, the *Eastlake* majority must reconcile an apparent conflict with existing Ohio statutory law.[36] The opinion cites an Ohio code provision[37] which provides for a mandatory referendum on any comprehensive zoning plan passed by county commissioners and an optional referendum[38] on amendments. The majority did not question the potentially arbitrary and unreasonable whims of the *rural* voting public but dismissed these statutes as being irrelevant, stating:

> The imposition of zoning in a state's rural area is a matter of substantial significance, restricting severely the individual use of land, and determining, perhaps permanently, the direction of future development. As such, it clearly involves the type of policy decision justifying approval by those affected.[39]

The necessary inference from such reasoning is that urban zoning is less substantial, less restrictive and less determinative of future community development. This is certainly contrary to the philosophy expressed as early as

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[32] 402 U.S. at 142.

[33] 256 So. 2d 404 (Fla. App. 1972). The change sought was from single family to multi-family which had been approved and passed by city council.

[34] *Id. at* 409.

[35] *Id.* The court also quoted extensively from Dwyer v. Berkeley, 200 Cal. 505, 253 P. 932 (1927) in which a rezoning ordinance was held subject to referendum since the community as a whole had a substantial interest in the matter and the right of referendum is to be favored. A similar policy regarding referendum has been expressed by the Ohio supreme court. State *ex rel.* Middletown v. City Commission, 140 Ohio St. 368, 44 N.E. 459 (1942). An additional limitation on judicial intrusion was enunciated in Euclid v. Ambler Realty, 272 U.S. 365, 388 (1926), where the court stated that judicial judgment is not to be substituted for legislative judgment where the issue is "fairly debatable." This test has been widely adopted and was followed in Edge v. Moraine, 58 Ohio Op. 2d 199, 283 N.E.2d 219 (C.P. 1970). *See also* Willot v. Beachwood, 175 Ohio St. 557, 197 N.E.2d 201 (1964).

[36] OHIO REV. CODE ANN. § 303.11 (Page 1953).

[37] *Id.* The constitutionality of the statute has been recognized by the Ohio supreme court, Cook-Johnson Realty Co. v. Bertolini, 15 Ohio St. 2d 195, 239 N.E.2d 80 (1968).

[38] OHIO REV. CODE ANN. § 519.12 (Page Supp. 1974).

[39] 41 Ohio St. 2d at 197, 324 N.E.2d at 747.

1926 by the United States Supreme Court in *Ambler*[40] and sharply contrasts with even the concurring opinion which stated that "[z]oning and other forms of urban planning are even more fundamental and necessary today than they were nearly fifty years ago. . . ."[41]

The majority then noted that rural zoning amendments are subject only to permissive referendum as opposed to mandatory referendum and concluded this distinction frees the county referendum process from the "deficiencies implicit in an unlawful delegation of legislative power,"[42] which rendered the Eastlake charter unconstitutional. How divesting the referendum of its mandatory character assures that the result reached thereby would be reasonable, rational and less arbitrary as required by the majority's standard of due process is never explained, nor perhaps can it be. This inconsistency may be explained in part by the failure of the majority to recognize a distinction between legislative due process and administrative due process.[43] Legislative due process involves those substantive individual rights enunciated in *Ambler* and its successors, violation of which will render a zoning ordinance invalid as an unconstitutional use of police power.[44] In addition to these rights, various procedural standards have been established such as those requiring notice and a fair hearing.[45] These procedures are designed to operate in an administrative context[46] and do not lend themselves to the direct legislative system of referendum.[47]

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[40] 272 U.S. 365 (1926).

[41] 41 Ohio St. 2d at 201, 324 N.E.2d at 749. *See* Belle Terre v. Borass, 461 U.S. 1 (1974).

[42] 41 Ohio St. 2d at 198, 324 N.E.2d at 747.

[43] *See* Comment, *Voter Zoning: Direct Legislation and Municipal Planning,* 1969 LAW AND THE SOCIAL ORDER 453 (1969).

[44] *See* note 16 *supra.*

[45] OHIO REV. CODE ANN. § 713.12 (Page Supp. 1973). Notice and a public hearing are mandatory as a prerequisite to amending a comprehensive zoning plan. *See* State v. Contini, 16 Ohio Op. 2d 263, 176 N.E.2d 536 (C.P. 1961); Annot., 96 A.L.R. 2d 449 (1964).

[46] South Gwinnett Venture v. Pruitt, 482 F.2d 389 (5th Cir. 1973). Adequate notice and a fair hearing are due process requirements for minimal procedural due process in tract zoning by an administrative proceeding. *See* Note, *Zoning—Due Process—The Adjudicative Decision Inherent in Tract Rezoning Requires the Decision-Maker to Adhere to Standards of Minimal Due Process,* 8 GEORGIA L. REV. 254 (1973).

[47] The referendum process in question was operative only after enactment by council of a rezoning ordinance and only after the notice and fair hearing requirements of procedural due process had been accorded appellant. The initiative process in contrast affords no notice of hearing to property owners affected and has been rejected as an improper method of zoning enactment. *See* Scotsdale v. Superior Court, 103 Ariz. 204, 439 P.2d 290 (1968) which held the initiative process is not available as a method for amending a comprehensive zoning plan and submission of the proposed ordinance to the voters, in the absence of a referendum petition, was beyond the delegated powers of the city council. The initiative process was an abuse of procedural due process due to the lack of notice and hearing required by statute. *Accord,* Laguna Beach Taxpayer's Assn v. City Council, 187 Cal. App. 2d 412, 414, 9 Cal. Rptr. 775 (1960) where the court stated the

Consequently, it may be argued that inherent in the referendum process are uncontrolled factors which should preclude its use to enact zoning laws.[48] Substantive safeguards against capricious arbitrary decision-making by individual voters[49] may not be inherently possible. The majority opinion appears to advance such a premise and then inexplicably concludes that only mandatory municipal referendums violate due process, while permissive referendums or even rural mandatory referendums are astonishingly fault-free. The majority, in placing substantial emphasis upon the mandatory character of the referendum, limits the scope of its decision. Its holding should not be extended inferentially to the initiative procedure, nor to statutory provisions for permissive referendums. However, the more flexible result-oriented approach used by the concurrence could more readily be used to challenge such procedures as abuses of zoning power.

The concurrence adopts an equal protection[50] analysis in determining the constitutionality of the charter provision in *Eastlake*. The opinion views the mandatory referendum as a tool for exclusionary zoning[51] which has "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."[52] The concurrence looks to the effect of zoning legislation not only as it applies to the individual property owner but as it reaches beyond local interests to society as a whole. The opinion does not consider the class to which equal protection is denied to be racial[53] but rather economic[54] in nature, and characterizes the referendum as being designed to facilitate the "exclusion of persons of low and middle

initiative procedure is not appropriate to amend zoning legislation because it conflicts with statutory procedure required for the adoption of such legislation. *Contra,* Drockton v. Board of Elections, 45 Ohio Op. 2d 171, 240 N.E.2d 896 (C.P. 1968), which held the initiative process doesn't require a public hearing under OHIO REV. CODE ANN. § 713.12 since the concept of an initiative places the power in the people by means of ballot, and the "public hearing" is achieved during the campaign period. This is a minority view. *See also* 8A MCQUILLAN, *supra* note 17, at § 25.246.

[48] *See* note 43 *supra.*

[49] Southern Alameda Spanish Speaking Organization v. Union City, 424 F.2d 291, 295 (9th Cir. 1970) which addressed the judicial propriety of examining the motives of the voting public. *See* Spaulding v. Blair, 403 F.2d 862, 864 (4th Cir. 1968) in which a state referendum rejecting an open housing provision was held valid as not denying equal protection under the fourteenth amendment. *See also* Ranjel v. Lansing, 417 F.2d 321 (6th Cir. 1969).

[50] *See* Belle Terre v. Borass, 416 U.S. 1 (1974); Comment, *Constitutional Law: Equal Protection—An Emerging Standard of Review,* 13 WASHBURN L.J. 106 (1974).

[51] *See* Note, *Exclusionary Zoning and Equal Protection,* 84 HARV. L. REV. 1645 (1971); Annot., 48 A.L.R.3d 1210 (1973).

[52] 41 Ohio St. 2d at 200, 324 N.E.2d at 749.

[53] *See* Annot., 15 A.L.R. Fed. 613 (1973).

[54] *See* Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection and the Indigent,* 21 STAN. L. REV. 767 (1970).

income."[55] Justice Marshall's dissent in *Valtierra* declared that such a classification is suspect and requires close judicial scrutiny.[56]

The mandatory element of the Eastlake provision is seen by the concurrence as being unduly burdensome. It is characterized as going beyond legitimate municipal planning in that it serves to obstruct change under the guise of popular democracy.[57] This constitutes an abuse of the zoning process. Although it applies equally to all proposed legislative changes in the zoning plan and is non-discriminatory on its face, the referendum in its effect operates as a denial of equal protection. The concurrence implied that for a valid exercise of zoning power there must be a reasoned balancing of interests between the individual property owner, the local municipality and the general public.

By adopting a broader result-oriented approach the concurrence avoided the inconsistencies of the due process rationale while maintaining the role of the judiciary as watchdog of the zoning process.[58] However, when zoning is viewed as a tool for social betterment, any use which the judiciary determines to be inconsistent with such an end becomes questionable. This places the judiciary in the position of arbiter of the social good and, in effect, substitutes the decision of the courts for the decision of the voters in determining what are the best interests of the community as a whole. The desirability of such a result is certainly open to question.

The dissenting opinion effectively distinguished the facts in *Eastlake* from those of the *Eubank* and *Cusack* decisions in that neither case concerned a municipal referendum but only the majority vote of residents in a neighborhood. The dissent relied extensively on *Southern Alameda Spanish Speaking Organization v. Union City*[59] which upheld a city-wide referendum nullifying a rezoning ordinance. The Ninth Circuit Court of Appeals in refuting the contention that a referendum destroys procedural safeguards and subjects zoning decisions to the bias, caprice and self-interest of the voter, distinguished neighborhood preferences from the right of the voter to

[55] 41 Ohio St. 2d at 201, 324 N.E.2d at 749.

[56] 402 U.S. at 145 (Marshall, J., dissenting).

[57] 41 Ohio St. 2d at 200, 324 N.E.2d at 748.

[58] A rezoning provision is non-appealable under the Administrative Appeals Act, OHIO REV. CODE ANN. ch. 2506 (Page Supp. 1974). *See* note 6 *supra.* Such provisions are subject to judicial review only on constitutional grounds. The increasing eagerness of the Ohio supreme court to inject the judiciary into the zoning process may be seen in Driscoll v. Austintown Associates, 42 Ohio St. 2d 263, 328 N.E.2d 395 (1975), in which the court held that the failure to exhaust available administrative remedies is merely an affirmative defense to a declaratory judgment action challenging the constitutionality of a zoning restriction and as such must be timely asserted or waived. *See also* Comment, *Zoning Amendments—The Product of Judicial or Quasi-Judicial Action,* 33 OHIO ST. L.J. 130 (1971).

[59] Southern Alameda Spanish Speaking Organization v. Union City, 424 F.2d 291 (9th Cir. 1970).

determine through direct legislation what best served the public interest.[60] The court further stated: "Nor can it be said that the resulting legislation on its face was so unrelated to acceptable public interest standards as to constitute an arbitrary or unreasonable exercise of the police power. . . ."[61]

A further point which neither the majority nor the dissent noted is that the Ohio constitution provides that the power of referendum is reserved to the people.[62] The distinction between a reservation of power and a delegation of power[63] is overlooked by the majority when it characterizes the referendum provision of the Eastlake charter as a "delegation of legislative power. . . ."[64] from the city council to the voting public. This is an apparent contravention of the express language of the constitution.

CONCLUSION

In seeking to determine due process standards applicable to the zoning process the court is faced with a dilemma. As a police power zoning restrictions must be adopted in a reasonable, unarbitrary manner according to established standards. But as a legislative function the power to rezone becomes subject to the constitutionally guaranteed right of referendum and becomes a political issue. Although the legislation once enacted is subject to judicial scrutiny,[65] the manner in which it is enacted does not conform to the administrative due process standards which zoning ordinances require. Merely distinguishing mandatory from permissive referendums does not cure this defect. If the court seeks to remove the zoning process from the political arena, it would be far sounder to recognize it as an administrative or quasi-judicial act or, in the alternative, to look to the result of the community's decision and determine if it violates reasonable standards of non-discriminatory land use.

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[60] *Id.* at 294.
[61] *Id.*
[62] *See* 5 MCQUILLAN, *supra* note 17, at § 16.49.
[63] Such a distinction was noted however in State *ex rel.* Davis v. Hildebrant, 94 Ohio St. 154, 114 N.E. 55 (1916), which held that the employment of initiative and referendum as a lawmaking agency is within the powers reserved to the states under Article X of the United States Constitution and does not contravene any of the other provisions of that instrument.
[64] 41 Ohio St. 2d at 187, 324 N.E.2d at 742.
[65] Reitman v. Mulkey, 387 U.S. 369 (1967).