1-1-1977

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

James H. Guterman

Follow this and additional works at: http://scholarship.law.unc.edu/nclr

Part of the Law Commons

Recommended Citation
Available at: http://scholarship.law.unc.edu/nclr/vol55/iss2/11

This Note is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized editor of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.
little sense if the ultimate goal is to protect these plans and ensure their survival.

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

ALLEN W. WOOD III

Zoning—Adjudication by Labels: Referendum Rezoning and Due Process

In recent years, the use of procedural devices providing for direct citizen participation¹ in land use planning decisions has proliferated.² The use of these devices to regulate change in land use patterns previously established by zoning ordinances³ has given rise to due process

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


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

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

4. Until this year, the Court's most recent statement was to be found in Washington *ex rel.* Seattle Title Trust Co. v. Roberge, 278 U.S. 116 (1928).
5. 96 S. Ct. 2358 (1976).
6. The referendum provision involved in *Eastlake* is atypical in that the requirement of voter review is applied to an entire class of legislation, thereby obviating the need for gathering petitions to combat a legislatively approved amendment. See note 12 infra.
7. 96 S. Ct. at 2362-63. The court below stated the claim as follows: "[A]ppellant's narrow claim is that Eastlake's charter provision constitutes a delegation of legislative power to the people, and as such violates the requirement that the police powers be exercised in a reasonable and unarbitrary fashion." Forest City Enterprises, Inc. v. City of Eastlake, 41 Ohio St. 2d 187, 191, 324 N.E.2d 740, 744 (1975) (emphasis added).
8. Plaintiff was an Ohio corporation and the owner of an eight acre parcel of land situated in the city of Eastlake, Ohio. 96 S. Ct. at 2360.
9. Challenges were made on both state and federal constitutional grounds. In addition to the fourteenth amendment claim, plaintiff asserted that the ordinance was in violation of the referendum provisions of Ohio Const. of 1851, art. II, § 1(f) (1912). Plaintiff also challenged the requirement of 55% voter approval, the requirement of having to bear the costs of the referendum, and the applicability of the referendum provision (which had been incorporated into the city charter only after its application for rezoning) to his request. 96 S. Ct. at 2361 nn.2-4.
of the Eastlake city charter\(^{10}\) that required that plaintiff’s request for rezoning\(^{11}\) its property be submitted to a city-wide referendum after city council approval of the proposed change.\(^{12}\) Both the court of common pleas and the Ohio Court of Appeals sustained the validity of the ordinance against the due process challenge.\(^{13}\)

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

On certiorari, the United States Supreme Court reversed,\(^{19}\) upholding the constitutionality of the charter provision on three grounds.

---

10. EASTLAKE, OHIO CHARTER art. VIII, § 3 (1971), quoted in 96 S. Ct. at 2368 n.8.
11. Plaintiff had requested that its parcel be rezoned from industrial to multi-family, high-rise residential use. 96 S. Ct. at 2360; 41 Ohio St. 2d at 187, 324 N.E.2d at 742.
12. The new ordinance provides in pertinent part:

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

96 S. Ct. at 2368 n.8.
13. 41 Ohio St. 2d at 188, 324 N.E.2d at 742. The Court of Common Pleas struck the cost-bearing provision. Defendant did not appeal this holding to the state supreme court, and plaintiff did not appeal the rejection of its contention that the ordinance could not be applied to its particular request. Id.
14. Id. at 189-90, 324 N.E.2d at 743.
15. Washington ex rel. Seattle Title Trust Co. v. Roberge, 278 U.S. 116 (1928); Thomas Cusack Co. v. City of Chicago, 242 U.S. 526 (1917); Eubank v. City of Richmond, 226 U.S. 137 (1912). The latter two are discussed in text accompanying notes 31-42 infra.
16. 41 Ohio St. 2d at 195, 324 N.E.2d at 746.
17. Id. at 196, 324 N.E.2d at 746.
18. Assuming that the Ohio Supreme Court properly interpreted the due process line of cases cited in note 15 supra, the result it reached does not necessarily follow. Since the charter had been amended before the city council approved plaintiff’s rezoning proposal, it is arguable that the council action never “made possible” the land use proposed, but rather that it only “made possible” the necessity of a referendum.
First, Chief Justice Burger, writing for the Court, interpreted the Ohio Constitution as reserving, rather than delegating, to the citizens of Ohio the referendum power over legislative affairs. There having been no delegation of power, the Court reasoned, there was no delegation in violation of the due process clause. Second, the Court accepted as binding for the purpose of its due process analysis the finding of the Ohio court that the rezoning process at bar was legislative in nature and summarily concluded that the only due process doctrine available to plaintiff was that of freedom from an unreasonable zoning classification, as opposed to freedom from an unreasonable procedure for obtaining a (new) classification. Finally, the Court distinguished the "standardless delegation of power" struck down in the due process cases relied on by the Ohio court from the Eastlake referendum process and its concomitant virtues. While borrowing language from two recent federal decisions to support this latter distinction, the Court failed to provide any factual analysis to demonstrate comparability between the case at bar and the cases it cited.

In dissent, Justice Stevens ignored the delegation of power issue entirely, arguing instead that the decision whether to rezone a particular parcel of land is, absent some evidence in the record of a potential for community-wide impact, adjudicative in nature.
asserted that this conclusion should result regardless of the "legislative" label affixed to the activity by the state court. Justice Stevens concluded that as an adjudicative mechanism, the referendum is an inappropriate device for disposition of the rezoning request because of its inherent inability to afford the applicant requisite procedural safeguards.

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

Five years after *Eubank,* the Court decided *Thomas Cusack Co. v. City of Chicago,* which added another dimension to the due process analysis. In *Cusack* the Court upheld a city ordinance that permitted a percentage of neighboring property owners to waive a billboard ban previously imposed by another provision of that ordinance. Responding to plaintiff's assertion that *Eubank* was controlling precedent, the Court distinguished the neighborhood imposition of land use prohibitions from the neighborhood removal (or waiver) of such prohibitions.
After Cusack then, both the nature of popular participation—waiver or imposition of restraints—and the number of persons allowed to participate are relevant due process concerns. Substantial tension exists, however, between these two factors. While the Eubank Court decried the potential for selfishness under the building line ordinance, the Cusack Court in upholding the billboard ordinance allowed such selfishness to prevail. Furthermore, the ordinance in Eubank was viewed as an unreasonable exercise of the city's police power in part because of the city-wide inconsistency in land use policy that would result. There is nothing to suggest less inconsistent results from the exercise of neighborhood power under the Cusack procedure.

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

The vitality of Eubank and Cusack, however, has been drawn into question by another line of Supreme Court cases that applied the prohibition to be modified with the consent of the persons who are to be most affected by such modification. This is not a delegation of legislative power, but is a familiar provision affecting the enforcement of laws and ordinances.

Id. at 531.

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

39. 226 U.S. at 144.

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

41. See note 18 supra.

42. Both the Ohio and United States Supreme Courts included Washington ex rel. Seattle Title Trust Co. v. Roberge, 278 U.S. 116 (1928), in the line of early due process cases. Although both courts treated Roberge, in essence, as an affirmance of the Eubank decision, it is questionable whether the Roberge Court believed itself to be confronted with a similar due process issue. The zoning ordinance challenged by plaintiff in Roberge was struck down as a denial of due process. 278 U.S. at 122 (citing Eubank). In support of its statement that the ordinance permits constitutionally infirm motives to enter into neighborhood decisionmaking, however, the Court relied on Yick
former decisions in analyzing due process challenges to congressional
deg�ations of authority. In *Carter v. Carter Coal Co.* the Court,
citing *Eubank* as primary authority, struck down as an unlawful dele-
gation of legislative authority an act that gave a portion of the em-
ployers and employees in a single industry and in a defined district
unchecked authority to set wage and hour standards for the entire in-
dustry in that district by vote. The administrative authority with
oversight responsibility was required to accept the resulting standards.

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

---

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

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

44. Id. at 311-12.

purpose of this Act was to “stabilize the . . . industry and promote its interstate com-
merce . . . .” 298 U.S. at 278.

46. Id. at 283-84.

47. Id.


at 7 U.S.C. §§ 511-517 (1970)). This Act was designed to bring stability into the inter-
state tobacco market and thereby protect producers. The Act conferred on the Secretary
of Agriculture the power to designate warehouses for tobacco inspection. 306 U.S. at
5-6.

50. Id. at 6.

51. Id. at 15-16.

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

53. Cf. McManus v. CAB, 286 F.2d 414, 419 (2d Cir.), *cert. denied,* 366 U.S. 928
These cases suggest an alternative to the imposition-waiver due process analysis of \textit{Cusack}: a “supervised participation,” under which popular participation in land use planning is acceptable, even if use restraints result, as long as it is controlled to insure that the decisions reached are consistent with an externally established policy. The \textit{Eastlake} case provided the Supreme Court with an excellent opportunity to rule on the applicability of supervised participation as an alternative due process approach in the area of land use decisionmaking and to delimit the minimum acceptable standards for such practices.\(^{54}\)

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

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

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

\(^{56}\) 424 F.2d 291 (9th Cir. 1970).

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

\(^{58}\) 424 F.2d at 291.

\(^{59}\) Appellants in \textit{SASSO} also mounted an unsuccessful equal protection challenge to the referendum. \textit{Id.} at 295-96.

\(^{60}\) \textit{Id.} at 294.
ess measure—the number of persons participating—but ignored the Cusack waiver-imposition distinction as well as the supervised participation approach from the Carter and Currin cases, under either of which the permissive referendum might not have fared so well.\(^6\)

Against this backdrop of multiple, and arguably conflicting, due process tests for the constitutionality of direct citizen participation in land use planning, the majority opinion in Eastlake is analytically inconclusive. Chief Justice Burger placed primary reliance on his interpretation of the Ohio Constitution to dispose of the Ohio Supreme Court's contention that an unlawful delegation occurred under the Eastlake ordinance.\(^6\) This interpretation provided the Court with a vehicle for disposing of the case without delimiting the utility or vitality of the various available due process tests.

The concept of supervised participation was the first test with which the Court attempted to deal. Responding to the Ohio Supreme Court's contention that the ordinance provided for inadequate legislative (council) control,\(^6\) Chief Justice Burger did take note of federal court decisions concerned with congressional delegations to other authorities.\(^6\) However, the cases to which he turned did not involve statutory requirements that make the implementation of policy decisions subject to approval by non-governmental persons, as was the case in Currin. Rather, the cases cited dealt more narrowly with the ability of the delegate itself to prescribe policy within definable boundaries.\(^6\)

The majority, however, did provide more relevant commentary that evinces a pessimistic perspective on the quality of legislative supervision that would ensue, were such supervision required. Stating that requiring supervision as a matter of due process "sweeps too broadly" because the legislative body and the voters are equally likely to misapply or ignore appropriate standards,\(^6\) the Court appears to have elimi-

---

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

62. See text accompanying notes 14-21 supra.


66. "Except as a legislative history informs an analysis of legislative action, there is no more advance assurance that a legislative body will act by conscientiously applying consistent standards than there is with respect to voters." 96 S. Ct. at 2363 n.10.
nated the very rationale relied on by the 1939 Court in distinguishing the *Currin* procedure from that held unconstitutional in *Carter*.67 Furthermore, since the *Currin* facts suggested judicial approval of the supervised imposition of restraints, the apparent removal of the supervision requirement with respect to a city-wide referendum procedure suggests that neither the imposition nor the waiver of land use restraints by referendum is constitutionally infirm. That is to say, the imposition-waiver distinction drawn in *Cusack* is overruled.68

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

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

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

---

67. See text accompanying notes 43-53 supra.
68. See text accompanying notes 35-41 supra.
69. 96 S. Ct. at 2364 n.12; see text accompanying note 37 supra.
70. 96 S. Ct. at 2364 n.13. In his dissenting opinion, Justice Stevens implicitly attacked the vitality of *Cusack* by arguing that the requirements of due process attach to the rezoning process with equal force whether additional restraint or additional freedom is at issue. Id. at 2367. See also Note, Zoning—Due Process—The Adjudicative Decision Inherent in Tract Rezoning Requires the Decision-Maker to Adhere to Standards of Minimal Due Process, 8 GA. L. REV. 254, 262 (1973).
71. 242 U.S. at 531; see note 38 supra.
72. "[T]he standardless delegation of power to a limited group of property owners condemned by the Court in *Eubank* and *Roberge* is not to be equated with decisionmaking by the people through the referendum process." 96 S. Ct. at 2364.
the Court quoted first from SASSO,\textsuperscript{73} and then from James v. Valtierra,\textsuperscript{74} the latter as a confirmation by the Court of the Ninth Circuit Court of Appeals decision in SASSO.\textsuperscript{75} In Valtierra, the United States Supreme Court upheld a provision of the California Constitution that required a referendum on all proposed low rent public housing projects.\textsuperscript{76} However, the Eastlake Court's reliance on Valtierra is inappropriate, because plaintiffs in Valtierra challenged the California provision on equal protection, not due process, grounds. Furthermore, in so construing the Valtierra opinion the Court overlooked two important distinctions between the facts of Eastlake on the one hand and Valtierra on the other. The language in the latter case approving community-wide policy making was supported by a record demonstrating that the rezoning would have an economic impact on the community at large.\textsuperscript{77} Furthermore, the mandatory referendum procedure challenged in Valtierra was limited to a certain class of projects.\textsuperscript{78} The scope of the impact of plaintiff's rezoning request in Eastlake was not similarly supported in the record.\textsuperscript{79} In addition, the Eastlake procedure was applicable to all requests for rezoning by amendment of the comprehensive plan.\textsuperscript{80}

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

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

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

\textsuperscript{75} See note 73 supra.

\textsuperscript{76} 402 U.S. 137, 139 & n.2 (1971).

\textsuperscript{77} \textit{Id.} at 143 n.4.

\textsuperscript{78} \textit{Id.} at 139 n.2.

\textsuperscript{79} 96 S. Ct. at 2368 n.10 (dissent).

\textsuperscript{80} See note 12 supra.

\textsuperscript{81} 96 S. Ct. at 2362 n.7; see Note, supra note 21, at 178.

\textsuperscript{82} 96 S. Ct. at 2371 (dissent).
policy making, and since community-wide policy making is involved, the referendum is an appropriate device.

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

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

83. Id. at 2362.  
84. Id. at 2368 (dissent).  
REFERENDUM REZONING

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

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

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

If federal law is to be invoked, the issue may perhaps be framed more appropriately in terms of the deprivation of a meaningful hearing when a referendum is required, rather than in terms of the reasonableness of the referendum provision as an exercise of the police power. It must be noted, however, that a Supreme Court majority recently decided not to hear an appeal in one case88 that would have challenged rezoning by initiative as a denial of such procedural due process requirements.89 Nevertheless, Justice White’s desire to hear that appeal, together with the frequent allusions of the three dissenting Justices in Eastlake to deprivations of “fundamental fairness” and especially with the willingness of Justices Stevens and Brennan to declare tract rezoning an adjudicative function on federal law grounds, suggests that at least four members of the Court may be willing to reconsider a procedural due process claim when an appropriate case arises.

JAMES H. GUTERMAN


89. See 44 U.S.L.W. 3042 (1975) (summary of case and questions presented to the Court).
The Editors of the *North Carolina Law Review* dedicate this issue to Frank R. Strong, Cary C. Boshamer University Distinguished Professor, upon his retirement from teaching at the University of North Carolina School of Law.