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IN THE SUPREME COURT OF FLORIDA

BOARD OF COMMISSIONERS OF
BREVARD COUNTY,

Petitioner,

v. CASE NO.: 79,720

JACK R. SNYDER, ET UX.,

Respondents.

_____/

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**Brief of *Amicus Curiae* Monticello Drug Company on Behalf of Respondents**

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## STATEMENT OF THE CASE AND FACTS

*Amicus* Monticello Drug Company adopts the statement of the case and facts presented by the Respondent Snyder.

## SUMMARY OF ARGUMENT

A local government development order regarding an individual rezoning application is a quasi-judicial action. Such development order deals specifically with a particular piece of property and affects the particular rights of its specific owners. Regardless of whether the form of the application is for Planned Unit Development (PUD), Limited Use Site Plan, or other type rezoning, local government is still required to adjudicate a requested conceptual use for a particular piece of property.

Under comprehensive planning laws now effective in Florida, all individual land use applications must be adjudicated through development orders. Regardless of the form of the action or the name of the decision-making entity, the determination is quasi-judicial in nature. Modern zoning authorities and courts throughout the country have so held, including the Second, Third, Fourth and Fifth District Courts of Appeal in Florida, which have confronted the issue.

Determination of development use for an individual parcel based on an owner's application is distinguished from a comprehensive plan amendment or rezoning initiated by the government for a large geographic area affecting a large number of persons. In the latter instances, elected local government

authorities are making general policy decisions and have a political incentive to treat the parcel owners fairly and uniformly.

However, deciding individual cases is not a legislative function. Deciding individual applications involves the application of the legislative and legal standards that control land use to the facts of the particular case. The individual owner needs the protection of due process as a bulwark against political pressure to withhold development rights or impose arbitrary restrictions.

The enactment of the 1985 Local Government Comprehensive Planning and Land Development Regulation Act confirmed and implemented the modern trend to treat single parcel rezoning applications as quasi-judicial action. Under this new law, the comprehensive plan is the essential legislative policy statement that controls land use, together with plan amendments, adopted studies, the zoning code and other land development regulations, and controlling law. All decisions on individual land use applications must conform to the land use plan and the plan map that demarks various uses or use categories.

The 1985 statute expressly defines a "development order" to include all action on applications for a development permit, which includes rezoning as well as all other permits, variances, exceptions and types of development approvals. The legislative intent is to abolish technical distinctions between these forms of

individual land use decisions. A standardized procedure is provided for such actions whereby the owner seeks a conceptual or preliminary land use permit that confers the right to go forward with development plans pursuant to the approved use. All individual parcel action is therefore deemed a development permit, and is decided by order rather than by ordinance. Thus, the 1985 legislation extends the protection of due process to individual property owners no matter what form of land development permit is sought, and no matter whether the permit is for conceptual, preliminary or finalized approval.

## ARGUMENT

THE PROPERTY OWNER'S RIGHT TO REVIEW OF QUASI-JUDICIAL LAND USE DECISIONS, INCLUDING SINGLE PARCEL REZONING DECISIONS UPON THE OWNER'S APPLICATION, REMAINS BY COMMON LAW WRIT OF CERTIORARI UNDER THE APPLICABLE PROVISIONS OF THE STATE COMPREHENSIVE PLAN LAW.

### Introduction

The distinction between quasi-judicial and quasi-legislative land use decisions is discussed in the article Developments in the Law: Zoning, 91 Harv. L. Rev. 1427, 1508-1528 (1978). This article presents a functional distinction between the two types of proceedings by the type of facts that are presented (adjudicative or legislative) and by the extent to which the action has a particularized impact on a specific individual (or parcel). Id. at 1510-11. The article recognizes the need for due process protection where the proceeding is one involving adjudicative facts

and a particularized individual impact. Id. at 1512-13, 1524-28. Rather than quote the article at length, the *amicus* appends a copy of the pertinent portion of the article to this brief.

> A. The purpose for the Local Government Comprehensive Planning and Land Development Regulation Act is to provide objective controlling standards by which individual land use decisions, including rezoning decisions, can be reviewed.

The common experience of property owners in Florida and elsewhere bears out the need for due process protection as discussed in the Harvard Law Review article. Local governments' individual parcel land use decisions have traditionally tended to subordinate rational and even-handed consideration of the property owner's rights to arbitrary political convenience and the influence of political preferments. See Snyder, 595 So.2d at 73-74. One fundamental purpose for the comprehensive plan is to provide a controlling framework of land use standards that can be used to adjudicate individual parcel decisions apart from such arbitrary political preferences and expediency.[1]

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[1] The *amicus* brief submitted by the Florida Department of Community Affairs (Department) admits that one purpose for comprehensive planning is to eliminate "trial by neighborism." Department Brief at 11. However, the Department's argument that politically inspired rezoning decisions remain insulated from court review frustrates this laudable purpose.

The Court should certainly not impute any intent to the Legislature to encourage "trial by neighborism", since that would both frustrate the statutory purpose and create constitutional objections. See cases cited at p. 13-14 below.

The comprehensive plan serves as the foundation quasi-legislative policy governing land use and development. The plan must include a future land use element and map which designates the geographic areas and use categories which guide rezoning actions. Section 163.3177(6)(a), Florida Statutes. All subordinate land use orders and regulations must be consistent with the plan. See, e.g., § 163.3161(5), Florida Statutes (general statement of legislative intent); § 163.3194(1)(a) and (b), Florida Statutes (requiring all development orders and development regulations to be consistent with the plan); §§ 163.3201 and 163.3202 (requiring regulations to implement plan).

One early Florida decision analogized the comprehensive plan to a "constitution" to which all subordinate zoning actions must conform. See Machado v. Musgrove, 519 So.2d 629, 631-32 (Fla. 3d DCA 1987), review denied, 529 So.2d 694 (Fla. 1988). The Machado decision held that Florida law is committed to the doctrine that legislative standards embodied in the plan would govern all zoning or rezoning actions. The plan would not be a "vest pocket tool" for making individual zoning changes based on political vagary. Id., 519 So.2d at 635. Thus individual parcel rezoning decisions are no longer acts of unfettered legislative discretion, but are now quasi-judicial acts that must conform to the standards in the comprehensive plan and land use regulations can be tested by whether public harm is shown.

B. The comprehensive planning law designates decisions on an owner's application for rezoning as a "development order", meaning a quasi-judicial order, as opposed to a quasi-legislative "ordinance."

The 1985 legislation carefully distinguishes between rezoning orders, on one hand, and rezoning ordinances, on the other. The definitions section of the law specifies that any decision upon a rezoning application is a "development order," and that such rezoning is a form of "development permit":

> (6) "Development order" means any order granting, denying, or granting with conditions an application for a development permit.
>
> (7) "Development permit" includes any building permit, zoning permit, subdivision approval, rezoning, certification, special exception, variance, or any other official action of local government having the effect of permitting the development of land. (e.s.)

Section 163.3164(6) and (7), Florida Statutes. Thus, the comprehensive planning law classifies rezoning upon an owner's application the same as other single parcel decisions on applications for permits, variances, exceptions and other approvals; and the resulting decision in all such cases is an "order." Any technical or formal distinction between the various types of development permits and orders is eliminated in favor of a standardized quasi-judicial procedure.

By contrast, a rezoning action other than one upon an application is accomplished by regulation enacted by ordinance:

> (22) "Land development regulations" means ordinances enacted by governing bodies for the regulation of any aspect of development and

> includes any local government zoning, rezoning, subdivision, building construction, or sign regulations or any other regulations controlling the development of land .... (e.s.)

Section 163.3164(22), Florida Statutes. Other provisions in the comprehensive planning law treat separately the categories "development orders" and "development regulations." See, e.g. § 163.3194(1)(a) and (b), Florida Statutes.

Other related statutes confirm this distinction. A county or a municipality proceeds by ordinance when it initiates a zoning action that presumably affects an entire area involving a large number of property owners. See § 125.66(5), Florida Statutes (procedures for county-initiated rezoning action); and § 166.041(3)(c), Florida Statutes (procedure for municipal-initiated rezoning action). However, these statutes do not prescribe any procedures for acting on owner-initiated applications for a single parcel. These applications do not require ordinances at all but quasi-judicial orders.

Reading all of these statutes together, it is clear that the Legislature contemplates that local government acts quasi-judicially when it reviews an owner's rezoning application.[2] Since the Respondent Snyder initiated an application for rezoning of his

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[2] Of course, the form of a decision should not negate its quasi-judicial character. See, e.g., 91 Harv. L. Rev., supra, at pp. 1509-10. Resolutions or ordinances have often been held to be quasi-judicial determinations. Nevertheless, the legislatively directed distinction between "development order" and ordinance or regulation controls the substance of local actions and recognizes the modern trend in zoning law.

individual property, the County should proceed quasi-judicially by "development order" in conformity with this legislative scheme.[3]

C. The modern trend in the Florida courts, even before the statute was enacted, has been to hold that an owner-applicant in a rezoning case is entitled to review by writ of certiorari.

The Fifth District's Snyder opinion contains a useful discussion of the authorities which hold that single parcel rezoning is reviewable on the record by writ of certiorari. See Snyder, 595 So.2d at 76 n. 42 (citing scholarly commentary); id. at 77-78 nn. 43-57 (citing trend of decisions in other jurisdictions); id. at 76 n. 38, and at 78 n. 58 (citing trend of Florida cases). The court's analysis omits several other Florida cases that have reached the same result, both before and after the enactment of the 1985 comprehensive planning law. These include:

Second District:

Grady v. Lee County, 458 So.2d 1211 (Fla. 2d DCA 1984)

Hillsborough County v. Putney, 495 So.2d 224 (Fla. 2d DCA 1986)

Third District:[4]

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[3] Ordinarily an application for a development permit (including rezoning) will involve a single parcel, while a government-initiated rezoning ordinance will ordinarily involve multiple parcels. If the government attempted to rezone individual parcels piecemeal, its action may be vulnerable to challenge as spot zoning or other bad faith action. See generally 7 Fla. Jur. 2d Building, Zoning and Land Use Controls § 110 (1978).

[4] Some Dade County cases refer to a special ordinance authorizing certiorari review. However, neither Carmichael nor Baker above contain any reference to such an ordinance, and presumably ruled on common law certiorari.

Dade County v. Carmichael, 165 So.2d 227 (Fla. 3d DCA 1964)

Baker v. Dade County, 237 So.2d 201 (Fla. 3d DCA 1970)

Fourth District:

> Rural New Town v. Palm Beach County, 315 So.2d 479 (Fla. 4th DCA 1975) (certiorari jurisdiction exercised and decision rendered that record was insufficient to support denial of rezoning, despite dicta observation that rezoning was legislative action).

Thus all Florida appellate courts, except the First District, have already expressly adopted the Snyder court's reasoning. The First District also adopted this reasoning, at least in dicta, in Andover Dev. Corp. v. City of New Smyrna Beach, 328 So.2d 231, 237 (Fla. 1st DCA 1976) (quoting with approval the seminal case Fasano v. Board of County Commissioners, 507 P.2d 23 (Or. 1973)), cert. denied, 341 So.2d 790 (Fla. 1976).

Earlier decisions in Florida, as in other states, had ruled that approval of an individual rezoning was not reviewable by certiorari upon challenge by an interested third party. This apparently resulted in large part because approval took the form of adoption of an ordinance which the challengers had to invalidate. E.g., see Harris v. Goff, 151 So.2d 642 (Fla. 1st DCA 1963) (traditional method for assaulting validity of zoning ordinance is by suit in equity).[5]

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[5] In a more recent case dealing with a third party challenge to invalidate approval of a rezoning application, the court still confusingly refers to the legislative character of the action but nevertheless applies the certiorari standard of whether competent substantial evidence in the record supported the

The Snyder court emphasized the existing case law and scholarly commentary as primary authority for its decision. The court did not emphasize the 1985 comprehensive planning law provisions, although its opinion made a general reference to the law. See Snyder, above, 595 So.2d at 75-76 n. 35. However, the statute not only provides an additional ground to sustain the Snyder decision; it effectively supercedes all prior case law to the contrary. Henceforth, the Legislature's classification of rezoning upon the owner's application as an "order", just like all other types of quasi-judicial orders, is dispositive of the matter. The Snyder decision should be affirmed on this ground.

D. Treating rezoning on an owner's application as quasi-judicial action does not thwart desirable public participation in rezoning and land use orders.

Some of the *amici* contend that the decision below would limit citizen participation in land use decisions. This is not a judicial issue at all, but a legislative one. The Legislature has already provided for optimal citizen participation in the quasi-legislative process of adopting a comprehensive plan and plan amendments. See § 163.3181, Florida Statutes (public participation encouraged); and § 163.3184(15) (public hearings on plan

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decision. See Naples Airport Auth. v. Collier Dev. Corp., 513 So.2d 247, 249 (Fla. 2d DCA 1987). This case involved approval of large public project. The Legislature has now specified that local rezoning actions on an owner's application do not take the form of an ordinance, but rather are accomplished by "development order" like all other forms of quasi-judicial action. This has clearly eliminated the source of confusion produced by Harris and its progeny.

adoption). See also § 163.3177(8), Florida Statutes (surveys may be incorporated into plan).

Citizen participation in the adoption of all land use regulations, including those that may apply to rezoning applications, is assured by §§ 125.66(5) and (6), Florida Statutes (proceedings for county ordinances) and § 166.041(3), Florida Statutes (proceedings for municipal ordinances).

Local plans and land use regulations can provide for public notice on any use application, and members of the public can be allowed to testify. This is common practice for most land use decisions, including site plan approvals, PUD concepts, variance requests and other forms of "development permits." It does not matter whether the decision maker is a Board of Adjustment, a Planning Commission or Board of Commissioners. Furthermore, the process is often multi-tiered, with public input received at every stage. Testimony by members of the public is frequently evaluated and considered in evaluation reports submitted by planning authorities to the decision maker as part of the evidence to be considered.

Public input on a development in a fair and orderly manner is not diminished by quasi-judicial decision making. Instead, due process is assured for the owner-applicant, and the decision must be legally supportable. If *amici* are contending that quasi-judicial decisions will thwart purely political decision making, then their position is tantamount to resurrecting the long discredited notion of development permitting through neighborhood plebescite.

It is well established that opposition from other owners cannot justify denying a development right to which the applicant is otherwise entitled, and that administrative action based solely on such political opposition is a denial of due process or equal protection. See Washington ex rel. Seattle Title Trust Co. v. Roberge, 278 U.S. 116 (1925); Wheeler v. City of Pleasant Grove, 664 F.2d 99 (5th Cir. Unit B 1981), cert. denied, 456 U.S. 973 (1981); Corn v. City of Lauderdale Lakes, 771 F. Supp. 1557, 1569 (S.D. Fla. 1991) (public outcry against a project does not constitute a legitimate state interest or a rational basis for action). State court decisions adopt the same rule. See Pollard v. Palm Beach County, 560 So.2d 1358, 1360 (Fla. 4th DCA 1990); Bailey v. City of St. Augustine Beach, 538 So.2d 50, 52 (Fla. 5th DCA 1989); Irvine v. Duval County Planning Comm'n, 466 So.2d 357, 367 (Fla. 1st DCA 1985) (dissenting opinion), 495 So.2d 167 (Fla. 1985) (approving dissent), 504 So.2d 1265 (Fla. 1st DCA 1986) (adopting dissent as Court's opinion); Conetta v. City of Sarasota, 400 So.2d 1051 (Fla. 2d DCA 1981). Thus action on development applications should not be allowed to return to the "trial by neighborism" which these decisions condemn.

The Legislature has also provided a mechanism for members of the public to intervene and challenge a development order after its issuance. Section 163.3215, Florida Statutes, provides the procedure whereby a "substantially affected party" can object to an order that materially alters land use, density or intensity contrary to the Comprehensive Plan, by timely filing a verified

administrative complaint. If the land use authority does not make a satisfactory response, the third party challenger can bring an action for injunction or other relief to prevent action on the development order.

This statute was enacted to liberalize the citizen's preexisting common law rule governing standing to challenge development orders, as set forth in Citizens Growth Management Coalition v. City of West Palm Beach, 450 So.2d 204 (Fla. 1984) (requiring injury to a legally recognizable right as a basis for standing). See Southwest Ranches Homeowners Ass'n, Inc. v. County of Broward, 502 So.2d 931, 935 (Fla. 4th DCA 1987), review denied, 511 So.2d 999 (Fla. 1987) (discussing purpose for statute). Accord, see Degrove and Stroud, New Developments and Future Trends in Local Government Comprehensive Planning, 17 Stetson L. Rev. 573, 595-98 (1988) (describing statute as vehicle for environmental groups and citizen watchdogs to challenge development orders).

Thus the Legislature has conferred liberalized standing for citizen involvement in individual development orders, but has also protected the owner against bad faith challenges by requiring that the order be one that materially alters land use, density or intensity (§ 163.3215(1)); that the challenging party be substantially affected (§ 163.3215(2)); that it act promptly within 30 days of the order (§ 163.3215(4)); and that it be accountable for sanctions if the challenge is brought for a bad faith purpose (§ 163.3215(6)).

This statute reasonably accommodates the interests of the various parties in proceedings to challenge a development order, and the courts are not free to substitute their own views that greater or lesser citizen participation is needed.

Another concern raised by some *amici* is that citizen participation in rezoning decisions would be unduly hampered by the prohibition against ex parte communications in quasi-judicial proceedings. See Jennings v. Dade County, 589 So.2d 1337 (Fla. 3d DCA 1991), review denied, 598 So.2d 75 (Fla. 1992). The Jennings decision is based on fundamental fairness. An owner should neither be permitted to secretly lobby for its permit application, nor be victimized by opponents' secret lobbying against the permit application, regardless of what form the permit application takes. This rule works no hardship on anyone. Rather it guarantees a level and open playing field where the contestants are aware of one another's position and can respond fairly to one another's arguments. At a minimum, citizen input opportunities are guaranteed by post-order proceedings under § 163.3215, Florida Statutes. Greater citizen input can be secured by local policies allowing public hearings and liberal intervention. No desirable aspect of citizen input is curtailed by the decision below.[6]

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[6] The need for and effect of ex parte contacts is qualitatively different when the local land use agency adopts regulations by ordinance, as opposed to when it decides an owner's application by order. These two situations remain distinct under the legislative scheme discussed in Part B above. A local zoning authority member remains free to hear ex parte communications when he or she acts quasi-legislatively, but not when he or she acts quasi-judicially on an owner's application.

Another concern expressed by *amici* is that rezoning by referendum will no longer be permitted. This concern is inappropriate because Snyder does not purport to foreclose a public initiative and referendum to amend the plan or the zoning regulations. Any such action would be quasi-legislative and would control development orders, unless enacted in bad faith or in deprivation of vested rights or otherwise in violation of planning laws or substantive due process.[7]

E. The owner's right to review of quasi-judicial orders by common law certiorari is not extinguished by enactment of § 163.3215, Florida Statutes.

The Department of Community Affairs contends that Section 163.3215, Florida Statutes, has replaced the owner-applicant's remedy of common law certiorari with a statutory procedure, at

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[7] The public's right to effect a repeal of a rezoning action by initiative and referendum is discussed in City of Winter Springs v. Florida Land Co., 413 So.2d 84 (Fla. 5th DCA 1982), approved, 427 So.2d 170 (Fla. 1983). That decision was not concerned with an owner's application for the right to use its property, as in Snyder, but with the repeal of a rezoning ordinance upon public initiative and referendum pursuant to city charter provisions. The owner in Winter Springs did not argue that the initiative and referendum interfered with its vested rights, or was undertaken in bad faith, or was inconsistent with a comprehensive plan. The only issue was whether the rezoning initiated by the public (acting in place of the zoning authority) was quasi-legislative action. The courts held that it was, and the result would be the same under current law if a local comprehensive plan authorized a public initiative and referendum. Of course, under the Comprehensive Planning Act, an amendment to the plan may be proposed in prescribed cycles. The Winter Springs decision is not relevant here, however, because this case concerns rezoning upon an owner's application for the right to use its property, which is quasi-judicial action.

least where plan inconsistency issues are presented. This argument is both impractical for the owner and inconsistent with the plain language of § 163.3215. The only purpose of the statute is to confer limited standing on third party intervenors, not to displace the owner's traditional remedy.[8]

The Department is not ordinarily a participant in the proceedings to review individual land development orders, and its brief does not discuss the practical consequences of its argument. The established common law certiorari remedy is a practical necessity for the owner-applicant, who needs a speedy and efficient determination of its development rights in order to avoid the delay and expense of prolonged legal procedures to ascertain whether an economically feasible development will be permitted. Obviously substantial delay and expense at the permit approval stage can throw a development off its critical time path or budget as purchase options, financing and construction commitments expire or grow more expensive and sales or rental markets fluctuate.

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[8] The proper application of § 163.3215 is exemplified by the recent decision in Jensen Beach Land Co. v. Citizens for Responsible Growth, 17 FLW D 2410 (Fla. 4th DCA, Oct. 21, 1992). There the citizens group brought action against a county to challenge a development order as inconsistent with the plan, without having complied with the verified administrative complaint procedure in § 163.3215(4). The developer who had applied for the order intervened to protect its rights under the order. The Court ruled that the citizens group's failure to comply with the statutory verified complaint procedure deprived the trial court of jurisdiction to hear their challenge. However, the same Court continues to recognize common law certiorari rather than the statutory procedure is the proper remedy when the owner-applicant seeks review of a development order. See and compare Park of Commerce Assocs. v. City of Delray Beach, 17 FLW D 2047 (Fla. 4th DCA, Sept. 2, 1992) (en banc).

Application of § 163.3215, Florida Statutes, to the owner-applicant would turn every case into a procedural quagmire, wherein some issues are resolved promptly by certiorari and other interrelated issues await prolonged de novo review, following an unnecessary and dilatory second round of administrative review under § 163.3215(4), Florida Statutes.

The problems are exacerbated because a "plan inconsistency" issue to be reviewed under § 163.3215, Florida Statutes, cannot readily be separated from all other issues in the same case. Plan inconsistency issues will normally overlap with other substantive issues such as consistency with other regulations and statutes, and will also overlap with issues of evidentiary sufficiency, procedural due process, and the adequacy of the announced findings and reasons in the development order to support the action taken. Thus one substantive issue cannot readily be carved out for bifurcated proceedings under the statute while all other issues are resolved by wholly different procedures upon a writ of certiorari. The applicable remedy may in many cases depend on such artificial considerations as how the issue is worded, and by which party.

The Legislature never intended § 163.3215 to apply to the owner at all, but to third party intervenors who wish to challenge an order. The plain language of the statute shows its limited function. The statute creates a remedy for persons to prevent government action on a development order that materially alters the use or density or intensity of use. Section 163.3215(1), Florida Statutes. This language could not apply to an owner whose

application is denied, because the denial order does not alter anything, and there is no prospect of any further action on the denial order that a court can "prevent." The reference to the exclusive remedy in § 163.3215(3)(b), Florida Statutes, means only the remedy created by subsection (1), which is obviously not applicable to an owner whose application has been denied.

Likewise, the requirement for a verified administrative complaint in § 163.3215(4) would serve no purpose except to delay matters in a case of an owner whose application has already been comprehensively reviewed. This procedure makes sense only if limited to third party challenges. See also § 163.3215(6), explaining the purpose for the verified complaint is to prevent delay or harassment (of the owner).

Section 163.3215 merely extends standing to third parties in exchange for some certainty that the challenge will be timely brought in good faith, and not merely for purposes of harassment, delay, or economic advantage. It does not alter the owner's common law certiorari remedy in any way. The Legislature had no reason to change the owner's remedy which was not "broken." The Department cites no legislative history or rule of construction that supports its contention that the statute eliminates common law certiorari for the owner-applicant.

The Department's argument is based entirely upon the First District Court of Appeal's divided decision in Leon County v. Parker, 566 So.2d 1315, after remand sub nom. Emerald Acres Inv., Inc. v. Leon County, 601 So.2d 577 (Fla. 1st DCA 1992), and Parker

v. Leon County, 601 So.2d 1223 (Fla. 1st DCA 1992) (Judges Allen, Barfield and Wentworth joining the majority opinions; Judge Nimmons dissenting; and Judge Kahn concurring based on law of the case but agreeing with Judge Nimmons' dissent). Many of the foregoing problems with the Parker decision are set forth in Judge Kahn's concurring opinion.

The Parker decisions are an aberration. No other reported decision has followed the Parker majority's reasoning. Even though the statute has been in effect for seven years, numerous reported decisions continue to consider the owner's exclusive remedy to challenge quasi-judicial action to be common law certiorari. The Parker decision is not even followed by other panels of the First District Court of Appeal. Compare Planning Commission v. Brooks, 579 So.2d 270 (Fla. 1st DCA 1991) (upholding certiorari in case involving plan inconsistency issue without any discussion of statute or Parker decision).

The First District majority apparently recognized that its decision was not followed elsewhere, and certified the issue as one of great public importance for review in this Court. See Parker v. Leon County, 601 So.2d 1223 (certifying question), Case No. 80,239 (Fla. pending). If this Court reverses Parker, the Department's argument fails.

**CONCLUSION**

The decision below should be affirmed.

Respectfully submitted,

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I hereby certify that a true and accurate copy of the foregoing has been furnished to the counsel listed below, by United States Mail this 9 day of November 1992.

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DEVELOPMENTS IN THE LAW

# ZONING

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## I. Introduction

The increasing complexities of modern life have had some of their most pronounced effects on the relationship of the government to private property. If, in an earlier era, an individual's use of his property could be seen as a wholly autonomous enterprise,[1] property uses today are perceived as highly interdependent and often conflicting in nature.[2] Not surprisingly, the role of government as an arbiter among conflicting property uses has expanded measurably. Yet state intervention in the realm of private property has extended beyond simply the mediation of these property conflicts. Because property arrangements are today recognized as inextricably related to broader social policies, government efforts to foster particular social ends have increasingly taken the form of active state involvement in land use control.[3]

Zoning is the predominant technique by which governments have exercised this control over private property. The zoning authority is usually wielded by localities pursuant to an express delegation of the states' police power.[4] Narrowly defined, zoning consists of the division of a municipality into districts and the imposition of prospective restrictions upon the use of land within those districts.[5] Typically, the uses permitted within the districts will have a "cumulative" character: for example, in a district zoned for light industry or commercial enterprises, less intensive uses — such as residences — are permitted, while more intensive uses like heavy industry are not allowed.[6]

This relatively simple model of zoning has been supplemented by a wide range of new techniques during the past few decades in response to evolving social problems. Concern for the environment has spawned growth moratoriums and other limitations on private land use development.[7] Fear of urban sprawl has led some localities to check overall growth so as to preserve semi-

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[1] *See, e.g.*, 2 W. Blackstone, Commentaries *2 (property described as "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe").

[2] *See, e.g.*, Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 386–87 (1926).

[3] *See generally* R. Anderson & B. Roswig, Planning, Zoning and Subdivision: A Summary of Statutory Laws in the 50 States (1966).

[4] *See* Note, *State Land Use Regulation — A Survey of Recent Legislative Proposals*, 56 Minn. L. Rev. 869, 869–70 (1972).

[5] 1 R. Anderson, American Law of Zoning § 2.13 (2d ed. 1976).

[6] 2 *id.* § 9.14. As Anderson points out, however, the trend in this area is toward noncumulative zoning, in an attempt to prevent economic injury to commercial or industrial districts caused by the presence of residential units. *Id.* § 9.38.

[7] *See* pp. 1595–601, 1630 & note 23 *infra*.

the requisite process is not extended, the decision cannot constitutionally be enforced.[7]

These procedural requirements have particularly important implications in the context of zoning through initiatives and referenda. The tension between direct electoral decisionmaking and individual due process rights is examined, along with the Supreme Court's one major decision in this area, *City of Eastlake v. Forest City Enterprises, Inc.*,[8] in the third section. The conclusions reached in that section indicate that the power of the electorate to make land use decisions directly through the use of initiatives and referenda is significantly curtailed by due process.

Due process rights to be free from arbitrary government action, whether in the form of mistaken or procedurally deficient administrative determinations or in the form of unreasonable legislative enactments, depend upon judicial review for their vindication. Two significant aspects of state court review of zoning decisions are considered in the concluding section: standing to secure judicial review and the standard of review a court will apply assuming standing requirements are satisfied.

### *A. Conditions for the Applicability of Procedural Requirements to Zoning Decisions*

Procedural rights of due process attend not all government actions, but only administrative actions which threaten to deprive someone of a protected interest in life, liberty, or property.[9] The relatively inchoate state of contemporary due process analysis as applied to zoning may in large part be attributed to an inadequate understanding of these preconditions to the availability of procedural safeguards. The central task of this Section, therefore, is to explicate, within the zoning context, the prerequisites of an administrative action and a protected property interest. Before undertaking this endeavor, however, it is useful to consider the functions due process safeguards are intended to serve, so that the standards developed for defining the applicability of procedural

[7] The remedy for a failure to extend procedural due process rights is invalidation of the zoning decision. *See* City of Scottsdale v. Superior Court, 103 Ariz. 439 P.2d 290 (1968); De Latour v. Morrison, 213 La. 292, 34 So. 2d 783 (1948). *See generally* 1 A. RATHKOPF, THE LAW OF ZONING AND PLANNING §§ 10:01 (4th ed. 1977).

[8] 426 U.S. 668 (1976).

[9] If, however, procedural due process is conceived expansively to include structural concerns pertaining, for example, to the competence and reflectiveness of the decisionmaking entity, *see* note 5 *supra*, a strong case can be made that procedural protections attach to some government actions which are legislative in nature. *See* Sager, *supra* note 5, at 1403 n.104, 1411–23.



requirements are consistent with the purposes of procedural due process.[10]

*1. Interests Served by Procedural Due Process.* — A functional analysis of due process suggests that at least three distinct interests are served by extending process rights. First, due process assures that governmental decisions affecting individuals are made correctly and efficiently (the efficiency interest). Second, it permits the person affected by a decision to argue before the relevant body about the substantive rules that are to be applied and how they should be interpreted in the particular instance (the representational interest).[11] Third, and last, it protects individual dignity by requiring that the government explain its actions to those directly affected (the dignity interest).[12]

Courts, when speaking of the functions of due process, often do not clearly differentiate among the efficiency, representational, and dignity interests.[13] Nevertheless, implicit recognition of these

[10] A similar approach to due process problems is followed in Sabin & Dykstra, *Notice and the Right to be Heard: The Significance of Old Friends*, 9 HARV. C.R.-C.L. L. REV. 449, 451–58 (1974). A somewhat different approach to due process analysis is proposed in L. TRIBE, *supra* note 5, § 10-7. *See also* Michelman, *Formal and Associational Aims in Procedural Due Process*, in NOMOS XVIII: DUE PROCESS 126, 130–31 (J. Pennock & J. Chapman eds. 1977); Van Alstyne, *Cracks in "The New Property": Adjudicative Due Process in the Administrative State*, 62 CORNELL L. REV. 445, 487 (1977). Under this approach, the functions are expressed as differing "views" of the due process clause, with each view corresponding to a concept of liberty or property interests. Professor Tribe's formulation assumes that the views are both distinct and inconsistent. The functional analysis proposed here, however, keeps the views distinct, but allows them to inform the due process analysis commensurate with its relevance to any given circumstance.

[11] Thus, for example, a government employee about to be fired for cause could argue that he had not committed the alleged infraction, or that even if he had, the infraction should not be considered significant enough under the rules to warrant release. The first argument would exemplify the efficiency interest. The second, in focusing on the substantive norms underlying the rules, would exemplify the representational interest. *See* Tribe, *supra* note 5, at 503–83.

[12] It is frequently stated that the purpose of due process is to safeguard individuals from arbitrary or unfair governmental action. *See, e.g.*, Fuentes v. Shevin, 407 U.S. 67, 80–81 (1972). Protection against arbitrary government action can be analyzed in terms of the three interests identified in text. To the extent that the arbitrariness arises from erroneous application of given rules, the interest implicated is that of efficiency. Where the arbitrariness stems from a failure to understand the correct rules, or from an ill-considered application of rules, it offends the representational interest. Finally, the due process protection against action that is arbitrary because it is not forewarned or explained can be traced to the dignity interest.

[13] In Fuentes v. Shevin, 407 U.S. 67 (1972), for example, the Supreme Court said that the purpose of the due process clause is

> to protect [the] use and possession of property from arbitrary encroachment — to minimize substantially unfair or mistaken deprivations of property . . .

interests underlies much due process analysis. Perhaps the most directly recognized function of due process is the efficiency interest.[14] It requires that substantive rules, once decided upon, be accurately and scrupulously administered.[15] Thus, the Supreme Court has often stated that the role of due process is to avoid erroneous results and deprivations.[16] Moreover, efficiency considerations may underlie the requirement that the rules implemented be based on general substantive norms, rather than personal animus or mass sentiment.[17] Within the context of zoning decisions, efficiency interests are clearly implicated, for example, in the specific requirements that zoning boards consistently and accurately implement the statutory grant of zoning authority,[18] that decisions be supported by substantial evidence,[19] and that a record be made to facilitate review of whether decisionmaking criteria have been correctly applied.[20]

> . . . For when a person has an opportunity to speak up in his own defense, and when the State must listen to what he has to say, substantively unfair and simply mistaken deprivations of property interests can be prevented.

*Id.* at 81. The Court's reference to "mistaken deprivations of property" suggests the efficiency interest in seeing agreed-upon rules correctly enforced. Reference to "substantively unfair" property deprivations could be viewed as part of the representational interest of applying the most defensible rules or interpretations. Finally, the Court's singling out of the person's right to force the government to listen to his defense captures part of the concerns underlying the dignity interests.

[14] *See, e.g.*, Codd v. Velger, 429 U.S. 624, 627–28 (1977); Morrissey v. Brewer, 408 U.S. 471, 484 (1972); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313–14 (1950); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 171–72 (1951) (Frankfurter, J., concurring).

[15] *See* L. TRIBE, *supra* note 5, § 10-7; Subrin & Dykstra, *supra* note 10, at 452–56; *cf.* Kadish, *Methodology and Criteria in Due Process Adjudication — A Survey and Criticism*, 66 YALE L.J. 319, 346 (1957) (ensuring reliability of guilt-determining process is one function of due process).

[16] *See* cases cited note 14 *supra*. At times, by its reluctance to examine the substantive rules by which decisions are made, *see, e.g.*, Codd v. Velger, 429 U.S. 624, 627–28 (1977), the Court has by implication suggested that the efficiency interest is the sole function of procedural due process.

[17] *See* Kent v. Zoning Bd. of Review, 74 R.I. 89, 91, 58 A.2d 623, 624 (1948); Michelman, *supra* note 10, at 120–30.

[18] *See, e.g.*, Younes v. Zoning Bd. of Appeals, 127 Conn. 715, 17 A.2d 51 (1941); Bradley v. Board of Zoning Adjustment, 255 Mass. 106, 150 N.E. 1 (1926); Brandon v. Board of Comm'rs, 124 N.J. 135, 11 A.2d 304 (1940).

[19] *See, e.g.*, Danseyar v. Zoning Bd. of Appeals, 164 Conn. 325, 321 A.2d 27 (1973); Heft v. Zoning Bd. of Appeals, 31 Ill. 2d 266, 201 N.E.2d 362 (1964); Stice v. Gribben Allen Motors, Inc., 216 Kan. 744, 534 P.2d 1267 (1975); Ourisman v. Board of Zoning Appeals, 201 Md. 397, 104 A.2d 568 (1954).

[20] *See, e.g.*, Topanga Ass'n for Scenic Community v. County of Los Angeles, 11 Cal. 3d 506, 522 P.2d 12, 113 Cal. Rptr. 836 (1974); Ward v. Zoning Bd. of Appeals, 153 Conn. 141, 215 A.2d 104 (1965); Gougeon v. Board of Adjustment, 52 N.J. 212, 245 A.2d 7 (1968).



The efficiency interest takes as given the rules being used to reach a decision, and demands only that these rules be accurately applied. The representational function, on the other hand, relates due process directly to the substantive rules of decision by promoting debate over the merits and correct interpretation of the rules themselves.[21] Courts frequently characterize hearings as an "informal give and take,"[22] thus recognizing that a function of due process is to allow the individual to question the substantive scope of the relevant legal rules and the acceptability of the outcome for the specific situation.[23] The representational function becomes particularly important where, as is true in many zoning cases, the criteria of decisionmaking are inherently imprecise. Zoning variances illustrate this aspect of the representational function. Most variance ordinances require that "undue hardship" be demonstrated before the variance is granted.[24] Hearings on variance applications serve the representational interest by allowing interested parties to argue how "undue hardship" should be characterized and how such a characterization should be applied to the specific facts. The hearing, of course, also serves the efficiency and dignity interests by bringing all relevant information to the decisionmaker's attention, and by allowing persons to feel that they are not being subjected to some "secret, one-sided determination of facts decisive of rights."[25]

Unlike the efficiency or representational aspects of due process, the dignity function is not concerned with the individual's right to argue for a different outcome in his particular case. Instead, participation is required because human dignity mandates consultation with an individual prior to taking any action vitally affecting

[21] *See* Subrin & Dykstra, *supra* note 10, at 454. *See also* Tribe, *supra* note 5, at 310, 314–20.

[22] Goss v. Lopez, 419 U.S. 565, 584 (1975); *see* Morrissey v. Brewer, 408 U.S. 471, 484 (1972); Fuentes v. Shevin, 407 U.S. 67, 81 (1972). *See also* Kadish, *supra* note 15, at 347–49.

[23] This function of due process is reflected in the common belief that courts exist at least in part to adapt general statutory provisions to individual cases. *See* Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights — Part II*, 1974 DUKE L.J. 527, 537 (legislatures rely on court rulings to "prevent unanticipated injustice" by tempering rules or entitlements with "the traditions and principles of common law and equity"). The interest in scrutinizing the substantive rules of decisionmaking is perhaps much stronger where these rules are no longer consistent with existing social mores, or where the courts may perceive that the rules are otherwise palpably unfair. *See* Tribe, *supra* note 5, at 296–305.

[24] *See* 3 R. ANDERSON, AMERICAN LAW OF ZONING § 18.09 (2d ed. 1976).

[25] Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 170–71 (1951) (Frankfurter, J., concurring); *see* Fleming v. City of Tacoma, 81 Wash. 2d 292, 502 P.2d 327 (1972).

his interests.[26] The Supreme Court has recognized that participation is the surest means of fostering the belief that government may not act against the governed in a clandestine or arbitrary manner.[27] As Justice Frankfurter noted in his famous concurrence in *Joint Anti-Fascist Refugee Committee v. McGrath*:[28] "Nor has a better way been found [than procedural due process] for generating the feeling, so important to a popular government, that justice has been done."[29]

*2. The Distinction Between Legislative and Administrative Acts.* — It is an established constitutional principle that procedural due process attaches only to administrative or adjudicatory action by the state, and not to legislative action.[30] A legislature, for example, may enact or increase a property tax — which clearly deprives the landowning citizenry of some of the value of their land — without according individual landowners any right to process.[31] But as a general matter it is often difficult, particularly in the area of zoning, to decide whether government action is legislative or administrative.[32] A careful examination of the distinguishing characteristics of legislative and administrative action with reference to the functional analysis of due process is therefore necessary.

Due process is limited to nonlegislative actions in part because of practical concerns of administrability. A constitutional right to procedural due process for every person affected by legislation would entail procedures so cumbersome as to make

[26] *See* Meachum v. Fano, 427 U.S. 215, 230–35 (1976) (Stevens, J., dissenting); Morrissey v. Brewer, 408 U.S. 471, 484 (1972); Goldberg v. Kelly, 397 U.S. 254, 264–65 (1970); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 172 (1951) (Frankfurter, J., concurring); L. TRIBE, *supra* note 5, § 10-7; Karst, *The Supreme Court, 1976 Term — Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 30 & n.166 (1977); Scanlon, *Due Process*, in NOMOS XVIII: DUE PROCESS, *supra* note 10, at 93, 94–99; Note, *The Judicial Role in Defining Procedural Requirements for Agency Rulemaking*, 87 HARV. L. REV. 782, 800 (1974).

[27] *See, e.g.*, Perry v. Sindermann, 408 U.S. 593, 597 (1972); Fuentes v. Shevin, 407 U.S. 67, 80–81 (1972); Goldberg v. Kelly, 397 U.S. 254, 264–65 (1970).

[28] 341 U.S. 123 (1951).

[29] *Id.* at 172. The present positivist philosophy of the Court appears to place much less emphasis on the dignity interest, however. *See, e.g.*, Codd v. Velger, 429 U.S. 624, 627–28 (1977); Paul v. Davis, 424 U.S. 693, 710–12 (1976). *See generally* Michelman, *supra* note 10, at 132–38; Monaghan, *Of "Liberty" and "Property,"* 62 CORNELL L. REV. 405, 428–29 (1977).

[30] *See* Rendleman, *The New Due Process: Rights and Remedies*, 63 KY. L.J. 531, 559–61 (1975); Subrin & Dykstra, *supra* note 10, at 260. *But see* note 5 *supra*.

[31] *See, e.g.*, Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441 (1915).

[32] *See* Ward v. Village of Skokie, 26 Ill. 2d 415, 424–25, 186 N.E.2d 529, 533–34 (1962) (Klingbiel, J., specially concurring).



government action impossible.[33] More importantly, due process need not attach to legislative acts because the large number of people affected by most legislative acts normally ensures that government will not act unreasonably towards the populace.[34] Legislators will usually attempt to represent the views of their constituents accurately, and, if they do not do so, the electoral process provides recourse.[35]

In attempting to distinguish between legislative and administrative zoning acts, courts have used at least three tests. Some have adopted the formalistic view that the nature of the decision-making body determines the character of the act.[36] Thus, if an elective body, such as a city council, decides a zoning matter, the action is considered legislative regardless of the specific nature of the matters in question, while if an appointed zoning board decides the question, the action is considered administrative. Other courts simply classify some types of zoning decisions, such as the adoption of a comprehensive plan, as legislative acts, while characterizing other decisions, such as the granting of zoning variances, as administrative.[37] A third approach distinguishes general policy formulations, which are considered legislative, from specific applications of previously formulated policy, which are considered administrative.[38]

None of these approaches is entirely satisfactory. The first two are essentially labeling approaches, insensitive to the factors that might indicate that a particular label is warranted.[39] The

[33] *See* Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441, 445 (1915); West v. City of Portage, 392 Mich. 458, 221 N.W.2d 303 (1974).

[34] *See* Williams, *"Hybrid Rulemaking" Under the Administrative Procedure Act: A Legal and Empirical Analysis*, 42 U. CHI. L. REV. 401, 404–05 (1975); Comment, *Due Process Rights of Participation in Administrative Rulemaking*, 63 CALIF. L. REV. 886, 889 (1975).

[35] Not only can the electors vote their unsatisfactory representatives out of office, but the legislative process itself helps screen out ill-considered actions. *See* Monaghan, *The Function of the Due Process Clause*, 116 U. PA. L. REV. 1025, 1040 n.58 (1968).

[36] *See, e.g.*, Berg v. City of Struthers, 176 Ohio St. 526, 198 N.E.2d 48 (1964); *but see, e.g.* Hunzicker v. Pulliam, 168 Okla. 632, 37 P.2d 417 (1934).

[37] *See, e.g.*, Burns v. City of Des Peres, 534 F.2d 103 (8th Cir.), *cert. denied*, 429 U.S. 861 (1976); Dwyer v. City Council, 200 Cal. 505, 513, 253 P. 935, 939 (1927); Josephson v. Autrey, 96 So. 2d 784 (Fla. 1957); Wippler v. Hohn, 341 Mo. 1110, 110 S.W.2d 409 (1937).

[38] *See, e.g.*, City of Bowie v. County Comm'rs, 255 Md. 452, 267 A.2d 772 (1970); Kelley v. John, 162 Neb. 319, 75 N.W.2d 713 (1956); Meyers v. Schiering, 174 Ohio St. 2d 11, 271 N.E.2d 864 (1971); Fasano v. Board of County Comm'rs, 264 Or. 574, 507 P.2d 23 (1973).

[39] *See* Comment, *The Initiative and Referendum's Use in Zoning*, 63 CALIF. L. REV. 74, 89–90 (1976) [hereinafter cited as *Initiative and Referendum in Zoning*] (criticizing second approach as overly formalistic); Comment, *Zoning*

first approach is particularly inappropriate because it permits the availability of procedural rights to turn upon the legislative allocation of zoning power among city councils, zoning boards, and other governmental entities — an allocation guided by considerations of administrability and political expediency rather than by the functional interests underlying due process.[40] The third approach, although often useful, produces the anomalous result that a hearing would be granted whenever a decision implemented previous policy, but could be denied whenever a decision on a specific application is used to announce a new general policy.[41]

Two separate inquiries are necessary if administrative decisions are to be differentiated from legislative decisions in a manner that is responsive in all cases to the due process interests in efficiency, representation, and dignity. The first inquiry concerns the type of underlying facts on which the decision is based. This examination provides a reasonably clear and feasible means for distinguishing policy decisions from specific applications of the policy. The second inquiry considers whether the government action results in a differentiable impact on specifiable individuals, thus making allowance for the fact that new policies may be articulated through specific decisions of limited applicability.

Professor Kenneth Culp Davis has been the leading proponent for differentiating between legislative and administrative actions on the basis of the nature of the facts used to reach the given decision.[42] Legislative facts are normally generalizations concern-

*Amendments — The Product of Judicial or Quasi-Judicial Action*, 33 OHIO ST L.J. 130, 133 (1972) [hereinafter cited as *Zoning Amendments*] (same).

[40] In addition, determining the nature of action by the nature of the decision maker yields certain paradoxical results, as in the case where a matter decided by the zoning board is appealed to the city council and thereby is transformed from an administrative into a legislative decision.

[41] Under this approach, for example, if the decisionmakers decide to change a previous policy favoring single-family dwellings, they could constitutionally deny a building permit for a single-family house without granting a hearing to the applicant. On the other hand, if the board had chosen to follow the previously-established policy in favor of single-family housing, they could not have denied a hearing right to the affected interests.

A similar problem is inherent in the holdings of several courts that zoning amendments, even though directed at a very small area and proposed by a single landowner, are legislative in nature. *E.g.*, City of Coral Gables v. Carmichael, 25 So. 2d 404 (Fla. Dist. Ct. App.), *cert. denied*, 268 So. 2d 1 (1972); Donney v. City of Duluth, 295 Minn. 22, 202 N.W.2d 802 (1972); Lawton v. City of Austin, 404 S.W.2d 648, 650–51 (Tex. Civ. App. 1966).

[42] *See* 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 7.02, .06 (1958); Davis, *The Requirement of a Trial-Type Hearing*, 70 HARV. L. REV. 193 (1956). A distinction based on the nature of the underlying fact has been adopted by some courts. *See, e.g.*, City of Louisville v. McDonald, 470 S.W.2d 173 (Ky. 1971); Hyson v. Montgomery County Council, 242 Md. 55, 64, 217 A.2d 578, 584 (1966).



ing a policy or state of affairs;[43] they "do not usually concern the immediate parties but are general facts which help the tribunal decide questions of law, policy, and discretion."[44] In contrast, administrative facts — "adjudicative facts" in Professor Davis' nomenclature — relate with greater specificity to individuals or particular situations. They are "roughly the kind of facts that go to a jury in a jury case."[45]

The second inquiry important for distinguishing between legislative and administrative acts concerns the particularity of the impact of the state action. Administrative acts are those that single out specifiable individuals and affect them differently from others.[46] For example, a decision to deny a variance for a shopping center will specifically affect the developer who applied for the variance. Such a decision would be considered administrative whether it was based primarily on general policy considerations relating to commercial development, or on specific findings as to the suitability of the site for the proposed project.[47] Certainly much general legislation — such as the establishment of building height limits or the rezoning of land for an airport — may also have a differentiated impact on certain groups of people. But such governmental action would not be considered administrative because it was not taken against specific identifiable people.[48] Those singled out may be members of a more generally disfavored

Lordland Civic Ass'n v. DiMatteo, 10 Mich. App. 129, 135–36, 157 N.W.2d 1, 5 (1968).

[43] *See* City of Louisville v. McDonald, 470 S.W.2d 173 (Ky. 1971); Kelley v. Johnson, 162 Neb. 319, 325, 75 N.W.2d 713, 715–16 (1956).

[44] Davis, *supra* note 42, at 190.

[45] *Id.* As Davis admits, almost every fact contains a mixture of legislative and administrative elements, and borderline cases will exist. *Id.* at 200. Although this distinction has been attacked as unworkable or "at least susceptible to semantic manipulation," Robinson, *The Making of Administrative Policy: An Early Look at Rulemaking and Adjudication and Administrative Procedure Reform*, 118 U. PA. L. REV. 485, 503–04 (1970), other approaches to the problem of distinguishing legislative from administrative actions, *see, e.g.*, *id.* at 504, not only suffer from similar linedrawing problems, but also do not comport as well with a functional due process analysis.

[46] *See, e.g.*, West v. City of Portage, 302 Mich. 258, 221 N.W.2d 301 (1974); Fleming v. City of Tacoma, 81 Wash. 2d 292, 299, 502 P.2d 327, 331 (1972); Booth, *A Realistic Reexamination of Rezoning Procedure: The Complementary Requirements of Due Process and Judicial Review*, 10 GA. L. REV. 753, 775 (1976); *Zoning Amendments*, *supra* note 39, at 137.

[47] Likewise, action that indirectly impinges on specifiable individuals would also be considered administrative. Thus, for example, the decision concerning the shopping center variance would trigger a due process right not only for the developer, but also for those neighboring landowners potentially affected by the variance decision. *See* pp. 1516–18 *infra*.

[48] *Cf.* Note, *supra* note 26, at 789 (similar test proposed in agency rulemaking context).

group, but it is the act of singling them out for governmental action which makes the decision administrative for due process purposes.[49]

Identifying actions that are administrative by the nature of the underlying facts and the particularity of the impact comports with the functional analysis of procedural due process. For example, efficiency interests in reaching the correct decision will generally be served by extending process only in cases involving administrative facts, which, unlike legislative facts, can be shown to be either true or false. Decisions based on administrative facts are also more likely to implicate the representational interests of due process, since those individuals directly affected by such decisions are likely to be more sensitive to the policies underlying the applicable rules and thus particularly motivated to argue for different interpretations of the rules. Finally, the greater the specificity of a governmental action — the more it singles out particular, identifiable individuals — the greater the threat to dignity interests and hence the need for extending individual procedural rights.

Application of these suggested criteria reinforces the conclusions of most courts on which types of zoning decisions must be accompanied by procedural safeguards. Courts have generally held that a decision whether to grant or deny a variance is administrative for due process purposes.[50] This consensus comports with the above criteria, both because a variance decision normally produces a differential impact and because it will usually be made on the basis of administrative facts best known by the applicant and his neighbors.

Most courts also hold that the adoption of a comprehensive plan is a legislative act.[51] The suggested criteria support this conclusion as well. First, unverifiable legislative facts, rather than specific, administrative facts, will usually inform the final shape of the plan. Second, although some areas or people might be

[49] Administrative actions can be analogized to bills of attainder. Since United States v. Brown, 381 U.S. 437 (1965), the bill of attainder prohibition, U.S. CONST. art. I, § 9, cl. 3; *id.* art. I, § 10, cl. 1, has been applied to "legislative punishment, of any form or severity, of specifically designated persons or groups." 381 U.S. at 447. *See generally* L. TRIBE, *supra* note 5, §§ 10-4 to -5; *see also* Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 468–84 (1977).

[50] *See* Tandy v. City of Oakland, 208 Cal. App. 2d 600, 25 Cal. Rptr. 111 (1962); Cunningham, *Rezoning by Amendment as an Administrative or Quasi-Judicial Act: The "New Look" in Michigan Zoning*, 73 MICH. L. REV. 1341, 1347–42 (1975).

[51] *See, e.g.*, O'Loane v. O'Rourke, 231 Cal. App. 2d 774, 42 Cal. Rptr. 2d (1965); Kelley v. John, 162 Neb. 319, 322, 75 N.W.2d 713, 715 (1956). *See generally* 3 R. ANDERSON, *supra* note 24, at §§ 21.12–.15.



affected more than others, the impact of any general plan is distributed over the entire community.

Amendments to general plans have not been dealt with uniformly by the courts.[52] Some jurisdictions have held that because the adoption of the original plan is a legislative act, an amendment to it must also be characterized as legislative.[53] But many zoning amendments fit the charactersitics of administrative action. A zoning amendment generally proposes reclassification of a specific parcel of land, and involves an inquiry into the desirability of a particular land use.[54] The inquiry will therefore frequently turn on facts concerning a specific situation and will have a differentiated impact on particular individuals, thus fulfilling both criteria for an administrative action. Some amendments to general plans, however, are properly classified as legislative, particularly where they are the result of a change in a basic policy decision underlying the formulation of the original plan. For example, a decision whether or not to amend a plan to permit multiunit residential housing in a small, rural community will likely turn on a policy debate over whether the town is now willing to accept the consequences of growth and urbanization. Assuming that the decision does not produce a differentiated impact, that certain people or neighborhoods are not forced to bear the entire cost of the amendment, implementation of the amendment need not be accompanied by procedural safeguards.

*3. Protected Property Interests.* — For due process protection to apply, it must not only be established that the zoning action is based on administrative facts or creates a differential impact on specifiable individuals, but also that the action has deprived someone of a protected property or liberty interest.[55] While the Supreme Court has never offered a comprehensive definition of the liberty and property interests protected by the fifth and fourteenth amendments,[56] it has recognized that due process protects liberty interests besides those threatened by imprisonment, and property rights in addition to the simple ownership of chattels.[57] On the other hand, Supreme Court decisions denying process rights to discharged policemen,[58] aliens deprived of social security benefits

[52] *See Initiative and Referendum in Zoning*, *supra* note 50, at 80–82; *Zoning Amendments*, *supra* note 39, at 136–39. *See also* Cunningham, *supra* note 50.

[53] *E.g.*, City of Coral Gables v. Carmichael, 256 So. 2d 264 (Fla. Dist. Ct. App.), *cert. denied*, 268 So. 2d 1 (1972); Wippler v. Hohn, 341 Mo. 750, 110 S.W.2d 1 (1937).

[54] *See Initiative and Referendum in Zoning*, *supra* note 50, at 90; *Zoning Amendments*, *supra* note 39, at 137 n.62.

[55] *See* Board of Regents v. Roth, 408 U.S. 564, 569–70 (1972).

[56] *See id.* at 571–72.

[57] *See id.* at 571–72, 576–77.

[58] Bishop v. Wood, 426 U.S. 341 (1976).

upon deportation,[59] and prisoners transferred to maximum security prisons[60] indicate that not every administrative government action implicates interests protected by due process. Specific inquiry must therefore be made into the nature of a property interest sufficient to trigger due process protection in the zoning context.

Landownership might initially appear to present a straightforward example of a protected property interest. Undoubtedly this ownership is the most important source of protected interests in zoning cases. Yet it is far from clear that every impact on landownership caused by zoning regulations creates a right to process. Conversely, even without landownership, process rights may arise in some instances from entitlements created by zoning statutes. In yet other cases, the impacts of zoning decisions, though considerable, may not give rise to procedural safeguards because the interests affected do not fall within the definition of property under the due process clause.

The following four hypotheticals address some of the problems in defining the scope of protected property interests in zoning cases. These hypotheticals, all couched in terms of administrative actions, necessarily involve somewhat specific illustrations. Nonetheless they do present fact patterns recurring in numerous zoning cases and serve to suggest one possible analysis of the protected property interests most likely to be found in zoning cases.

*Case 1*: The city council considers a proposal to change the zoning classification of *A*'s land. This reclassification would require *A* to abandon plans to build a luxury apartment complex and thereby reduce the value of *A*'s land by fifty percent.[61]

*Case 2*: *B*'s neighbor applies for a variance to build an apartment complex. The variance, if granted, would cause the value of *B*'s land to drop fifty percent.[62]

*Case 3*: *C* owns land zoned residential. He wishes to build an industrial park on it, and applies for a zoning variance. The board decides to deny the variance.[63]

*Case 4*: *D* owns and operates a small widget factory on his property. The government proposes to rezone property five miles away for an industrial park, including a site for a second widget factory. Increased competition from the second factory would cause *D*'s profits to drop fifty prcent.[64]

In Case 1, where the city council considers a change in his zoning classification that would bar construction of a luxury apartment complex, *A* would still retain the right to use his property for various other purposes. At common law, however, *A* may use his property in any way that does not create a nuisance.[65] This common law principle creates a property interest in the free use of land cognizable under the due process clause.[66] To be sure,

[59] Fleming v. Nestor, 363 U.S. 603 (1960).

[60] Meachum v. Fano, 427 U.S. 215 (1976).

[61] The following cases present factual situations analogous to this hypothetical, though they do not necessarily address the procedural due process issue: Eubank v. City of Richmond, 226 U.S. 137 (1912) (set back requirement authorized by property owners along street); Southern Alameda Spanish Speaking Org. v. City of Union City, 424 F.2d 291 (9th Cir. 1970) (rezoning of land through referendum); Minneapolis-Honeywell Regulator Co. v. Nadasdy, 247 Minn. 151, 76 N.W.2d 670 (1956) (building permit nullified by petition for referendum); Shellburne, Inc. v. New Castle County, 293 F. Supp. 237 (D. Del. 1968) (challenging rezoning on grounds of improper notice); Wood v. Town of Avondale, 75 Ariz. 217, 232 P.2d 963 (1951) (same); Burke v. Board of Representatives, 147 Conn. 33, 166 A.2d 849 (1961) (same); Sikes v. Pierce, 212 Ga. 567, 94 S.E.2d 427 (1956) (same); Nardi v. City of Providence, 89 R.I. 437, 153 A.2d 111 (1959) (same); Trans-Oceanic Oil Corp. v. City of Santa Barbara, 85 Cal. App. 2d 776, 194 P.2d 148 (1948) (ex parte rescission of permit).

[62] The following cases present facts analogous to the ones in this hypothetical, though not necessarily discussing due process implications: Scott v. City of Indian Wells, 6 Cal. 3d 541, 492 P.2d 1137, 99 Cal. Rptr. 745 (1972); Anderson v. Judd, 158 Colo. 46, 404 P.2d 553 (1965); Sirota v. Kay Homes, Inc., 208 Ga. 113, 65 S.E.2d 597 (1951); Minton v. State, 349 N.E.2d 741 (Ind. 1976); Morris v. Howard Research & Dev. Corp., 278 Md. 417, 365 A.2d 34 (1976); Wippler v. Hohn, 341 Mo. 780, 110 S.W.2d 409 (1937); Adams v. Mayor of Jersey City, 107 N.J.L. 449, 151 A. 863 (1930); Higginbotham v. City of the Village, 361 P.2d 191 (Okla. 1961); Lawton v. City of Austin, 494 S.W.2d 613 (Tex. Ct. App. 1966); Fleming v. City of Tacoma, 81 Wash. 2d 292, 502 P.2d 327 (1972).

[63] Some cases with similar facts to the hypothetical are: Hawkins v. Louisville & Jefferson County Planning & Zoning Comm'n, 266 S.W.2d 314 (Ky. 1954); Reinauer Realty Corp. v. Borough of Paramus, 34 N.J. 406, 169 A.2d 813 (1961); Humble Oil & Ref. Co. v. Board of Aldermen, 284 N.C. 458, 202 S.E.2d 129 (1974).

[64] Facts similar to these were adjudicated in the following cases: Westwood Meat Mkt., Inc. v. McLucas, 146 Colo. 455, 361 P.2d 776 (1961); London v. Planning & Zoning Comm'n, 149 Conn. 252, 179 A.2d 614 (1962); Kratchman v. Ramsburg, 224 Md. 209, 167 A.2d 345 (1961). These cases were all decided on standing grounds. Since the adverse competitive impact of a zoning decision is insufficient to grant standing as a "person aggrieved," *see* p. 1543 *infra*, plaintiffs like *D* will usually be denied standing and their due process claim therefore will rarely be adjudicated.

[65] *See* Washington *ex rel.* Seattle Title Trust Co. v. Roberge, 278 U.S. 116, 121–22 (1928); Cleaver v. Board of Adjustment, 414 Pa. 367, 371–72, 200 A.2d 405, 411–12 (1964); 5 R. POWELL, THE LAW OF REAL PROPERTY ¶ 705, at 320–32 (rev. ed. 1968).

[66] Sikes v. Pierce, 212 Ga. 567, 568, 94 S.E.2d 427, 428 (1956); Borough of Cresskill v. Borough of Dumont, 28 N.J. Super. 26, 100 A.2d 182 (Law Div. 1953), *aff'd*, 15 N.J. 238, 104 A.2d 441 (1954); *see* Washington *ex rel.* Seattle

partial restrictions on use, such as that in Case 1, are authorized under the state's police power to require landowners to use their property consistently with the general social, moral, and economic wellbeing of the community.[67] Nevertheless, the existence of the common law property interest must be recognized by affording landowners such as *A* process rights prior to exercise of the regulatory power.

By hypothesis here, the restrictions on the uses to which landowner *A* may put his property will cause him to suffer an economic loss in an amount equal to fifty percent of the property value.[68] Such a loss in economic value concretizes the loss in property rights arising from restrictions on the permissible uses of the land. Permitting the deprivation of such an economic interest without process would seem analogous to depriving *A* of that amount of money without opportunity for notice or a hearing.

Granting process rights to *A* would also comport with the functions of procedural due process. The efficiency function underlying due process will be promoted because *A* is likely to be the best source of facts relevant to whether his land should be rezoned.[69] The dignity function demands that the government recognize *A*'s special interest by explaining to him why any decision to rezone is made. Finally, *A*'s participation is likely to serve the representational function of due process, since *A* has the greatest interest in advocating changes in the zoning law.

Case 2 differs from Case 1 insofar as the impact of the zoning change would be on an adjacent landowner, *B*, rather than the owner of the rezoned land. Ostensibly, *B*'s freedom to use his property as he desires is unaffected by whether the variance is granted or denied. Thus, *B*'s claim that a property interest has been affected may not initially appear as straightforward as in Case 1. Case 2 can be analogized to the rezoning in Case 1, however, if *B* can prove that the proposed government action would have an adverse economic impact on his land.[70] Such an economic

Title Trust Co. v. Roberge, 278 U.S. 116, 121 (1928); Wood v. Town of Avondale, 72 Ariz. 237, 232 P.2d 963 (1951); Taschner v. City Council, 31 Cal. App. 3d 45, 107 Cal. Rptr. 214 (1973).

[67] Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); *see* pp. 1443–47 *supra*.

[68] For simplicity, it is assumed that no other property interest is so affected in Case 1. To the extent that adjacent property is not itself rezoned, but nevertheless drops in value because of rezoning, the due process implications of the rezoning would be analyzed through Case 2 *infra*.

[69] *Cf.* Fuentes v. Shevin, 407 U.S. 67 (1972) (analogous reason given for granting predispossession hearing in replevin action).

[70] The diminution in value of *B*'s land would provide a basis for recognizing a due process right. *See* City of Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668, 674 n.8 (1976); Scott v. City of Indian Wells, 6 Cal. 3d 541, 548, 492 P.2d



loss is identical to the one recognized in Case 1 as creating a right to process. A diminution in the value of *B*'s land would thus also seem to reflect a property interest cognizable under the due process clause.[71]

Further consideration of the causes underlying the decline in value of *B*'s property strengthens the analogy to Case 1 and the claim for procedural rights. Any economic loss by *B* occurs because of the interrelated nature of property uses.[72] If *B*'s neighbor is granted the variance, and thus permitted to use his property in a given way, it may become effectively impossible for *B* to put his own property to use in other, incompatible fashions.[73] *B*'s land will thereby be subject to de facto use limitations of a substantial character, regardless of what his formal, legal rights may be. To consider one extreme example, granting *B*'s neighbor a variance to build a factory may economically foreclose the use of *B*'s land as a site for luxury apartments. The decline in value of *B*'s property thus reflects the fact that certain uses of the property are now effectively precluded. Viewed from this perspective, Case 2 involves the deprivation of the right to use property in certain fashions, and *B* would thereby appear to qualify for a right to at least some procedural safeguards.

Alternatively, some courts have found *B*'s property interest to exist in the expectation of a certain type of neighborhood.[74] Decisions to purchase land or homes are often made with a view towards the prevalent type of land use in the neighborhood. Zoning benefits landowners by creating a system of "existing rules or understandings,"[75] allowing landowners to operate with the

1142, 1141, 90 Cal. Rptr. 745, 749 (1970); Sirota v. Kay Homes, Inc., 228 Ga. 113, 114, 183 S.E.2d 597, 598 (1971).

[71] If, of course, the diminution in value, although tantamount to the deprivation of a property interest is the result of legislative action, rights to procedural due process need not be accorded. Thus, landowners have no constitutional right to notice and hearing prior to the enactment of a general property tax, even though property taxes strip the landowner of a portion of his economic wealth. *See* Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441 (1915); *cf.* Londoner v. City of Denver, 210 U.S. 373 (1908) (reassessment of property tax base is administrative and must be accompanied by procedural due process).

[72] *See* Board of Supervisors v. Snell Constr. Corp., 214 Va. 655, 657, 202 S.E.2d 902, 903 (1974); Borough of Cresskill v. Borough of Dumont, 28 N.J. Super. 26, 100 A.2d 182 (Law Div. 1953), *aff'd*, 15 N.J. 238, 104 A.2d 441 (1954).

[73] *See* Johnston v. City of Claremont, 49 Cal. 2d 826, 837, 323 P.2d 71, 78 (1958) ("What is done with respect to one piece of property of necessity has an effect, good or bad, upon adjacent or nearby property.").

[74] *See* Village of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974); Burns v. City of Les Peres, 534 F.2d 103, 110 (8th Cir.), *cert. denied*, 429 U.S. 861 (1976); Friedland v. City of Hollywood, 130 So. 2d 306, 309 (Fla. Dist. Ct. App. 1961). *But see* Eatner v. City of Richmond, 136 Ind. App. 578, 584, 291 N.E.2d 49, 53 (1964).

[75] Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

expectation that the advantages enjoyed under the current pattern of land use will not be abruptly terminated.[76] Clearly no person has a right to a certain zoning pattern, precluding any change whatsoever in zoning regulations.[77] Expectations about neighborhood character nonetheless generate a right to notice and a hearing before the character of the neighborhood is altered through rezoning.[78]

Defining a property interest to exist in expectations about the character of a neighborhood may merely represent an alternative means of recognizing that the grant of a variance potentially restricts the range of uses for adjacent property. For example, if a neighborhood is to remain a "quiet place where yards are wide, [and] people are few,"[79] other, alternative land uses must be excluded. It is also possible, however, that a property right in the character of the neighborhood may be considerably more expansive than one founded in the diminution of value. Thus, it remains unclear whether courts which have found a property right in expectations about the neighborhood would also find such an interest in instances where property values do not decline as a result of zoning variances. If, for example, the variance application in Case 2 is for the right to build an airport, and if *B*'s property would actually increase in value as a result of such nearby construction, it is uncertain whether *B* can still allege that he would be deprived of a property interest in the character of the neighborhood as it previously existed.[80] A recognition of a property right in neighborhood character, independent of the effect of rezoning on local property values, would suggest that some process is due in this situation.[81]

[76] *See* City of Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668, 682–83 (1976) (Stevens, J., dissenting); Rockhill v. Township of Chesterfield, 23 N.J. 117, 129, 128 A.2d 473, 480 (1957); Norbeck Village Joint Venture v. Montgomery County Council, 254 Md. 59, 68–69, 254 A.2d 700, 705 (1969).

[77] *See* Kent v. Zoning Bd. of Review, 74 R.I. 89, 91–92, 58 A.2d 623, 624 (1948); Shellburne, Inc. v. Roberts, 43 Del. Ch. 276, 278–80, 224 A.2d 250, 252–53 (1966). *See also* Nardi v. City of Providence, 189 R.I. 437, 446, 153 A.2d 136, 141 (1959).

[78] Although the interest in the prevalent pattern of zoning is sufficient to create a protected property interest for due process purposes, it does not rise to the level of an entitlement to any sort of neighborhood. Thus, challenges to a zoning pattern as exclusionary and violative of the fourteenth amendment could not be rebutted by reference to the prevalent character of the neighborhood, since it is precisely that charcteristic that is claimed to be the product of unconstitutional discrimination. *See* pp. 1654–55 *infra*.

[79] Village of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974).

[80] *See* Chrobuck v. Snohomish County, 78 Wash. 2d 858, 867–68, 480 P.2d 489, 495 (1971) (landowners entitled to rely on the prevalent zoning pattern unless it is changed through an orderly and fair process).

[81] Recognition of such a property interest would comport with the general entitlement strand of due process analysis, *see* Perry v. Sindermann, 408 U.S. 593, 601 (1972) ("A person's interest in a benefit is a 'property' interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing"), and is further supported by state standing decisions granting standing to persons unable to demonstrate harm to the value of their land on the basis of this interest. *See, e.g.*, McDermott v. Zoning Bd. of Appeals, 150 Conn. 549, 553, 191 A.2d 551, 552 (1963); Southern Burlington County NAACP v. Township of Mt. Laurel, 67 N.J. 151, 159 n.3, 336 A.2d 713, 717 n.3, *appeal dismissed*, 423 U.S. 808 (1975).

[82] W.C. & A.N. Miller Dev. Co. v. District of Columbia Zoning Comm'n, 349 A.2d 420, 424 (D.C. Ct. App. 1975); *see* O'Loane v. O'Rourke, 231 Cal. App. 2d 774, 42 Cal. Rptr. 283 (1965).

[83] Sniadach v. Family Fin. Corp., 395 U.S. 337, 342 (1969) (Harlan, J., concurring); *see* Fuentes v. Shevin, 407 U.S. 67, 86 (1972).

[84] *See, e.g.*, Borough of Cresskill v. Borough of Dumont, 28 N.J. Super. 26, 42–43, 100 A.2d 182, 191 (Law Div. 1953), *aff'd*, 15 N.J. 238, 104 A.2d 421 (1954).

[85] *See, e.g.*, State *ex rel.* Saveland Park Holding Corp. v. Wieland, 269 Wis. 262, 273–74, 69 N.W.2d 217, 223–24, *cert. denied*, 350 U.S. 841 (1955).

[86] Constructive notice through publication has been held to meet the requirements of due process in other instances where the property owners affected are unknown. *See* Tyler v. Judges of the Court of Registration, 175 Mass. 71, 55 N.E. 812 (1900); *cf.* Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 317 (1950) (trustee must take reasonable efforts to locate beneficiaries to the trust and give personal notice, but may rely on constructive notice in cases of persons missing or unknown).



The recognition of a due process right in landholders other than those whose land is directly affected by a zoning decision introduces problems of identifying all protected propertyholders. This is true regardless of whether the property interests of landowners such as *B* are seen to exist in the economic value of their land or in their expectations of a certain neighborhood character. Zoning changes will often impact on the potential uses, and hence the economic value, of many neighboring parcels of land.[82] Although de minimis harms to property interests need not be recognized,[83] it will often be difficult to identify all the landholders whose property, like *B*'s, would decline appreciably in value if the variance is granted. Similarly, since a land use change may cause widespread alterations in neighborhood character,[84] many landholders may be able to claim property interests in the established zoning pattern. Even assuming that neighborhoods are used as the basis for determining who is entitled to process, definition of the relevant neighborhood would be imprecise at best.[85] But under either conception of the underlying property interest, problems of identification in Case 2 situations can be avoided by providing constructive notice through publication,[86] followed by an open hearing for all interested, and affected, propertyholders. Furthermore, even in the absence of constructive notice, landholders like *B*, to prove a due process violation, can be required to establish a

clear causal link between the government action and the alleged impairment of property value or alteration of neighborhood character.

Case 3 poses the problem of a summary dismissal of landowner *C*'s rezoning application. The discussion of Case 2 suggested that neighboring landowners would have a right to notice and hearing if the board intends to grant *C*'s application. If the board intends to deny the request, however, it is somewhat more difficult to locate *C*'s due process property interest.[87] The range of permissible uses of *C*'s property has not been changed, its value has not been diminished, and *C*'s interest in a certain type of neighborhood has not been affected.

*C*'s entitlement may lie in the expectation that zoning laws will evolve over time. The "static end-state" concept of zoning has been replaced by a more flexible zoning outlook that contemplates reasonable change.[88] These expectations are furthered by affirmative state enactments providing a mechanism for granting variances when necessary.[89]

> A zoning code is unlike other legislation affecting the use of property. The deprivation caused by a zoning code is customarily qualified by recognizing the property owner's right to apply for an amendment or variance to accommodate his individual needs. The expectancy that particular changes consistent with the basic zoning plan will be allowed frequently and on their merits is a normal incident of property ownership.[90]

Of course, *C* has no more right to a zoning change than *B* in Case 2 had a right to no zoning change. But *C*'s expectation of a zoning change, like *B*'s reasonable expectation of a neighborhood character, qualifies as a property interest entitling the owner to a hearing.[91]

A recognition of a property interest in the expectation of zoning changes might seem inconsistent with the existence of a property interest, such as recognized under Case 2, in maintaining the character of a neighborhood. The former interest recognizes expectations in changes in the zoning pattern, while the latter recognizes expectation in the maintenance of the status quo. This inconsistency, however, is no more than an indication that, as with all adjudicatory claims, a case in controversy exists. Competing interests in zoning changes and neighborhood stability may each form the basis for a mutual right to process, without reaching the issue of which claim should prevail on the merits.[92]

In Case 4, the zoning change would allow added competition which would in turn affect the profitability of *D*'s business. By hypothesis, only the profits of *D*'s business would be harmed, although *D* might also find that the value of the land — separate from the value of the business enterprise placed on it — might diminish. If, for example, a widget factory would continue to be the most profitable use of the land, the value of the land as a factory site may nevertheless decline. It is most important, then, to identify the precise nature of any diminution in the value of *D*'s land. In Case 4, *D*'s claim to a property deprivation arises because the business located on his land would be less profitable. Alternatively stated, *D* is claiming that the source of the property deprivation would be the added competition made possible by the government's zoning decision.

The distinction between a specific commercial enterprise and the land as the site for that enterprise may have some significance

[87] An analogous problem in identifying the due process property interest of persons denied government entitlements is presented by government employment decisions. Current doctrine holds that a discharged government employee has a right to notice and a hearing, while a rejected job applicant may be denied process. The failure to accord due process to rejected applicants increases the probability that government decisions will be influenced by impermissible factors, since illegitimate considerations will not be uncovered through a due process hearing. *See generally* Van Alstyne, *supra* note 10, at 448–52.

[88] *See, e.g.*, McQuail v. Shell Oil Co., 140 Del. Ch. 366, 183 A.2d 572 (1962); Kozesnik v. Township of Montgomery, 24 N.J. 154, 131 A.2d 1 (1957); Udell v. Haas, 21 N.Y.2d 463, 235 N.E.2d 897, 288 N.Y.S.2d 888 (1968); Bross, *Circling the Squares of Euclidean Zoning: Zoning Predestination and Planning Free Will*, 6 ENVT'L L. 97, 118 (1975); Mandelker, *The Role of the Local Comprehensive Plan in Land Use Regulation*, 74 MICH. L. REV. 899, 910 (1976).

[89] Every state has some sort of administrative mechanism to allow for exceptions to any zoning ordinance. *See* R. ANDERSON & B. ROSWIG, PLANNING, ZONING AND SUBDIVISION: A SUMMARY OF STATUTORY LAWS IN THE 50 STATES (1966).

[90] City of Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668, 682 (1976) (Stevens, J., dissenting).

[91] In Reinauer Realty Corp. v. Borough of Paramus, 34 N.J. 406, 169 A.2d 813 (1961), the New Jersey Supreme Court found that a plaintiff like *C* was denied due process when his application for a special exception was rejected at a regular meeting of the city council without notice having been given to the plaintiff. The court found this to be "fundamentally unfair . . . . [T]he application of ordinary concepts of representative government requires notice to him that his application is to be taken up at a public meeting on a certain date at which time he will be given an opportunity to be heard." *Id.* at 418, 169 A.2d at 821.

Nonetheless, the property interest in the established regulatory land use pattern is much more attenuated than the property interest in Cases 1 and 2. *See* City of Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668, 672 n.13 (1976) (majority opinion) (suggesting that freedom from existing land use restrictions does not constitute a protected property interest). Whether or not courts recognize a protected property interest in Case 3 situations, however, will often be academic, since most local zoning boards or authorities conduct public hearings, open to anyone in the community, on applications for rezoning or a variance.

[92] Procedural rights, such as the right to notice and a hearing do not, of course, entitle one to any particular outcome on the merits. *See, e.g.*, Fuentes v. Shevin, 407 U.S. 67, 81 (1972).

for due process purposes. There are, in fact, important reasons for denying due process to those deprived only of some profitability in their business. First, if a due process interest were recognized in every case where government action harmed someone's competitive advantage, action by the government would be impossible. The interdependence of profits among businesses suggests that affecting profits in one industry may also indirectly affect a much wider portion of the economy.[93] These widespread direct and indirect effects on profits indicate that the number of affected persons could not be reduced to a manageable size. More importantly, business expectations of any given level of income derived from profitmaking activities have not been protected under any traditional entitlement theory.[94] A free market economy implies competition among producers, and indeed competition is generally considered quite salutary. To extend process rights to landowners who have been hurt only insofar as they have chosen to pursue a business activity on their property would vest with those landowners a certain level of profit or return as a legitimate entitlement. Such an entitlement, however, could not be made consistently with the fostering of competition.[95] Thus, in Case 4, the mere fact that *D*'s profits dropped substantially would not be sufficient to accord process rights.

The threatened entrance of a direct competitor, as in the hypothetical, is, however, the least persuasive case for extending due process rights to commercial enterprises. Where, on the other hand, conflicting commercial land uses — as opposed to direct competition — are involved, there may be compelling arguments for according procedural rights. For example, few land uses are compatible with adult entertainment enterprises; location of an adult bookstore adjacent to a beauty shop will not only radically curtail the beauty shop's profitability, but may also restrict feasible commercial uses of the site to activities such as bars and penny arcades. Such a significant limitation on possible land uses could

[93] *See* 1 A. KAHN, THE ECONOMICS OF REGULATION: PRINCIPLES AND INSTITUTIONS 2, 11–14 (1970).

[94] An important qualification to this thesis, however, is presented by those situations in which the government acts directly against the business. For example, the revocation of a liquor license or other permit must be accompanied by due process, whereas the granting of a liquor license to a competitor does not trigger due process protection. *Compare* Trans-Oceanic Oil Corp. v. City of Santa Barbara, 85 Cal. App. 2d 776, 194 P.2d 148 (1948) (revocation of oil drilling permit without notice and hearing violates due process), *with* Westwood Meat Mkt., Inc. v. McLucas, 146 Colo. 435, 361 P.2d 776 (1961) (owners of business property near land rezoned for shopping center not aggrieved because of competitive harm).

[95] *See, e.g.*, Swain v. County of Winnebago, 111 Ill. App. 2d 458, 467–68, 250 N.E.2d 439, 444 (1969).



form a basis for due process rights. This situation constrasts with that presented in Case 4, where there was no evidence of a substantial de facto limitation on land use.

A second justification for according process rights to businesses is present in situations where the business has in some way relied upon the prevailing zoning pattern in the area. For example, an application for a variance permitting a residential use in an industrial park would, if granted, frustrate the expectations of a certain commercial character upon which neighboring enterprises relied when locating within the park.[96] As in Case 2, where construction of an apartment complex would alter the neighborhood land use character, the adjacent businesses might have a legitimate claim to process rights. Reliance sufficient to constitute a cognizable property interest might also be based on specific provisions in the zoning ordinances. Returning to the example of the beauty shop and adult bookstore, if the zoning laws stated that adult bookstores and other specified uses had to locate at least 1000 feet apart,[97] and the beauty shop had located relying on his ordinance, the shop owner should be accorded process at the variance hearing attempting to waive this requirement. The sources of process rights noted here — substantial limitations on land use and reliance on prevailing zoning patterns — are sufficiently narrow to forestall unlimited claims to process based on commercial interests, while extending procedural rights to businesses when sufficient justification is present.

In summary, the hypotheticals suggest that four types of property entitlements fall within the procedural protections of due process: (1) expectations of the free use and enjoyment of land, (2) entitlements to the economic value of the land itself, (3) expectations that the type of neighborhood will not change suddenly, and (4) expectations that zoning patterns will evolve over time.[98]

[96] The establishment of an area reserved for industrial uses, *see generally* 2 R. ANDERSON, *supra* note 24, § 9.40, assures potential users a certain relaxation of the legal constraints — whether statutory controls upon the emission of smoke, fumes, or noise, or common law principles of nuisance — that might otherwise impose significant additional costs upon the operation of an industrial enterprise.

[97] For an example of such an ordinance, see p. 1556, note 39 *infra*.

[98] Liberty interests, the other general strand of due process analysis, are rarely implicated in zoning decisions. The substance of particular zoning ordinances may of course infringe upon liberty interests protected by the due process clause, *e.g.*, Moore v. City of E. Cleveland, 431 U.S. 494 (1977), *discussed* pp. 1570–72 *infra*, and it is conceivable that various liberty interests (such as the freedom to travel, *see* Aptheker v. Secretary of State, 378 U.S. 500 (1964)) might underlie a right to procedural due process where no property rights exist. Nonetheless, courts have not predicated recognition of procedural rights in zoning decisions upon the deprivation of any liberty interest.

### B. What Process Is Due

If a particular zoning decision is both administrative in nature and deprives someone of a protected property interest, it cannot be implemented or enforced if it was reached without satisfying the procedural requirements of due process.[99] Thus, the second stage in a due process analysis of zoning — after defining administrative actions and identifying protected property interests — is to determine what process is due.

As a general constitutional matter, the Supreme Court has stressed that "due process is flexible and calls for such procedural protections as the particular situation demands."[100] The Court has articulated a balancing test to determine the requirements of due process in any given situation: the private interest affected by the government interest, and the value of additional procedures in guarding against erroneous deprivations of that interest, are weighed against the fiscal and administrative burdens that the additional procedures would impose upon the government.[101] This balancing normally centers on whether a prior hearing is necessary, and on whether oral testimony need be given.[102]

In the context of zoning decisions, however, the constitutional issues are rarely reached. Most states require by statute that prior public hearings be held before a locality may adopt or amend a comprehensive plan, or act on a variance application.[103] Where this statutory right to notice and hearing does not exist, the due process balancing test would nonetheless require such procedural

[99] *See* p. 1504 & note 7 *supra*.

[100] Morrissey v. Brewer, 408 U.S. 471, 481 (1972); *see* Hannah v. Larche, 363 U.S. 420, 442 (1960).

[101] *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976); Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in* Mathews v. Eldridge: *Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28 (1976); Note, *Specifying the Procedures Required by Due Process: Toward Limits on the Use of Interest Balancing*, 88 HARV. L. REV. 1510 (1975).

[102] *See, e.g.*, Mathews v. Eldridge, 424 U.S. 319, 332–49 (1976); Wolff v. McDonnell, 418 U.S. 539, 557–58 (1974); Goldberg v. Kelly, 397 U.S. 254, 266–71 (1970). *See generally* Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267 (1975). All factors being equal, there is a presumption that the constitutional right to due process includes the right to a prior hearing. *See* Boddie v. Connecticut, 401 U.S. 371, 378–79 (1971) ("root requirement [of due process] that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest, except for extraordinary situations . . . that justify[] postponing the hearing until after the event") (emphasis in original); Sniadach v. Family Fin. Corp., 395 U.S. 337, 342 (1969) (Harlan, J., concurring) (notice and a prior hearing as "the usual requisites of procedural due process").

[103] *See* 3 R. ANDERSON, *supra* note 24, §§ 20.24–.29; Comment, *Voter Zoning: Direct Legislation and Municipal Planning*, 1969 LAW & SOC. ORD. 453, 457–58. For the precise scope of the statutory procedural requirements in each state, see R. ANDERSON & B. ROSWIG, *supra* note 89.



safeguards. The severity of the loss to the landowner may be substantial: a drop in land values, restrictions on his use of the property, and disruption of the neighborhood. Moreover, the government has no strong justification for denying a prior oral hearing. No possessory interests are in jeopardy of dissipation, so that need for the government to act summarily is slight,[104] and added administrative costs alone cannot justify a denial of process.[105]

Requiring a prior oral hearing also comports with the functions of due process. A prior hearing increases the probability that the necessary information will be available to guarantee that the initial decision is the correct one. It also serves the dignity interest by guaranteeing that the government will have listened to potentially affected landowners before reaching its decisions. Finally, by providing landowners an opportunity to argue directly with the decisionmakers, a prior oral hearing promotes the representation interest much better than would a hearing restricted to written materials alone.[106]

The right to a hearing, however, would be a hollow one absent additional procedural requirements that ensure the integrity and responsibility of the decisionmaking process.[107] A landowner's opportunity to argue his case in a hearing whose outcome is predetermined or whose decisionmaker harbors illegitimate biases against him protects none of the interests underlying due process. The Supreme Court has recognized that the "mere gesture" of formal compliance with hearing rights is insufficient to meet due process requirements,[108] and has held that hearings must be accorded "at a meaningful time and in a meaningful manner."[109] Despite increasing elaboration of a flexible concept of due process, in which the elements of a meaningful hearing vary according to the context,[110] two requirements are common to all due process

[104] *Cf.* Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974) (summary repossession procedures justified by need to protect creditors' interests).

[105] *See* Goldberg v. Kelly, 397 U.S. 254, 265–66 (1970); *cf.* Stanley v. Illinois, 405 U.S. 645, 656 (1972) ("[T]he Constitution recognizes higher values than speed and efficiency.").

[106] *Cf.* Comment, *supra* note 34, at 888 (analogous rationale advanced to justify oral hearing in administrative law context).

[107] *Cf.* Rubenstein, *Procedural Due Process and the Limits of the Adversary System*, 11 HARV. C.R.-C.L. L. REV. 48, 93 (1976) ("Due process means that an individual has a realistic and not just theoretical opportunity to have his claim decided by an impartial forum and not to be subjected to a private or bureaucratic will which he is powerless to contest."). Some of the due process concerns for the integrity and responsibility of the decisionmaking process might be analyzed as elements of structural, rather than procedural, due process. *See* note 5 *supra*.

[108] *See* Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 315 (1950); Armstrong v. Manzo, 380 U.S. 538, 552 (1965).

[109] *See* sources cited notes 100 & 101 *supra*.

hearings — and indeed central to the very notion of "procedural fairness and regularity" [111] that underlies the constitutional right to "due process of law": the decisionmaker must be an impartial one and he must reach his decision according to articulable standards.

The "essential" requirement of an impartial decisionmaker [112] is embodied in a number of Supreme Court holdings. First, a "neutral and detached judge" must perforce be free from any personal pecuniary interest in the outcome of the case.[113] He should also be free from improper nonpecuniary influences, such as the pressures of mob rule.[114] Moreover, because the appearance of fairness lies at the center of due process, decisionmakers are required not only to be impartial in fact, but also to be free from any appearance of bias.[115]

Equally important for the protection of individuals from the arbitrary exercise of government power is the requirement that administrative decisions be made with reference to articulable standards.[116] Standardless decisions exhibit in its sharpest form

[111] Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 224 (Jackson, J., dissenting).

[112] *See, e.g.*, Ward v. Village of Monroeville, 409 U.S. 57 (1972); Morrissey v. Brewer, 408 U.S. 471, 489 (1972); Goldberg v. Kelly, 397 U.S. 254, 271 (1970).

[113] Gibson v. Berryhill, 411 U.S. 564, 578–79 (1973); Ward v. Village of Monroeville, 409 U.S. 57, 62 (1972); Tumey v. Ohio, 273 U.S. 510, 523, 531–32 (1927).

[114] *E.g.*, Moore v. Dempsey, 261 U.S. 86, 90–91 (1923); *cf.* Benner v. Tribbitt, 190 Md. 6, 11, 20, 23–24, 57 A.2d 346, 349, 351, 353 (1948) (overturning city council zoning decision based solely on strong community sentiment).

[115] *See* Morrissey v. Brewer, 408 U.S. 471, 485–86 (1972); Mayberry v. Pennsylvania, 400 U.S. 455, 469 (1971) (Harlan, J., concurring) ("the apperance of even-handed justice . . . is at the core of due process"); Fleming v. City of Tacoma, 81 Wash. 2d 292, 295–96, 299–300, 502 P.2d 327, 329, 331 (1972).

[116] *See* White v. Roughton, 530 F.2d 750, 753–54 (7th Cir. 1976); Holmes v. New York City Hous. Auth., 398 F.2d 262, 265 (2d Cir. 1968); Hornsby v. Allen, 326 F.2d 605, 610–12 (5th Cir. 1964).

In Yick Wo v. Hopkins, 118 U.S. 356 (1886), the Supreme Court noted that "the very idea that one may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself," *id.* at 370. *Yick Wo* involved the enforcement of a San Francisco ordinance which banned the operation of laundries in wooden buildings unless a permit was obtained from the board of supervisors. Such permits were systematically denied to Orientals. The Supreme Court invalidated the ordinance on both due process and equal protection grounds. Although the case is normally cited for the proposition that discriminatory administration of a facially neutral law violates equal protection, equally important language condemning arbitrary and standardless power — such as that quoted above — is contained in the opinion, *see id.* at 370, 372–73. *See also* Hurtado v. California, 110 U.S. 516, 535–36 (1884); The Bank of Columbia v. Okely, 17 U.S. (4 Wheat.) 235, 244 (1819).



the problem of subjecting personal rights to the mere whim of another.[117] "Due process of law" entails that the standards be derived from principles of substantive law, developed by properly constituted bodies or tribunals, and not from the personal predilections of the decisionmaker;[118] considerations and influences extrinsic to the decisionmaking process must be excluded.[119] Moreover, the standards by which an administrative decision is reached should be stated with considerable specificity.[120] Closely related to this requirement is the further one that the decisionmaker explain its decision.[121] Not only does this latter requirement that the government explain its acts to affected individuals serve the dignity interest of due process,[122] but, in conjunction with the requirement that the standards be explicitly stated, it facilitates meaningful judicial review, which due process also mandates where the government deprives an individual of protected property or liberty interests.[123] If the administrative decisionmaker is compelled to state the reasons for its decisions, courts can assure that those decisions are not standardless, improperly motivated, or egregiously mistaken.[124] In short, the requirement of

[117] *See* Washington *ex rel.* Seattle Title Trust Co. v. Roberge, 278 U.S. 116, 122 (1928); Eubank v. City of Richmond, 226 U.S. 137, 143–44 (1912); Yick Wo v. Hopkins, 118 U.S. 356, 370, 372–73 (1886).

[118] *See* Offutt v. United States, 348 U.S. 11, 14 (1954); White v. Roughton, 530 F.2d 750, 754 (7th Cir. 1976).

[119] *See* Benner v. Tribbitt, 190 Md. 6, 57 A.2d 346 (1948); Kent v. Zoning Bd of Review, 72 R.I. 80, 58 A.2d 623 (1948).

[120] *See* Citizens Ass'n of Georgetown, Inc. v. Zoning Comm'n, 477 F.2d 402, 408–09 (D.C. Cir. 1973); Environmental Defense Fund, Inc. v. Ruckelshaus, 439 F.2d 584 (D.C. Cir. 1971); K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES § 2.00–6 (1976).

[121] *See* Goldberg v. Kelly, 397 U.S. 254, 271 (1970); Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 167–68 (1962); Citizens Ass'n of Georgetown, Inc. v. Zoning Comm'n, 477 F.2d 402, 408–10 (D.C. Cir. 1973); Topanga Ass'n for a Scenic Community v. County of Los Angeles, 11 Cal. 3d 506, 522 P.2d 12, 113 Cal. Rptr. 836 (1974). Developed most explicitly in the area of administrative law, *see, e.g.*, SEC v. Chenery Corp., 318 U.S. 80, 94–95 (1943); *see generally* 2 K. DAVIS, *supra* note 42, §§ 16.00–14; Booth, *supra* note 46, at 770–71, the requirement of an explanation has been applied to hearings not governed by the Administrative Procedure Act, *see, e.g.*, United States *ex rel.* Johnson v. Chairman of New York State Bd. of Parole, 500 F.2d 925 (2d Cir.), *vacated as moot sub nom.* Regan v. Johnson, 419 U.S. 1015 (1974).

[122] *See* Pincoffs, *Due Process, Fraternity, and a Kantian Injunction*, in NOMOS XVIII: DUE PROCESS, *supra* note 10, at 272–81.

[123] *See, e.g.*, Hampton v. Mow Sun Wong, 426 U.S. 88, 115–16 (1976); Oestereich v. Selective Serv. Bd., 393 U.S. 233, 243 n.6 (1968); Harlan, J., concurring); Crowell v. Benson, 285 U.S. 22, 87 (1932) (Brandeis, J., dissenting). *See also* Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1372, 1380–85 (1953).

[124] *See* Citizens Ass'n of Georgetown, Inc. v. Zoning Comm'n, 477 F.2d 402, 408 (D.C. Cir. 1973); Booth, *supra* note 46, at 769–72. *See also* Ohio Bell Tel.

articulable standards, supplemented by judicial review, is central to the concern for fundamental fairness that the due process clause embodies.

### *C. Due Process and Decisionmaking by the Electorate Through Initiatives and Referenda*

An increasingly popular alternative to the traditional allocation of zoning decisionmaking authority among local legislatures and administrative bodies is the use of initiatives and referenda.[125] These forms of plebiscite permit zoning matters to be brought directly before the people rather than decided by elected or appointed representatives on city councils and zoning boards. Broad debate in the larger political forum substitutes for the more formal proceedings followed by local authorities.[126] Referenda extend to the electorate the power to rescind laws enacted by their representatives, and thus provide for popular review of legislation already enacted by a responsible body of government.[127] Initiatives, on the other hand, place before the electorate legislation proposed by nongovernmental groups; these propositions may represent extensions of legislative authority or may instead attempt to supersede existing legislation.

At least twenty-two state constitutions expressly provide for initiatives and referenda at either the state or local level.[128] In

Co. v. Public Utilities Comm'n, 301 U.S. 292, 302–04 (1937); White v. Roughton, 530 F.2d 750, 754 (7th Cir. 1976).

[125] There has been a recent increase in the number of cases dealing with initiatives and referenda in the zoning context. *See, e.g.*, City of Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668 (1976); James v. Valtierra, 402 U.S. 137 (1971); Hunter v. Erickson, 393 U.S. 385 (1969); Southern Alameda Spanish Speaking Organization v. City of Union City, 424 F.2d 291 (9th Cir. 1970); City of Scottsdale v. Superior Court, 103 Ariz. 204, 439 P.2d 290 (1968); San Diego Bldg. Contractors Ass'n v. City Council, 13 Cal. 3rd 205, 529 P.2d 570, 118 Cal. Rptr. 146 (1974), *appeal dismissed*, 427 U.S. 901 (1976); Taschner v. City Council, 31 Cal. App. 3d 48, 107 Cal. Rptr. 214 (1973); People's Lobby, Inc. v. Board of Supervisors, 30 Cal. App. 3d 869, 106 Cal. Rptr. 666 (1973). *See also* Note, *The Proper Use of Referenda in Rezoning*, 29 STAN. L. REV. 819, 823–25 (1977).

[126] Dwyer v. City Council, 200 Cal. 505, 253 P. 392 (1927); *Initiative and Referendum in Zoning*, *supra* note 35, at 74–77 & nn.1–2.

[127] Referenda may be either mandatory or ad hoc (permissive). A mandatory referendum statute requires that every ordinance relating to a given subject must be approved by the voters, regardless whether a given number or percentage of voters have petitioned for the referendum. Ad hoc referenda are conducted only if the statutorily required number of voters specifically petition to review an action of the local legislature. The distinction between these two types of referenda is important to some analyses of direct voter participation in zoning. *See, e.g.*, Note, *supra* note 125, at 845–46. *But see* pp. 1530–32 *infra*.

[128] *See* M. JEWELL & S. PATTERSON, THE LEGISLATIVE PROCESS IN THE UNITED STATES 138 (1966); ARIZ. CONST. art. IV, pt. 1, § 1 (1)–(2); CAL. CONST. art. IV, § 1; MAINE CONST. art. IV, pt. 3, §§ 17–21; MICH. CONST. art. II, § 9; OHIO CONST. art. II, §§ 1a–1g.



some of these states, the legislature has extended authority for these procedures to localities through statutory enactment.[129] Authority to use initiatives and referenda to decide zoning matters may be absolute, or may be impliedly or expressly limited. These limitations normally take the form of either exempting specific enumerated issues from the iniative and referendum power,[130] or limiting initiatives and referenda to legislative rather than administrative decisions.[131]

From the perspective of political theory, increased public participation in the zoning process, through the use of initiatives and referenda, might be regarded as a desirable development as it commits important policy issues directly to the people for democratic resolution. Nonetheless, land use regulation by plebiscite has significant drawbacks. The ability of the public at large, through the medium of the polls, to engage in efficient, rational land use planning is dubious.[132] It is also probable that in suburban com-

[129] *E.g.*, CAL. ELEC. CODE §§ 4000–4061 (West 1977); N.Y. MUN. HOME RULE LAW §§ 23–26 (Consol. 1969).

[130] *See, e.g.*, OKLA. CONST. art. 5, § 2 (excluding initiative and referendum from emergency legislation). Other legislative matters typically excluded from decision by initiative or referendum are appropriation measures and tax laws.

[131] Restriction of initiatives or referenda to legislative acts may be imposed either by the state constitution, *see, e.g.*, Forest City Enterprises, Inc. v. City of Eastlake, 41 Ohio St. 2d 187, 190–91, 324 N.E.2d 740, 743–44 (1975), *rev'd and remanded*, 426 U.S. 668 (1976), or by judicial interpretation, *see, e.g.*, West v. City of Portage, 392 Mich. 458, 465–66, 221 N.W.2d 303, 306 (1974); Bird v. Sorenson, 16 Utah 2d 1, 394 P.2d 808 (1964).

The relevant factors in determining whether, as a matter of state law, a given action is legislative and therefore subject to decision by initiative or referendum differ significantly from the concerns applicable to the distinction between legislative and administrative acts for due process purposes, *see* pp. 1510–13 *supra*. The former inquiry has been heavily influenced by the recognition that all power under our system of government ultimately resides with the people. Thus, an expansive definition of "legislative" actions has emerged in the decisional law. *See, e.g.*, City of Fort Collins v. Dooney, 178 Colo. 25, 496 P.2d 316 (1972); State *ex rel.* Hunzicker v. Pulliam, 168 Okla. 632, 640, 37 P.2d 417, 425 (1934). Nonetheless, some courts have found a reasoned basis for limiting initiative and referendum power in pragmatic considerations, such as the time and cost involved in submitting questions to popular vote. *See, e.g.*, Bird v. Sorensen, 16 Utah 2d 1, 394 P.2d 808 (1964). But however courts define legislative actions for initiatives and referendum purposes, their considerations do not correspond to the questions concerning the types of facts and differential impact properly addressed in the federal due process analysis. A good example of the different sort of inquiries is Forest City Enterprises, Inc. v. City of Eastlake, 41 Ohio St. 2d 187, 324 N.E.2d 740 (1975), *rev'd and remanded*, 426 U.S. 668 (1976), in which the Ohio Supreme Court held that a city's mandatory referendum provision was "legislative" for purposes of Ohio's initiative and referendum laws, but nonetheless violated due process.

[132] *See* Note, *supra* note 125, at 838–44.