Reconsidering the Use of Direct Democracy in Making Land Use Decisions

*by Daniel P. Selmi**

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I.
INTRODUCTION

During the past thirty years, the use of direct democratic devices, particularly the initiative, has fundamentally altered the political landscape of politics in numerous states.[1] So powerful is the initiative that it has been labeled the "fourth branch" of government.[2] As the consequences of this trend have unfolded, however, political observers and scholars have become concerned that direct democracy may be eroding representative democracy.[3] Others have argued for more stringent judicial review where direct democracy affects the rights of minorities.[4]

Most of this debate has centered on the efficacy and appropriateness of statewide initiatives. At the same time, however, the use of the initiative and referendum at the local governmental

1. For a listing of state practices of initiatives, *see* PHILIP L. DUBOIS AND FLOYD FEENEY, LAWMAKING BY INITIATIVE: ISSUES, OPTIONS AND COMPARISONS 28-29 (1998).

2. *See* CALIFORNIA COMMISSION ON CAMPAIGN FINANCING, DEMOCRACY BY INITIATIVE: SHAPING CALIFORNIA'S FOURTH BRANCH OF GOVERNMENT 2 (1992) ("When early 20th century Progressives designed the ballot initiative in California, they envisioned a process that would act as a safety valve. Today's initiative process in California, however, has outstripped the Progressive's vision. An emerging culture of democracy by initiative is transforming the electorate into a fourth and new branch of state government.").

3. *See*, most recently, DAVID S. BRODER, DEMOCRACY DERAILED 1 (2000) (suggesting that the initiative process "threatens to challenge or even subvert the American system of government in the next few decades.").

4. Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503 (1990).

level has also increased.[5] A principal development here has been the attempt to use direct democracy to make land use decisions,[6] a practice encouraged by the United States Supreme Court's 1976 decision *City of Eastlake v. Forest City Enterprises*,[7] which upheld the constitutionality of a municipal referendum on a rezoning.[8] As a result, numerous state courts have been forced to consider whether state law allows the use of direct democracy to make land use decisions, and many have concluded that it does not.[9]

Moreover, although some commentators have favored such use,[10] the vast majority of the academic writing on the subject has concluded that direct democracy is an inappropriate means of making land use decisions.[11] Scholars have reasoned that initia-

5. *See* Tari Renner and Victor S. DeSantis, *Municipal Form of Government: Issues and Trends in* 1998 MUNICIPAL YEARBOOK, at 30 (listing results of a study by the International City/County Management Association of the use of the initiative and referendum at the local level).

6. THOMAS E. CRONIN, DIRECT DEMOCRACY 207 (1989) ("Development (for and against), rent control, and measures affecting public officials and municipal employees were the most prevalent on local ballots.").

7. 426 U.S. 668 (1976).

8. Voters have also made a wide variety of decisions that more indirectly affect land use, as opposed to directly affecting land use by enacting rezonings or master plans. *See* Phyllis Myers, *Livability at the Ballot Box: State and Local Referenda on Parks, Conservation, and Smarter Growth, Election Day 1998 in* THE BROOKINGS INSTITUTION CENTER ON URBAN AND METROPOLITAN POLICY, at 1 (1999) ("On November 3rd, 1998, voters from California to New Jersey approved, often with large majorities, more than 70 percent of two hundred-plus state and local ballot measures to protect, conserve, and improve parks, open space, farmlands, historic resources, watersheds, greenways, biological habitats, and other environmental enhancements in communities and regions across the country.").

9. *See, e.g.*, Transamerica Title Insurance Co. Trust Nos. 8295 et al. v. City of Tucson, 757 P.2d 1055, 1059 (Ariz. 1988) ("[T]he law in the vast majority of other jurisdictions . . . prohibits zoning by initiative.") (citing cases).

10. *See* RAYMOND J. BURBY AND PETER J. MAY, MAKING GOVERNMENTS PLAN 29 (1997) ("In framing initiatives and referendums, however, citizens have to comply with the substantive provisions of state planning statutes. Thus, this is another tool to strengthen compliance with, rather than circumvent, state planning authority."); Robert H. Freilich & Derek B. Guemmer, *Removing Artificial Barriers to Public Participation in Land Use Policy: Effective Zoning and Planning by Initiatives and Referenda*, 21 URB. LAW. 511, 514 (1989) ("[T]here are no persuasive public policy reasons or legal issues which justify preventing the electorate from holding an ultimate control over land-use policy."); Craig N. Oren, Comment, *The Initiative and Referendum's Use in Zoning*, 64 Cal. L. Rev. 74, 93 (1976) (suggesting a balancing test under which "the validity of the initiative's use in zoning should be upheld.").

11. David L. Callies *et al.*, *Ballot Box Zoning: Initiative, Referendum, and the Law*, 39 WASH. U. J. URB. & CONTEMP. L. 53 (Spring 1991) ("[O]n balance it is difficult to make a consistent case for the use of initiative or referendum to rezone land."); Ronald H. Rosenberg, *Referendum Zoning: Legal Doctrine and Practice*, 53 U. CIN. L. REV. 381, 433 (1984) (Criticizing referendum zoning and concluding that "[p]rior

tives and referenda imperil comprehensive land use planning and upset the delicate procedural structure of land use decision making. Critics coined the derogatory term "ballot box planning"[12] to describe what they view as an ill-advised practice.

Despite this academic criticism, the use of direct democracy continues to be popular with citizens in those states where it is allowed.[13] Given this popularity, and the now-lengthy experience with the use of initiatives and referenda as devices for making land use decisions, a re-appraisal of this use is both appropriate and timely. Accordingly, this article systematically examines the criticisms leveled against the use of direct democracy in the land use context, particularly the charge that it fundamentally conflicts with rational land use planning. The article concludes that the case against direct democracy is far less one-sided than previous criticism has found.

By skirting procedural devices, such as public hearings and planning commission review of proposals, direct democracy does sacrifice information and process values inherent in the means by which plans are adopted and land use decisions made. Furthermore, the use of direct democracy in the land use context is at its most dubious when automatically triggered and when focused on land use decisions that have no policy aspects to them. At the same time, however, not all of the objections to direct democracy

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to embracing a doctrine encouraging referendum zoning as a means of increasing citizen involvement in the affairs of local government, states and localities must understand fully the less attractive implications of the technique."); Mark August Nitikman, *Instant Planning—Land Use Regulation by Initiative in California*, 61 S. CAL. L. REV. 497, 523 (1988) ("[L]and use initiatives may threaten individual rights and interests, disserve the general welfare, not provide truly democratic control and create substantively bad law. A balancing of interests strongly suggests that land use initiatives should be severely restricted, if not prohibited."); Nicolas M. Kublicki, Comment, *Land Use By, For, and Of the People: Problems With the Application of Initiatives and Referenda to the Zoning Process*, 19 PEPP. L. REV. 99, 101 (1991) ("[T]he application of initiatives and referenda to the zoning process creates many more legal problems and inconsistencies than it resolves.").

12. *See, e.g.*, ROGER W. CAVES, LAND USE PLANNING: THE BALLOT BOX REVOLUTION 28 (1991) ("Ballot box planning is the name commonly associated with the use of the initiative or referendum in deciding a land use matter.").

13. *See* Margolis v. District Court, 638 P.2d 297, 303 (Colo. 1981) ([S]uggesting that "a heightened community sensitivity to the quality of the living environment and an increased skepticism of the judgment of elected officials provide much of the impetus for the voters' exercise of the powers of referenda and initiative in the zoning context."); CALIFORNIA COMMISSION ON CAMPAIGN FINANCING, DEMOCRACY BY INITIATIVE: SHAPING CALIFORNIA'S FOURTH BRANCH OF GOVERNMENT 76 (1992) ("Surveys conducted in California since 1979 have consistently demonstrated a strong positive view of the initiative process among the voting public.").

in the land use context are well taken. For example, the objections that land use decisions are too "complex" for voters and impair the "flexibility" of the land use system are unconvincing. Land use questions involving broad policy determinations in the planning context are suitable for decision by the electorate.

Moreover, recent sociological and political science theory about the nature of modern local governments may explain the popularity of the use of direct democratic devices in the land use context. At least to some extent, this theory may also justify the use of these devices as a response to structural imbalances in the makeup of local government.

In short, blanket generalizations about the incompatibility of direct democracy with land use decisionmaking ignore a more complex series of underlying issues. A strong case can be made in defense of the use of direct democracy in this context, one that critics have not previously recognized.

The analysis below proceeds as follows. First, the article summarizes the context in which land use initiatives and referenda are used at the local government level. This section emphasizes the unique aspects of local elections in comparison to the use of direct democracy at the statewide level. Next, the article sets forth a typology of initiatives and referenda utilized at the local level. These range from referenda on narrow rezoning questions to the enactment of citywide urban growth policies embodied in separate master or general plans.

The article then examines the principal objections to the use of initiatives and referenda to make land use decisions. These objections break down into two general categories: (1) objections to the process of land use decisionmaking by direct democracy, and (2) objections to the effects of decisions, such as interference with plans, lack of flexibility in the aftermath of such decisions, and unfair impacts on individual property owners.

The discussion also repeatedly touches on another theme. Unlike the situation generally prevailing at the state law level, legislatures have the power to shape the use of the initiative and referendum at the local government level through the adoption of legislation. In its analysis of many of the objections to direct democracy as a means of making land use decisions, the article points out that appropriate legislation on the subject could alleviate some of the objections.

In sum, while the normal regulatory process is certainly superior to the use of the initiative and referendum, direct democracy

can serve valuable purposes and is not necessarily incompatible with sound land use practices.

II.
DIRECT DEMOCRACY AND LOCAL LAND USE

A. *The Municipal Context*

1. Terminology

Initially, the terminology of direct democracy must be established.[14] Initiatives are legal devices whereby citizens enact legislation.[15] Proponents circulate a petition that attaches the proposed legislation, and they must obtain a set number of signatures from the registered voters of the jurisdiction in which the petition is being circulated. Once the petition is verified as complete, the legislative body of that jurisdiction (e.g. a city council or county board of commissioners) must decide whether to approve the legislation or place it before the voters at either the next general election or a specially called election.[16]

In contrast, a referendum decides the validity of previously enacted legislation.[17] Once a bill is signed into law, state constitu-

14. The initiative and referendum are legacies of the progressive political movement of the early twentieth century. The history of this movement and the adoption of the initiative, referendum and recall in many states are well-chronicled. *See, e.g.*, DAVID D. SCHMIDT, CITIZEN LAWMAKERS 3-24 (1989).

15. Technically, there are two types of initiatives: (1) The direct initiative, which is a measure proposed by a petition signed by a specified number or percentage of voters and placed directly on the ballot at the ensuing general or special election for approval or rejection by the electorate; and (2) The indirect initiative, where the measure proposed by petition is transmitted to the legislative body, which has a stated number of days to act on the petition. If the body fails to act or amends the petition, the original petition is placed on the ballot. JOSEPH F. ZIMMERMAN, PARTICIPATORY DEMOCRACY 12 (1986).

16. At the state level, propositions can either be statutory (propositions that change existing statutes or enact new ones) or constitutional (propositions that change the state constitution). ELISABETH R. GERBER, THE POPULIST PARADOX 15 (1999). The initiatives addressed in this article are local propositions, which are almost always enacted as legislation. In some instances, however, they may change the city's constitutional document, usually the charter. *See* City of Eastlake v. Forest City Enterprises, 426 U.S. 668, 670 (1976).

17. The "petition referendum" provides for a citizens' veto by allowing voters to stop, by petition, the implementation of a law until the citizens vote on whether the law is to be repealed. ZIMMERMAN, *supra* note 15, at 45. *See also* Byre v. City of Chamberlain, 362 N.W.2d 69, 79 (S.D. 1985):

> Initiative is the constitutional reservation of power in the people to propose bills and laws and to enact or reject them at the polls independent of the legislative assembly. Referendum, on the other hand, is a right constitutionally reserved to the people of the state or local subdivisions thereof to have submitted for their

tions, statutes, or city charters allow voters a brief window period, often thirty days, to circulate a petition to place a referendum on that legislation before the voters.[18] If the required percentage of registered voters signs the petition, the voters will then consider the referendum at the next election.[19]

The subject matter of both the initiative and referendum is limited. Both devices can be used only to enact or reject legislation; they are unavailable to make either administrative or quasi-judicial decisions.[20] This restriction is particularly important in the land use context, where many important decisions, such as those to grant a variance or a use permit, are considered quasi-judicial or administrative.[21] As a result, such decisions are not subject either to the initiative or referendum.[22]

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approval or rejection any act, or part of any act, passed by the legislature which in most cases would, without action on the part of the electorate, become a law.

18. *See, e.g.*, Colo. Rev. Stat. Ann. § 31-11-105(2) ("Within thirty days after final publication of the ordinance, a referendum petition protesting against the effect of the ordinance or any part thereof may be filed with the clerk."); Neb. Rev. Stat. § 18-2528 (3) ("Referendum petitions . . . shall be filed . . . within thirty days after such measure's passage by the governing body . . . .").

19. *See, e.g.*, State ex. Rel. English v. Geauga County Bd. of Elections, 369 N.E.2d 11 (Ohio 1977) (determining appropriate election date for referendum on zoning).

20. *See, e.g.*, Citizen's Awareness Now v. Marakis, 873 P.2d 1117, 1125-26 (Utah 1994) (zoning by referendum allowed only if matter is deemed legislative rather than administrative in nature); Margolis v. District Court, 638 P.2d 297, 304 (Colo. 1981) (en banc) (determining that zoning and rezoning are legislative in nature, and thus subject to the initiative and referendum process).

21. *See, e.g.*, State ex rel. Crossman Communities of Ohio, Inc. v. Greene County Board of Elections, 717 N.E.2d 1091 (Ohio 1999) (finding that approval of the implementation of a planned unit development was legislative and thus referendable). *Compare* State ex rel. Zonders v. Del. County Bd. Of Elections, 630 N.E.2d 313, 319 (Ohio 1994) ("[T]he enactment of a new PUD classification that is not tied to any specific piece of property is a legislative act subject to referendum. . . . However, where specific property is already zoned as a PUD area, approval of subsequent development as being in compliance with the existing PUD standards is an administrative act which is not subject to referendum."); Citizens Lobby of Port Huron, Michigan, Inc. v. Port Huron City Clerk, 347 N.W.2d 473 (Mich. App. 1984) (ordinance designed to restrict development of waterfront property owned by the city was administrative in nature and thus not subject to initiative). *But see* Buckeye Community Hope Foundation v. City of Cuyahoga Falls, 692 N.E.2d 997, 1004 (Ohio 1998) ("the people of a municipality may, by charter, reserve to themselves the power to approve or reject, by popular vote, any actions of city council regardless of whether such actions are administrative or legislative in nature.").

22. *See, e.g.*, Myers v. Schiering, 271 N.E.2d 864, 866 (Ohio 1971) ("[T]he passage by a city council of a resolution granting a permit for the operation of a sanitary landfill, pursuant to an existing zoning regulation, is an administrative act and is not subject to referendum proceedings."); Hanson v. City of Granite Falls, 529 N.W.2d 485, 488 (Minn. App. 1995) ("The resolution clearly is not an act laying down a permanent or uniform rule of law. It simply approves a layout plan for the proposed airport, and is more in the nature of an administrative act relating to the daily ad-

2. Features of Local Direct Democracy

The intense debate over the possible perils posed by the increased use of direct democracy has centered on the use of the initiative at the state level. Over the last twenty years, statewide initiatives have addressed a broad variety of controversial issues, ranging from the rights of immigrants to term limits for elected officials.[23] Most importantly for the functioning of government, initiatives have restricted the revenue-raising abilities of some state governments and thereby markedly altered the operation of government in those states.[24]

In contrast, the use of direct democracy to make land use decisions has largely taken place at the local government level. However, knowledge of how direct democracy actually operates at the local level is not well developed.[25] For example, attempts have been made to study the effects of campaign contributions on the success or failure of state initiatives.[26] However, little information exists about how campaign contributions affect electoral outcomes in local jurisdictions, even though the development industry is an obvious source of campaign contributions.

Direct democracy clearly operates quite differently at the local level in at least five important respects. First, the voting electorate at the local level is, in general, much smaller than the statewide electorate, and the means by which local voters obtain information is also different than at the state level. Proponents and opponents of initiatives (or, in far fewer cases, referenda) in statewide elections often employ television advertisements to make their case. In local elections, voters gain information through such sources as local newspapers, local businesses,

ministration of municipal affairs. We therefore conclude that the resolution is not a legislative act entitled to referendum.").

23. *See, e.g.*, Gerberding v. Munro, 949 P.2d 1366 (Wash. 1998) (proceeding term limit initiative); Morrissey v. State, 951 P.2d 911 (Colo. 1998) (same); League of United Latin American Citizens v. Wilson, 997 F. Supp. 1244 (C.D. Cal. 1997) (action challenging initiative requiring denial of benefits to certain immigrants).

24. *See* SCHMIDT, *supra* note 14, at 138-39 (detailing tax initiatives in the 1978-80 period).

25. CAVES, *supra* note 12, at xii (observing that most of the research on the topic of direct democracy and direct legislation has been conducted at the state level); David Hadwiger, *The Initiative Comes to Town: California Cities and Citizen-Sponsored Ballot Measures in* WESTERN CITY, at 60 (Oct. 1989) ("Studies of direct democracy to date have focused primarily on statewide measures in California and elsewhere. No general systematic effort has been made to study initiative and referendum use in cities.").

26. *See, e.g.*, David Hadwiger, *Money, Turnout, and Ballot Measure Success in California Cities*, WEST. POL. Q. 539 (1992).

neighborhood or citizen groups, and other social institutions organized and centered at the municipal level.

Second, the nature of local elections means that many of the criticisms of statewide direct democracy have less force when considered in the local context.[27] For example, there is much criticism of proponents' use of paid signature gatherers at the state level.[28] In contrast, at the local level grassroots activists rather than hired gatherers typically secure the needed signatures. Furthermore, while the accuracy of television ads used at the state level has been roundly criticized, such ads are not the norm at the local level.

Third, the range of governmental decisions subject to direct democracy is much narrower at the local level. The scope of local government powers is limited, hedged in by constitutional limitations on local powers and preemption by state law.[29] A strong case can be made that the single most important power that local officials continue to possess is the power to make land use decisions.[30] Local use of direct democracy reflects that conclusion.[31]

Fourth, although political scientists decry apathy about government on the part of the citizenry,[32] such apathy is often nonexistent when it comes to debates over important local land use

27. One author noted a key aspect of the use of direct democracy at the local level: "The greatest potential for citizen participation exists in local governments because . . . their smaller geographical scale facilitates citizen involvement." ZIMMERMAN, *supra* note 15, at 180.

28. *See also* BRODER, *supra* note 3, at 52 ("The unique part of the industry—and the one that makes everything else possible—is the business of collecting signatures to place initiatives on the ballot. It sprang up within the first decade of the Progressive era—the first decade!—as if to mock the pretensions of those public-spirited reformers who brought the idea to America.").

29. Little v. City of Lawrenceville, 528 S.E.2d 515 (Ga. 2000) (Zoning Procedures Law preempted provisions in city charter); Soaring Vista Properties, Inc v. Bd. of County Comm'rs, 741 A.2d 1110 (Md. 1999) (local ordinance regulating construction of sewage sludge storage facility was preempted); Town of Warren v. Thornton-Whitehouse, 740 A.2d 1255 (R.I. 1999) (Coastal Resources Management Council had exclusive jurisdiction over wharves).

30. PAUL PETERSON, CITY LIMITS 25 (1981) ("Urban politics is above all the politics of land use.").

31. A survey of California cities reporting on ballot measures between 1983 and 1988 found that 46% of the measures concerned "community development," 16% concerned rent control, and seven percent each concerned environmental measures and public property acquisition/disposition. The remaining measures addressed issues of national and international policy. Hadwiger, *supra* note 25, at 60.

32. *See* CAROL PATEMAN, PARTICIPATION AND DEMOCRATIC THEORY 104 (1970) (positing that voter apathy is related to powerlessness); MARCIA LYNN WHICKER ET AL., THE CONSTITUTION UNDER PRESSURE 145 (1987) (increase in number of issues

decisions.[33] Land use decisions unquestionably are highly political and often controversial. At the least, some citizens care passionately about the future of their communities and vigorously participate in the political discourse over local land use decisions.

Finally, the subject matter of statewide initiatives and referenda is often limited only by federal and state constitutional restrictions, such as those that require initiatives to address a "single subject."[34] Legislatures have no power to restrict the substantive content of statewide initiatives through legislation. They may, however, be able to legislate on certain procedural matters related to the initiative or referendum. For example, they may be able to require a higher percentage of signatures from voters before a measure will qualify for the ballot.[35]

In contrast, legislatures retain the prerogative to legislate in most land use areas, and by so doing they can greatly affect both the availability and scope of direct democracy at the local level.[36] In particular, legislatures can design state laws that are inconsistent with the use of the initiative or referendum, and thus preempt the exercise of those devices.[37] For example, many state courts have concluded that local voters cannot exercise referen-

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addressed by government has led to a decline in voter ability to express preferences by voting and, in turn, a decline in voter turnout).

33. *See* Great Atlantic and Pacific Tea Co., Inc. v. Borough of Point Pleasant, 644 A.2d 598, 600 (Md. 1994) ("In municipal government, few issues generate as much public interest as the control of land-use development. Zoning ordinances touch people where they live."); Peter Grant, *The Debate Over Sprawl Has Just Begun*, WALL ST. J., Nov. 8, 2000, at B14 (initiative measures in Arizona and Colorado seeking to impose growth control "became more like civil wars, with people waving opposing signs at each other from opposite sides of the street. 'It pitted neighbor against neighbor,' says one national lobbyist who was in the thick of both campaigns.").

34. DUBOIS AND FEENEY, *supra* note 1, at 127 (1998) ("[O]f the 22 jurisdictions that allow use of the initiative for the adoption of statutes, 13 have, and three more probably have . . ." rules restricting bills to a single subject.).

35. *Id.* at 33-34 (listing signature requirements in various states, most set by the state constitution but a minority set by statute).

36. Heitman v. City of Mauston Common Council, 547 N.W.2d 450, 454 (Wisc. App. 1999) ("[I]n Wisconsin, initiative is a creature of statute and its use must comport with the requirements established by the legislature, both for direct action legislation and for the specific area of legislation in which initiative is attempted."); San Diego Bldg. Contractors Assn. v. City Council, 529 P.2d 570, 582 (Cal. 1974) (Burke, J., dissenting) ("The Legislature . . . might well develop an approach which strikes a proper balance between the rights of the affected property owners and the interests of the public in reserving the power to initiate legislation.").

37. *See, e.g.*, Committee of Seven Thousand v. Superior Court, 754 P.2d 708, 247 (Cal. 1988).

dum rights to consider local government decisions on redevelopment projects.[38]

B. *A Typology of Local Land Use Initiatives and Referenda*

Local voters considering initiatives and referenda theoretically may pass upon a wide variety of land use measures, ranging from rezonings affecting very small parcels of property to comprehensive amendments to master or general plans. In practice, the land use decisions most often subjected to direct democratic devices fall broadly into five categories. The typology below illustrates the principal factual differences that mark the various attempted uses of direct democracy in the land use area.

1. Site-Specific Zoning Amendments

Traditionally, the most important land use device employed by local governments is the amendment that changes the zoning map to allow new land uses on a specific parcel of property.[39] The impacts of such amendments are largely localized; any dispute over a zoning amendment is usually between a developer or landowner, who is seeking a more intensive use of property, and neighboring citizens who oppose the change. The citizens' concerns are usually site-specific, centering on such issues as traffic, aesthetics, and impacts on property values.

These types of amendments normally do not present policy issues of jurisdiction-wide impact. In specific cases, however, the individual rezoning can have broader significance.[40] For example, a rezoning of a small property from agricultural to residential could represent a fundamental change from the prior

38. *See, e.g.*, Atlantic City Housing Action Coalition v. Deane, 437 A.2d 918, 922 (N.J. Super. L. 1981) ("the redevelopment process is not subject to ordinance through voter initiative."); Redevelopment Agency of the City of Berkeley v. City of Berkeley, 143 Cal. Rptr. 633, 638 (Ct. App. 1978) ("The principle is well established that the local governing body is carrying out state policy when it acts in proceedings under the California Redevelopment Law.").

39. *See, e.g.*, Fox v. Polk County Bd. of Supervisors, 569 N.W.2d 503 (Iowa 1997) (amendment to zoning map). Rezonings can also change the text of the zoning ordinance, rather than the map. *See* State ex rel. Dahlen v. Ervin, 974 P.2d 264, 266 (Or. Ct. App. 1999) (proposed initiative would amend the county charter to establish new requirements for the siting of community corrections facilities).

40. *See* Citizens Awareness Now v. Marakis, 873 P.2d 1117, 1125 (Utah 1994) (requiring trial courts to consider "whether the [zoning] change was a common, everyday zoning change or a rare or unusual change that will significantly alter the basic nature of the community.").

municipal policy of avoiding development of outlying agricultural areas and set a new pattern for future development.

2. Comprehensive Rezonings

Another set of rezonings, usually considered by initiative rather than by referendum, establishes broad policies applicable either citywide or to a large area of the city. These types of rezonings often combine important amendments to the text of the zoning ordinance with an alteration of the zoning map used in the jurisdiction. An example of this category is found in a 1974 California Supreme Court decision in which the initiative established a 30-foot height limitation for large areas of a city along the coast.[41] Another example is a growth control ordinance passed by initiative that has broad impacts on the growth rate in the community.[42]

3. Site-Specific Master or General Plan Amendments

If a state statute or local ordinance requires a jurisdiction to adopt a master or general plan and also mandates that development must be "consistent" with the plan, land use decisionmaking no longer focuses solely on the zoning ordinance. Rather, any changes to land use can occur only if the zoning and the plan are compatible.

In such jurisdictions, land use decisions by initiatives and referenda have largely shifted to voter consideration of proposed changes in the general plan. For example, if a developer secures a rezoning to a more intensive use, but citizen-opponents pass a referendum overturning that rezoning, the opponents may find that they have accomplished nothing. If zoning must be consistent with the master or general plan, the referendum is invalid if the resulting zoning is inconsistent with the plan.[43]

41. San Diego Building Contractors Assoc. v. City Council, 529 P.2d 570 (Cal. 1974).

42. *See* Associated Homebuilders etc. Inc. v. City of Livermore, 557 P.2d 473 (Cal. 1976).

43. *See* DeBottari v. City of Norco, 217 Cal. Rptr. 790 (Ct. App. 1985) (invalidating a referendum whose outcome would have been inconsistent with the general plan); City of Irvine v. Irvine Citizens Against Overdevelopment, 30 Cal. Rptr. 2d 797 (Ct. App. 1994) (same); Building Industry Ass'n of San Diego, Inc. v. City of Oceanside, 33 Cal. Rptr. 2d 137 (Ct. App. 1994) (growth control initiative conflicted with general plan); Arnel Development Co. v. City of Costa Mesa, 620 P.2d 565, 573 (Cal. 1980) ("Neither do we believe departure from settled precedent is necessary to protect the public interests in rational and orderly land-use planning. Zoning changes must conform to the city's general plan . . . which must in turn conform to

Initiatives and referenda of this type often concern plan changes on single, relatively small parcels of property. In this sense, measures that fall into this category present considerations similar to those rezonings discussed above, that were labeled site-specific zoning amendments.[44]

4. Broad-Based Plan Amendments

Voters also may decide to make important changes to the master or general plan that have jurisdiction-wide ramifications. For example, an initiative might establish "urban growth limit" policies in the city's general plan. These enactments establish policies that direct growth to occur inside an urban limit line and call for lower density and less intense uses on lands outside those limits.[45]

5. Ratification of Existing Zoning or Plans Through Automatic Referrals

A last category of measures, almost exclusively enacted by initiative, makes no change either to the existing general plan or the town's zoning ordinances. Instead, citizens' groups that are pleased with the plan and zoning fear that future changes in the local political hierarchy will jeopardize them. As a result, they seek to preserve the current land use arrangements by passing an initiative requiring that voters must approve significant changes to the existing zoning[46] or the existing general plan.[47] The

requirements established by state statute . . . The specter of a few voters imposing their selfish interests upon an objecting city and region has no basis in reality.").

44. *See supra* note 39 (text).

45. *See, e.g.*, In the Matter of the Title, Ballot Title and Submission Clause and Summary for 1999-00 #256, 12 P.3d 246, 250 (Colo. 2000) ("The measure generally provides that, unless otherwise excepted, local governments may approve development only: (1) within areas committed to development, as defined in the proposal; or (2) within future growth areas defined by voter-approved growth area maps.").

46. *See, e.g.*, Breezy Point Limited Partnership v. City of Aurora, 1993 WL 164673 (Ohio App. 1993) ("In early November of 1989, the people of the city of Aurora voted for a measure which requires any change in zoning to be put to referendum.").

47. *See* Lee v. City of Monterey Park, 219 Cal. Rptr. 309, 311 (Ct. App. 1985) ("Measure L, with certain specified exceptions, required amendments to the City's Land Use Element of the General Plan, the Zoning Map or Zoning Code to be ratified by the voters."). This type of referendum was approved by the Supreme Court in the *City of Eastlake* decision. Interestingly, the referendum procedure in that case seemed to call for *all* land use changes to be submitted to the voters. Thus, even administrative acts, outside the scope of direct democracy, facially fall within the Eastlake ordinance. The Ohio Supreme Court later held that such automatic referendum ordinances were inconsistent with state zoning procedure, and thus invalid. Rispo Realty & Development Co. v. City of Parma, 564 N.E.2d 425 (Ohio

United States Supreme Court upheld such an automatic referral system, at least with respect to zoning, in its landmark *City of Eastlake* decision.[48]

The effect of this type of measure is both to validate current planning and to significantly decrease the flexibility of the land use system. Landowners now must secure the approval of both elected officials and the voters before any change becomes effective.[49]

III.

EVALUATING THE OBJECTIONS TO THE USE OF DIRECT DEMOCRACY IN MAKING LAND USE DECISIONS

A. *Evaluative Considerations*

1. Categorizing the Objections

The literature and cases that reject the use of direct democracy in the land use context often use shorthand phraseology in framing their objections. For example, one article claims that the use of the initiative or referendum is inconsistent with "sound planning" and "the wise use of land."[50] Terms like these, however, are not self-defining; they are code words or phrases that represent various underlying processes or goals that direct democracy may threaten. The discussion below identifies those underlying concerns and systematically examines them.

The discussion is broken into two general categories: (1) Objections to the process of land use decisionmaking by direct democracy, and (2) objections to the outcomes of that process. The first category includes the objection that voters do not possess adequate information or sufficient expertise to make land use decisions. It also includes the objections that voters do not actually consider the appropriate information in making land use deci-

1990). *See also* Madelyn Glickfield *et al.*, *Trends in Local Growth Control Ballot Measures in California*, 6 UCLA J. OF ENVT'L L. & POL'Y 111, 123 (1987). Many modern initiatives exempt minor changes in use.

48. 426 U.S. 688 (1976).

49. By statute in California, any changes to an initiative can only be made by the voters. *See, e.g.*, CAL. ELEC. CODE § 9125 (West 2001) ("No ordinance proposed by initiative petition and adopted either by the board of supervisors without submission to the voters or adopted by the voters shall be repealed or amended except by a vote of the people.").

50. *See, e.g.*, David L. Callies & Daniel J. Curtin, *On the Making of Land Use Decisions through Citizen Initiative and Referendum*, APA JOURNAL, Spring 1990, at 222 ("planning and zoning by popular vote is fraught with peril for the wise use of land and for sound planning.").

sions, that the complexity of those decisions prevents proper consideration by voters, and that voters are incapable of balancing the requisite factors that must be considered in such decisions. The second broad category focuses on the effects of decisions made by the voters. In particular, it examines whether such decisions interfere too greatly with plans, infuse excessive rigidity into the land use system, or unduly impact single landowners.

This methodology provides a useful way of organizing the objections and analyzing them. It should be noted, however, that the objections discussed in each category are not entirely distinct. For example, the objection that voters do not have sufficient information to consider land use issues has much in common with the objection that voters do not have sufficient expertise to do so.

2. Framing the Correct Questions

From the outset, a fundamental consideration must be kept in mind in examining these objections. Any determination whether direct democracy has a justifiable role in land use decisionmaking initially involves a balancing of the benefits of direct democracy against any impact that it has on values inherent in the land use system.[51] That determination must start with an unchallengeable premise: direct democracy is not the preferred decisionmaking system. It cannot be expected that the direct democratic devices will be better devices for land use decisionmaking than the normal legislative processes.

The initiative and referendum are intended as exceptional political instruments to be employed when representative government becomes unresponsive to the citizenry. They are

51. Lawrence Gene Sager, *Insular Majorities Unabated: Warth v. Seldin and City of Eastlake v. Forest City Enterprises, Inc.*, 91 HARV. L. REV. 1373, 1425 (1978) (the holding in *City of Eastlake* upholding referendum zoning "can be understood as consistent products of the view that the legislative facilitation of the aggregate will of the members of a community is to predominate over virtually all other possible concerns in the land use planning process."). *See also* Jeff C. Wolfstone, *The Case for a Procedural Due Process Limitation on the Zoning Referendum: City of Eastlake Revisited*, 7 ECOL. L. Q. 51, 85 (1978), recognizing that a balancing is occurring ("Denial of the referendum in administrative actions reflects an often unspoken policy assumption that the need for efficient government outweighs the added value of public participation."); Township of Sparta v. Spillane, 312 A.2d 154, 156 (N.J. Super. Ct. App. Div. 1973) ("This issue pits the philosophy of comprehensive zoning planned by a panel of experts and adopted by elected and appointed officials, against the philosophy of a wider public participation and choice in municipal affairs.").

procedurally blunt instruments,[52] for the electoral process lacks the ameliorative, power-distributing features of the legislative process. For example, because voters usually cannot amend initiatives before their passage, compromise among competing factions—a hallmark of the legislative process— is impossible under direct democracy. In short, direct democracy is intended to be very different from representative democracy because it is intended to serve different purposes.[53]

For these reasons, the question for analysis is not whether direct democracy is superior to the normal land use system. Nor is the question whether direct democracy has features that are "analogous" to those of the representative system of government, and thus that might substitute for those features.[54] Rather, the question is whether the initiative and referendum serve a valid function in the land use system and do not unduly impair the goals of that system.[55]

With this caveat in mind, the article now turns to an analysis of the specific objections raised to land use decisionmaking through direct democracy.

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52. "As succinctly and graphically expressed a number of years ago in a study of the California procedure, '. . . the initiative is in essence a legislative battering ram which may be used to tear through the exasperating tangle of the traditional legislative procedure and strike directly toward the desired end. Virtually every type of interest-group has on occasion used this instrument. It is deficient as a means of legislation in that it permits very little balancing of interests or compromise, but it was designed primarily for use in situations where the ordinary machinery of legislation had utterly failed in this respect. It has served, with varying degrees of efficacy, as a vehicle for the advocacy of action ultimately undertaken by the representative body.' " KEY & COUCH, THE INITIATIVE AND THE REFERENDUM IN CALIFORNIA 485 (1939); Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization, 583 P.2d 1281, 1289 (Cal. 1978).

53. A 1984 book summarized the differences in values:

> Direct democracy values participation, open access, and political equality. It tends to de-emphasize compromise, continuity, and consensus. In short, direct democracy encourages conflict and competition and attempts to expand the base of participants. Indirect democracy values stability, consensus, and compromise and seeks institutional arrangements that insulate fundamental principles from momentary passions or fluctuations in opinion.

DAVID B. MAGLEBY, DIRECT LEGISLATION: VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES 181 (1984).

54. *See* Peter G. Glenn, *State Law Limitations on the Use of Initiatives and Referenda in Connection With Zoning Amendments*, 51 S. CAL. L. REV. 265, 303 (1978) (suggesting that "the statutory devices attempting to ensure intelligence and fairness are substantially implicated and find no analogous substitute in direct legislation").

55. Professor Glenn framed the question similarly: "The important point here is that the direct legislation cure may be worse than the disease." *Id.* at 291.

B. *Objections To the Process of Decisionmaking Under Direct Democracy*

1. Information Defects

The land use regulatory system is intended as a rational decisionmaking process that first compiles relevant information and then applies expertise and planning principles to establish appropriate land uses. The first set of objections to the use of direct democracy focuses on whether unacceptable information deficits occur when voters pass on initiatives or referenda.

a. The Information Deficiency Objection

Electoral processes are not designed to facilitate narrow factual inquiries. Instead, they employ communication channels designed to convey arguments quickly and persuade voters. For example, land use initiatives and referenda often generate substantial publicity in the media.[56] The opposing sides, however, sharply characterize and color the information generated as they compete for attention and attempt to frame the issues in a manner that will attract the attention of voters.[57]

In short, the information generated by a hearing before a planning commission differs markedly from the information generated in the often-raucous public debate fostered by elections. Thus, it should come as no surprise that some commentators have roundly condemned the sufficiency of the information available to the electorate, implying that it is of such poor quality as

56. *See, e.g.*, Anne Arundel County v. McDonough, 354 A.2d 788, 811 (Md. 1976) (Levine, J., dissenting) ("It is not necessary to detail the very extensive extra-governmental publicity given to the question, including numerous newspaper articles, some of which contained the full text of the amendments, and the sample ballots distributed by the League of Women Voters. Suffice it to say that an officer of the Planning and Zoning Commission of Anne Arundel County testified that the Route 3 rezoning received by far the greatest publicity of any activity of the County Council.").

57. *See* L.A. Ray Realty v. Town Council of the Town of Cumberland, 603 A.2d 311, 314 (R.I. 1992) ("Among the elements of incompatibility [between zoning and referenda] was the very likely probability that the publicity that might accompany the referendum campaign and the exposure and discussion of the issues generated thereby would not be a substitute for the public hearings that would normally be required by the zoning statute prior to adoption or amendment."); Township of Sparta v. Spillane, 312 A.2d 154, 158 (N.J. Super. Ct. App. Div. 1973) ("We are not satisfied that the publicity which might accompany the referendum campaign and the exposure and discussion of the issues generated thereby justify disregarding these procedural requirements.").

to invalidate any decision based upon it.[58] The objection is principally, although not entirely, aimed at initiatives. Since referenda challenge a legislatively approved action, the record before the legislative body when it took that action will be available to voters, although whether it is disseminated may be an issue.

To rationally decide, voters require that information be available, that it be disseminated to them, and that it be accurate. With respect to the first requirement of availability, the evidence indicates that in some situations the information deficiency in elections is serious. At its worst, state law may not even require a sufficient identification of the land and regulatory device that the voters are considering.[59] In such instances, it is hard to argue that direct democracy is an appropriate basis for making land use decisions. This aspect of the information problem, however, is not limited to land use decisionmaking by direct democracy. It has been identified as a generic problem of direct democracy, particularly of initiatives.[60]

Several relatively obvious means could be used to improve the information available during a land use election. State law can authorize local elected officials to refer the initiative to the planning department for a report on its effect on the overall land use plan of the local jurisdiction.[61] The information might include the preparation of an environmental analysis of the effects of the

58. For an example in the land use area, *see* Daniel M. Warner, *Direct Democracy: The Right of the People to Make Fools of Themselves; The Use and Abuse of Initiative and Referendum, A Local Government Perspective*, 19 SEATTLE U. L. REV. 47, 74 (1995) (alleging that referendum supporters "egregiously misrepresented" the effect of the "critical area ordinance" that was the subject of the vote).

59. *See* Note, *The Proper Use of Referenda in Rezoning*, 29 STAN. L. REV. 819, 832 (1977) (apparently speaking of Ohio practice, the note claims that "[t]he ballot typically specifies only the name and location of the parcel to be rezoned. Thus, unless they learn of the proposal through alternative channels, the voters are inadequately informed to make a rational decision on the merits of the rezoning petition."). *Compare* Nelson v. Carlson, 21 Cal. Rptr. 2d 485 (Ct. App. 1993) (referendum was invalid because it did not attach entire several hundred page general plan to the referendum, as "[a]ttaching the entire plan allows prospective petition signers to consider whether they are comfortable proposing the repeal of such an extensive and important document that is so expensive to prepare.").

60. Dubois & Feeney, *supra* note 1, at 121 ("One critical problem with initiatives today is whether it is possible for the average voter, or even the extremely sophisticated voter, to understand the issues and the policy choices as they are presented on the ballot and in the ballot pamphlet.").

61. *See* CAL. ELEC. CODE § 9111 (West 1996) (allowing county board of supervisors to refer a matter that is the subject of an initiative to a county agency for study, including a study of the effect of the proposed initiative on the internal consistency of the county's general and specific plans).

proposed initiative.[62] Some jurisdictions have already employed this practice, and opposing factions in the election certainly can be expected to put information of this type to use in the campaign.[63]

Secondly, if a base of information is made available, means exist for the dissemination of that information – means unique to the local setting. Because the electorate is in many cases relatively small, information can be disseminated by channels not easily employed in state elections, such as pamphlets, telephoning, and door-to-door personal solicitations. Informal political networking on a small scale, such as block meetings or civic association meetings, can act as conduits for information. Local newspapers are also likely to cover controversial initiatives or referenda votes carefully and in some depth.[64] Debates among proponents and opponents also can be well attended and receive extensive attention.[65]

While no empirical work has documented the extent to which these mechanisms are used at the local level, considerable anecdotal evidence exists of their use. These mechanisms may well ensure that voters receive at least parts of the information necessary for voting. Assuming the information was sufficient, the third problem arises: will the information be accurate enough to form the basis for a considered decision?

Even if sufficiently detailed information is generated about a ballot measure, little control exists over whether that information is accurate or used appropriately. Fact-finding by voters during an election is a rough-and-tumble process in which opinion and fact are not necessarily congruent. Proponents and opponents can take facts out of context, and responses to inaccurate state-

62. *See* Friends of Sierra Madre v. City of Sierra Madre, 90 Cal. Rptr. 2d 855 (Ct. App. 1999) *review granted* (March 1, 2000) (No. S085088) (whether environmental impact report was required before measure was placed on the ballot).

63. *See, e.g.,* CITY OF CULVER CITY, CALIFORNIA, INITIATIVE IMPACT ANALYSIS: A PROPOSED INITIATIVE THAT PLACES CERTAIN RESTRICTIONS ON DEVELOPMENT NEAR SOME SCHOOLS, LIMITS HEIGHTS NEAR SOME SCHOOLS AND ELIMINATES THE EXISTING HEIGHT LIMIT EXCEPTION PROCESS (January 12, 2000) (copy on file with author). The document was prepared by the city staff at the instruction of the City Council and contains a variety of information that would be relevant to voters.

64. *See* Building Industry Assn. of Southern California v. City of Camarillo, 718 P.2d 68, 75 (Cal. 1986) (noting that "prior to its adoption, Measure A was debated at public forums and in the newspapers.").

65. *See, e.g.,* Tom Chorneau, *Measure I Has Fervent Believers on Both Sides. Debate Over Rural Heritage Initiative Draws Crowd of 300 to Junior College*, SANTA ROSA PRESS DEMOCRAT, Oct. 26, 2000, at B1.

ments may not reach the same audience that heard the initial statement.

Some steps could be taken to assure better accuracy. More control could be exercised over the official filings required for measures placed on the ballot. One might propose a heightened standard in which petitions circulating initiatives or referenda, or ballot arguments, are reviewed for accuracy.[66] Defining such a standard, however, would be quite difficult. In the election context, supporters and opponents of the initiative might have a first amendment right to employ hyperbolic language designed to move voters toward their position.[67] Furthermore, making courts the arbiters of arguments in the highly politicized atmosphere of such elections does not seem practical.

This is not to say that truth and accuracy in elections are entirely sacrificed in an election. It does suggest, however, that nuanced decisionmaking where individual facts are critical to outcomes cannot be expected. This outcome is important in considering the types of issues that might be suitable for direct democracy. For example, broad policy choices involving conflicting values will be more appropriate for direct democracy than choices involving individual properties, where small facts are likely to be much more important.

A final prong of the accuracy issue concerns the quality of the drafting of initiatives.[68] Critics argue that initiatives are poorly drafted and marshal considerable evidence to support their claim.[69] The problem is particularly acute at the local govern-

66. *See* San Francisco Forty-Niners v. Nishioka, 89 Cal. Rptr. 2d 388 (Ct. App. 1999) (court affirmed trial court's decision striking initiative from the ballot, finding that it contained intentional falsehoods designed to mislead the voters). *See also* Citizens for Growth Management v. Groscost, 13 P.3d 1188 (Az. 2000) (finding that Legislative Council's "impartial" analysis was not neutral but "attempts to persuade the reader at the very outset that the present laws adequately address the perceived problems that the initiative seeks to remedy.").

67. *See, e.g.* Brown v. Hartlage, 456 U.S. 45, 53-54 (1982) (state must have a compelling interest to restrict offer of ideas by candidate to voters).

68. Because referenda consider measures drafted pursuant to the normal governmental processes, the quality of this drafting is normally not an issue.

69. DUBOIS & FEENEY, *supra* note 1, at 114 ("While there is no definitive study comparing the technical quality of the drafting of initiative and legislative measures, the weight of opinion both in published analyses and in discussions that the authors have had with knowledgeable practitioners is that many initiatives are poorly drafted."); CRONIN, *supra* note 6, at 229 ("Critics say, with some justification, that direct legislation is less well prepared than institutional legislation . . . This problem could be remedied, and safeguards have been adopted in some states, but the number of judicial reversals of initiatives attests to the reality that direct democracy efforts sometimes produce poorly drafted legislation.").

ment level where citizens groups, perhaps recently formed, may lack the resources to hire the legal or planning help necessary ensure competent drafting.[70] The quality of the drafting is particularly important for initiatives, because an initiative cannot be altered once it is on the ballot.

The problem of drafting deficiencies is, once again, a generic one that plagues initiatives. Various suggestions have been offered about how to infuse drafting expertise into initiative measures, such as making state government resources available on an impartial, technical basis.[71] These suggestions are sensible, and no reason appears why the quality of land use initiatives cannot be improved. Technical drafting problems need not be an unsolvable problem of direct democracy, but improving drafting requires an institutional effort at improving the direct democracy process.

b. The Expertise Objection

A second widespread objection to making land use decisions by direct democracy is that they require expertise that voters do not and cannot possess.[72] Critics argue that only the professional

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70. *See* GERBER, *supra* note 16, at 39 ("Because drafting an initiative requires obtaining and paying for expertise, the hurdle at the drafting stage can be considerable for some groups."). *But see* SCHMIDT, *supra* note 14, at 34 ("Initiatives are usually drafted more carefully than bills in legislatures because sponsors cannot (except in Massachusetts) make any changes once their petition drive begins.").

71. *See, e.g.*, Hans A. Linde, *Taking Oregon's Initiative Toward a New Century*, 34 WILLAMETTE L. REV. 391, 406-07 (1998) (suggesting methods for improvement of drafting at the state level); In re The Title v. John Fielder And Elise Jones, 12 P.3d 246, 251 (Colo. 2000) (Holding that initiative proponents were not required to resubmit draft of growth management initiative to initiative title setting board and noting that "[t]he requirement that the original draft . . . be submitted to the legislative council and office of legislative legal services permits the proponents to benefit from the experience of experts in constitutional and legislative drafting. . . ." Citing In re Proposed Initiative Constitutional Amend. Concerning Limited Gaming in the *Town of Idaho Springs*, 830 P.2d 963, 966 (Colo. 1992)).

72. *See* Leonard v. City of Bothell, 557 P.2d 1306, 1311 (Wash. 1976) (en banc) ("Amendments to the zoning code or rezone decisions require an informed and intelligent choice by individuals who possess the expertise to consider the total economic, social, and physical characteristics of the community. Respondent's planning commission and city council normally possess the necessary expertise to make these difficult decisions."); Wilson v. Manning, 657 P.2d 251, 252 (Utah 1982) ("[t]he importance of professional expertise and community-wide perspective in zoning matters, given effect in common requirements for public hearings, planning commission recommendations, and the establishment of comprehensive plans, weighs against the piecemeal changes that can result from allowing voters to veto zoning actions by referenda.").

planning staff of the jurisdiction,[73] and perhaps the planning commission,[74] has the requisite skills to address land use issues.[75] For example, one commentator suggests that only professional planners should formulate planning and zoning laws based on "independent 'scientific' criteria."[76]

Use of direct democracy plainly diminishes the influence of professional planning staff and planning commissioners at the local government level, since their views can be bypassed.[77] Notably, however, one assumption underlying this objection is that the use of direct democracy politicizes a decision that otherwise is a "technical" one. Another is that, in the usual land use process, the city council or other elected group of officials actually relies upon staff and planning commission expertise.[78] Both assumptions merit closer examination.

Planning staff members undeniably perform some technical functions in analyzing a land use proposal, including gathering information about the proposal's impacts and determining its consistency with municipal policy. But in some senses the structure of land use law reflects an idealized vision of that planning

73. *See* Andover Development Corp. v. City of New Smyrna Beach, 328 So.2d 231, 235 (Fla. App. 1976) *disapproved* in Florida Land Co. v. City of Winter Springs, 427 So. 2d 170 (Fla. 1983).

74. State ex rel. Childress v. Anderson, 865 S.W.2d 384, 389 (Mo. App. 1993) ("[T]o permit zoning measures to be enacted pursuant to the initiative process would circumvent the procedure set forth in the charter, providing for examination and recommendation by the [planning] commission.").

75. Aaron J. Reber & Karin Mika, *Democratic Excess in the Use of Zoning Referenda*, 29 URB. LAW. 277, 291 (Spring 1997) (arguing that Supreme Court decisions prior to *City of Eastlake* "properly placed those types of [land use] decisions in the hands of those in the best position to make them—land planning experts."). *See also* Associated Home Builders etc. Inc. v. City of Livermore, 557 P.2d 473 (Cal. 1976) (Clark, J. dissenting) ("any change in zoning ordinances is not to be made until experts in the field have had an opportunity to evaluate the effects of the change . . . ."); Sager, *supra* note 51, at 1423 ("[local legislative and administrative] bodies—the convention runs—combine the virtues of popular will, technical expertise, and the capacity to plan comprehensively along both temporal and geographic axes . . . .").

76. Nitikman, *supra* note 11, at 498 (1988). The expertise objection is often leveled against direct democracy generally, not just in the land use context. *See* ZIMMERMAN, *supra* note 15, at 57 (listing as one objection to the use of the referendum that "[t]he electorate is not sufficiently informed to deal rationally with complex and technical questions.").

77. Rosenberg, *supra* note 11, at 412 (Referendum zoning "reduces the influence of professional city planners in the municipal land use regulatory system because all zoning changes would require voter ratification.").

78. *See* Comment, *Land Use By, For, and of the People*, *supra* note 11, at 99 ("Once a municipality acquires power to zone, the city council enacts ordinances, relying on planning commission hearings and analysis in its decisions.").

function. The ideal centers on the assumption that decisionmakers impartially consider land uses and, in doing so, elevate technical planning "expertise"—a term largely left undefined by the critics of direct democracy—over political needs.[79] In this sense, the vision can be traced to the outlook held by the originators of legally required zoning and planning early in the twentieth century, who thought of "good" land use decisionmaking as an apolitical exercise.[80]

This vision of planning, however, certainly does not always correspond well with the real world. Even if it is assumed that technical "expertise" is itself value-neutral, the land use activities of many planners today are not. Instead, these activities are often highly politicized.[81] Some observers have argued that, as a result of politicization, planners in many cases have become overly favorable toward development requests.[82]

All planners certainly do not act in such a fashion; many view their role as protecting the public interest and act upon that be-

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79. *See* The Great Atlantic and Pacific Tea Co., Inc. v. Borough of Point Pleasant, 644 A.2d 598, 600 (N.J. 1994) (the land use process "contemplates the rational development of land use, free from undue political influence"); Note, *The Proper Use of Referenda, supra* note 59, at 843 ("Because of experience gained during a council member's tenure in office as well as the city council's association with the local planning authority, the council members are likely to be more familiar with the comprehensive plan than are the voters. Moreover, the city council is bound by an official duty to serve the interests of their city, including those embodied as objectives of the city's comprehensive plan.").

80. ERIC DAMIEN KELLY & BARBARA BECKER, COMMUNITY PANNING: AN INTRODUCTION TO THE COMPREHENSIVE PLAN 51 (2000) ("All of our zoning laws today and most of our planning laws trace their history to the Standard Zoning Enabling Act and the Standard City Planning Enabling Act. One of the fundamental concepts included in the system was that of removing planing from politics.").

81. *Id.* at 52 ("Thus, despite the best efforts of the government reforms, planning remains political with a small *p*. At its best, it transcends politics and builds consensus across political coalitions. At its worst, it can become so embroiled in local political issues that it loses its credibility and effectiveness."); Richard Peiser, *Who Plans America? Planners or Developers?* J. AM. PLAN. ASSN. 496, 500 (1990) ("One of the most disheartening trends in recent years for both planners and developers is the politicization of land use and planning decisions. Even where the optimal land use patterns are clear, actions by opposing political interests often make them hard to achieve.").

82. *Id.* at 496 ("Critics will argue that planners are too close to developers already and are abrogating their role as watchdogs of the public interest . . . But [planners'] influence in effecting change is in recession. They no longer create the grand design. Whether by cause or effect, the purposefulness that attracted so many people to the planning profession in the 1950's and 1960's seems to be missing today. What happened to planning's missionary zeal? Has it disappeared because planners have less impact on city planning than developers?").

lief.[83] The point is simply that, in analyzing the expertise objection, it is erroneous to compare direct democracy to a "normal" land use regulatory process in which it is assumed that planning expertise is employed to the exclusion of politics.[84] In the real world, the politics of land use play a critical role in development decisions, just as they do when direct democracy is employed to make those decisions.[85]

Interestingly, even many professional planners no longer see providing technical planning expertise as their principal role, particularly in instances where the land use proposal in question is controversial. Instead, they envision that role primarily as facilitating acceptable outcomes.[86] This view partly stems from a recurring crisis in the planning profession concerning professional effectiveness. Many planners have lost faith in the efficacy of their efforts to actually affect land use outcomes—a suggestion that calls into question the underlying assumption of the expertise objection that planners' expertise is actually used. This skepticism is reflected in academic criticism of local government plan making and implementation.[87] Postmodernist thinking about

83. *See id.* at 497 (The planners view themselves as "represent[ing] the public interest, the generations yet unborn. They give political voice to the poor and the powerless. They provide a balance to the power of the rich and influential [developers].").

84. A classic case demonstrating the interaction of planning and politics is 216 Sutter Bay Assocs. v. County of Sutter, 68 Cal. Rptr. 2d 492 (Ct. App. 1997). After a majority of the board of supervisors passed planning amendments calling for greatly increased growth in the county, a referendum overturned those amendments. The board members who had favored the amendments, and who were soon to be replaced by a majority of members with very different views on growth, then approved a series of hastily drafted development agreements that would have allowed developments of numerous projects despite the political change in the entering board's composition. When the new board majority took office, those members promptly repealed the agreements.

85. Howell S. Baum, *Caring for Ourselves as a Community of Planners*, 55 J. AM. PLAN. ASS'N 64, 64-67 (1990) (observing that planners feel more comfortable in a technical world than a political world, where many well-organized interests make conflicting demands on politically vulnerable planning agencies).

86. William C. Baer, *General Plan Evaluation Criteria: An Approach To Making Better Plans*, 63 J. AM. PLAN. ASS'N 329, 333 (1997) ("In a postmodern conception of the plan: where does one look for an outcome if the plan itself is conceived as symbolic or expressive or merely a way station to the larger goal of achieving dialogue about community?").

87. *See, e.g.*, Ernest R. Alexander and Andreas Faludi, *Planning and Plan Implementation: Notes on Evaluation Criteria*, 16 ENV'T & PLAN. B: PLAN. & DESIGN 127-40 (1989).

planning goes even further, rejecting the very idea of a plan as a technical document.[88]

The doubts of planning professionals about their role in the land use process certainly do not mean that no expertise is lost when direct democracy replaces formal planning in making land use decisions. The electoral process emphasizes simplifying issues to appeal for votes, an effort that devalues technical details. The planners' doubts discussed above, however, do suggest that the normal land use process does not employ technical expertise in the idealized fashion that critics of direct democracy assume. Thus, the actual loss of expertise may not be nearly as great as objectors to direct democracy claim, an important factor to consider in weighing that loss against any benefits that may accrue from the use of direct democracy in the land use context.

c. The Process Objection

Many state court decisions have invalidated initiatives on the ground that the initiative process is inconsistent with the procedures set forth in state law for the enactment of zoning ordinances or other legislative-type land use approvals.[89] In particular, the courts cite the lack of public hearings in the initia-

88. *See* Robert A. Beauregard, *Without a Net: Modernist Planning and the Postmodern Abyss*, 10 J. PLAN. EDUC. & RES. 189, 193 (1991) ("[W]e only know the world through our arguments about it, and, therefore, that knowledge is not necessarily a reliable guide to effective action. Planners cannot be rational in a functional, that is modernist, sense.").

89. *See, e.g.*, Heitman v. City of Mauston Common Council, 595 N.W.2d 450, 457 (Wis. Ct. App. 1999) ("Heitman's proposed initiative is an invalid use of the initiative process because the zoning enabling act has established procedures and standards for zoning and Heitman may not modify them by zoning through the initiative process."); L.A. Ray Realty v. Town Council of Town of Cumberland, 603 A.2d 311, 315 (R.I. 1992) ("The safeguards and procedural requirements incident to the adoption or amendment of subdivision regulations or zoning ordinances contained in the general enabling acts are inconsistent with and incompatible with the exercise of direct legislation by the voters through the initiative or referendum process."); Gumprecht v. City of Coeur d'Alene, 661 P.2d 1214, 1215 (Idaho 1983) ("[W]e hold that the utilization of an initiative process for zoning matters is inconsistent with the comprehensive statutory procedures mandated by the Local Planning Act of 1975 to be followed in enacting and amending local zoning ordinances and is therefore invalid."); Rice v. Stoff, 844 S.W.2d 529, 531 (E.D. Mo. 1992) ("RSMo § 353.060 (1986) mandates a public hearing. . . . This statutory requirement . . . would be short-circuited by the instant initiative. We therefore conclude this situation is not a proper one for the initiative."); Korash v. City of Livonia, 202 N.W.2d 803, 808 (Mich. 1972) ("[T]he amendment to the ordinance, having been enacted by a procedure different from and contrary to the procedure required by the Zoning Enabling Act, is invalid.").

tive process as a fatal defect.[90] Most of these decisions declare that legislative intent compels this conclusion. The courts find that the enactment of these land use procedures indicates a legislative purpose that the initiative shall not be available[91] or that state law preempts the use of the initiative.[92]

The process objection applies differently to the referendum than to the initiative. A referendum challenges a land use decision that the local government has already considered and approved through its normal processes, while an initiative avoids these processes. Thus, the referendum is not inconsistent with the planning procedures required by state law in the sense that the referendum does not prevent these procedures from taking place.[93]

A few courts have held that the initiative process provides the equivalent of a hearing before the city council or local governmental body, and thus, effectively performs the same functions as the procedures employed at the municipal level.[94] That analogy,

90. *See Korash*, 202 N.W.2d at 807 ("The initiative makes no provision that . . . (2) a public hearing be held by the Livonia Planning Commission; (3) a final report be made by the Livonia Planning Commission; (4) publication of notice of hearing be made; (5) a public hearing be held by the Livonia City Council . . . .").

91. *See* Rispo Realty & Dev. Co. v. City of Parma, 564 N.E.2d 425, 428 (Ohio 1990) ("Additional burdens are imposed by the local ordinance that go far beyond what is permitted by the state statutory scheme. The state has legislated the manner and method noncharter municipalities must follow when enacting zoning ordinances.").

92. *See, e.g.*, Transamerica Title Ins. Co. v. City of Tucson, 757 P.2d 1055 (Ariz. 1988) (en banc) (initiative violated state zoning enabling act).

93. Queen Creek Land & Cattle Corp. v. Yavapai County Bd. of Supervisors, 501 P.2d 391, 394 (Ariz. 1972) ("A referendum is distinguishable in effect from an initiative in zoning matters. The referendum stays the effect of the action of the lawmaking body until the electorate has had an opportunity to approve or reject it. It does not change zoning as an initiative would, and the notice and hearing process has been accomplished prior to the referendum."); Florida Land Co. v. City of Winter Springs, 427 So. 2d 170, 173 (Fla. 1983) ("Petitioner, nevertheless, argues that it has been deprived of proper notice and the right to be heard on the subject. However, prior to the time the proposal was submitted to referendum the zoning change was twice the subject of a public hearing pursuant to the statutory procedure under chapter 163, at which the petitioner had the right to speak.").

94. City of Fort Collins v. Dooney, 496 P.2d 316, 319 (Colo. 1972) (concluding that the election campaign was sufficient notice and hearing insofar as the requirements of due process are concerned); Margolis v. District Court, 638 P.2d 297, 305 (Colo. 1991) ("The cities and amici curiae . . . argue that zoning and rezoning by referendum and particularly by initiative violate the Fourteenth Amendment due process rights of the affected landowners to prior notice and a hearing. We do not believe such to be the case. 'The election campaign, the debate and airing of opposing opinions, supplant a public hearing prior to the adoption of an ordinance by the municipal governing body.'") (citations omitted).

however, is strained. The means and level of discourse over a land use proposal in an election are simply not equivalent to the consideration that occurs when a land use proposal is evaluated at a public hearing.[95] The New Jersey Supreme Court rejected an attempt to equate the two sets of procedures more than 25 years ago, and that conclusion is correct.[96]

Because the electoral process for both the initiative and referendum cannot be deemed a substitute for the usual land use regulatory procedures, the process objection must be considered on its merits. Does the lack of process in direct democracy so increase the likelihood of an ill-advised action as to disqualify it as a means of making any land use decision?[97]

Important values certainly are lost when the normal land use process is unavailable. The concept of a public hearing symbolizes a wider variety of activities that occur under the rubric of the hearing process. These include the "give and take" of ideas among interested parties, the ability to float compromise proposals, the imposition of specific mitigation measures to address concerns raised, and the concentration of public concerns in the one specific forum where the actual decision is made.

All of these features tend to limit the possibility of arbitrary or ill-considered action. They force the parties to face facts, to consider the points raised by the opposition, and to compromise.[98] The "all or nothing" nature of the initiative irretrievably destroys

95. Anthony Saul Alperin & Kathline J. King, *Ballot Box Planning: Land Use Planning Through the Initiative Process in California*, 21 Sw. U. L. Rev. 1, 28 (1992) ("[S]ince the law does not require environmental analysis prior to finalizing a ballot measure, some of the implications of such measures may escape consideration.").

96. Township of Sparta v. Spillane, 312 A.2d 154 (N.J. Super. Ct. App. Div. 1973).

97. *See* Note, *supra* note 59, at 819 ("[B]oth permissive and mandatory referenda increase the likelihood of arbitrariness in rezoning decisions by substituting for one decisionmaker, who has a special set of procedural safeguards, another decisionmaker operating under procedures that fail to provide those same protections.").

98. Great Atl. & Pac. Tea Co., Inc. v. Borough of Point Pleasant, 644 A.2d 598, 606 (N.J. 1994) (Stein, J., dissenting):

> [T]he procedure for reviewing proposed zoning amendments . . . involves a lengthy, deliberative process, in which public opinion constitutes but one of many factors that must be considered before a governing body may approve an amendment to a zoning ordinance. The purpose of that elaborate process is to safeguard the public from the effects of arbitrariness and political influence in zoning decisions.

these possibilities,[99] and the referenda make them, if not irrelevant, at least far less important.[100]

However, the process objection is not idiosyncratic to the consideration of land use initiatives. Much the same type of objection can be made to the vast majority of initiatives passed at the state and local levels, as none of them are subjected to the usual public hearing processes before legislative bodies. Indeed, the very purpose of initiatives is to bypass the normal legislative process.[101] Accordingly, in one sense this objection is persuasive only if one is prepared to reject totally the use of initiatives.

Nonetheless, the loss is quite real. The question thus becomes whether the gains generated by the use of direct democracy render this loss acceptable.

2. Evaluation-Centered Objections

a. The Consideration Objection

Assuming that voters have sufficient information to make the policy choice posed by an initiative or a referendum, a next logical question is whether the voters actually consider that information. Some courts[102] and commentators[103] have cited concerns

99. In a few instances the voters have been given a choice between initiatives, usually where the local officials choose to put a "competing" initiative on the ballot. In some sense, the competing initiative can be viewed as a compromise. *See* Jeffrey A. Dubin et al., *Voting on Growth Control Measures: Preferences and Strategies*, 4 ECON. & POL. 191, 195 (1992) ("In recent years there has been a growing tendency, in California at least, for multiple measures concerning the same issue to appear simultaneously on the same ballot."). Still, the choice here is only between two measures; there is no ability to further refine them in response to public comment or other information that becomes available.

100. As one judge put it, because the initiative "is offered to the public on a take-it-or-leave-it basis . . . [it] cannot achieve . . . the fundamental legislative goal of a comprehensive blueprint for physical development formulated through widespread community involvement." DeVita v. County of Napa, 889 P.2d 1019, 1045-46 (Cal. 1995) (Arabian, J., dissenting).

101. *See, e.g.*, West v. City of Portage, 221 N.W.2d 303, 304-05 (Mich. 1974) ("During the latter part of the 19th century, distrust of legislatures reached such proportions that many states, including Michigan, amended their constitutions to provide for the initiative and referendum. The people could thereby initiate needed laws which the Legislature had not been bestirred to enact and could reject unpopular laws which the Legislature, perhaps at the instance of some special interest, had improvidently enacted.").

102. *See, e.g.*, Leonard v. City of Bothell, 557 P.2d 1306, 1311 (Wash. 1976) (en banc) ("In a referendum election, the voters may not have an adequate opportunity to read the environmental impact statement or any other relevant information concerning the proposed land-use change.").

103. *See, e.g.*, CRONIN, *supra* note 6, at 61-62 ("[M]any analysts who study populist democracy practices develop considerable reservations about them after finding

about voter refusal to consider relevant information as a ground for rejecting the use of direct democracy in the land use context.

A closely-related claim is the criticism that the initiative or referendum is not approved or rejected after genuine deliberation. As used in this objection, the word "deliberation" refers to a lack of consideration by the voters about the measure's effects.[104]

The consideration objection differs from the information deficiency objection, discussed above,[105] that occurs when poorly worded ballot measures or materials prevent voters from understanding the measure.[106] The concern underlying the consideration objection is the fear that voters will refuse to consider information even if it is available and accurate.

The consideration objection generally assumes, without much analysis, that the evaluative skills and efforts of legislators are, by comparison, far superior to those of voters. This conclusion may be true, but some have questioned it.[107] However, even if legislators act without evaluating the relevant information, the situation is not improved if voters, given the opportunity to consider the same matter in an initiative election, likewise do not evaluate the information. Elected officials at least face the consequences of their action at the next election; voters, in contrast, have no such accountability.

The question whether voters use available information resources to vote intelligently on initiatives and referenda is part of the larger issue of whether voters in a democracy are able to make reasoned choices.[108] Political scientists evaluating direct

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that citizens and voters often do *not* fully understand the process, frequently vote with limited information, and sometimes vote contrary to their own policy preferences.").

104. *See* Sager, *supra* note 51, at 1414-15 ("[T]here is no genuine debate or discussion, no individual record or accountability, no occasion for individual commitment to a consistent or fair course of conduct.").

105. *See supra* text accompanying notes 56-71.

106. Rosenberg, *supra* note 11, at 432 (empirical study of ballots in Ohio and concluding that "[t]he ballot language employed for land use referenda within the study area was confusing and occasionally incomprehensible"); *see supra* note 102, at 1311.

107. *See* CRONIN, *supra* note 6, at 210 (suggesting that the comparison to legislators is "to a false, ideal standard").

108. *See* ARTHUR LUPIA & MATHEW D. MCCUBBINS, THE DEMOCRATIC DILEMMA: CAN CITIZENS LEARN WHAT THEY NEED TO KNOW? 1 (1998) ("It is widely believed that there is a mismatch between the requirements of democracy and most people's ability to meet these requirements. If this mismatch is too prevalent, then effective self-governance is impossible. The *democratic dilemma* is that the people who are called upon to make reasoned choices may not be capable of doing so.").

democracy generally are quite pessimistic on this point; they find that voters in elections generally are poorly informed about politics.[109] The ray of hope here is research concluding that, at the statewide level, voters can use "cues" as a substitute for actual knowledge and thus cast a vote that accurately reflects their policy preferences.[110] The cues consist of information about a candidate's partisanship, ideology, and history.[111]

In the case of land use decisions by direct democracy, however, the confounding variable is that the vote takes place at the local rather than state level. Not all of the cues available in statewide elections, such as opinion leaders, campaign events, campaign information, statements by people with similar interests, interest group endorsements, and media editorials,[112] will operate at the local level. But some of them, perhaps a majority, will be available, and they will operate at a much more personal level than in

109. *See* CRONIN, *supra* note 6, at 61 (noting that, although political scientists have been divided on the question of voter competence, "most political scientists are skeptical").

110. *See* GERBER, *supra* note 16, at 145 ("A lack of substantive information or the presence of a complex policy issue does not mean that voters cannot make good decisions. Theoretical and empirical research . . . showed the conditions under which voters can make good decisions.").

111. Elisabeth R. Gerber & Arthur Lupia, *Voter Competence in Direct Legislation Elections*, *in* CITIZEN COMPETENCE AND DEMOCRATIC INSTITUTIONS 147 (Stephen L. Elkin & Karol E. Soltan eds., 1999) ("[A] substantial body of research shows how voters in presidential elections adapt to their information shortcomings. . . . For example, presidential campaigns generate volumes of information about a candidate's partisanship, ideology, and history. Some scholars argue that voters can use such cues to successfully emulate the voting behavior they would have exhibited if better informed about other candidate attributes such as policy positions."); *Id.* at 148 (arguing that voters can use elite endorsements and information about campaign substitutes as effective substitutes for more complex information, and since both types of information are and can be made available to direct-legislation voters, "many voters can cast competent votes in direct-legislation elections"). *See also* Samuel L. Popkin and Michael A. Dimock, *Political Knowledge and Citizen Competence*, *in* CITIZEN COMPETENCE AND DEMOCRATIC INSTITUTIONS 117 (Stephen L. Elkin & Karol E. Soltan eds., 1999) ("Voters do not need all the information about their government that theorists and reformers wish them to have, because they learn to use "information shortcuts," easily obtained and used forms of information that serve as 'second-best' substitutes for harder to obtain kinds of data. These shortcuts incorporate learning from past experiences, daily life, the media, and political campaigns . . . ."); Arthur Lupia, *Shortcuts Versus Encyclopedias: Information and Voting Behavior in California Insurance Reform Elections*, 88 AM. POL. SCI. REV. 63, 64 (1994) (suggesting that, under certain conditions, voters can use "information shortcuts" so that "voters who have not acquired encyclopedic knowledge can vote as though they had").

112. These are taken from a longer list of "heuristics" which Lupia and McCubbins identify as "simple means for generating information substitutes." LUPIA & MCCUBBINS, *supra* note 108, at 8.

statewide elections. For example, local voters are much more likely to actually know opinion leaders and makers at the local level than they are at the state level.

Even if these cues are less available at the local level, however, other features of local elections increase the possibility that voters can rationally choose in casting their votes. For example, a local land use initiative is likely to occupy a central place on the ballot. In contrast, the ballot at the state level is increasingly cluttered with numerous initiatives, thus greatly testing the educational capacity of the voter as well as the institutional capability of the system to produce sufficient information on them.[113] Of course, the local voter may have to vote on both statewide and local measures, but the local measure still is likely to stand out on its own. Voters thus may focus more attention on it.

Additionally, an election on a contested land use measure has unique possibilities for energizing local politics in an era of political apathy.[114] Individuals are often passionately concerned about the future of the community in which they live, and an election on a land use question is likely to engage widespread interest, at least if land use measures have not become overly common on the ballot.[115]

In the end, reaching a definitive conclusion about the ability of voters to make rational decisions is not yet possible. By analogy, the available evidence on the behavior of voters when they pass on statewide initiatives certainly raises a substantial question about whether local direct democracy in the land use area will have the benefit of knowledgeable, deliberative voting. At the same time, unique aspects of local elections suggest that local voters in land use matters tend to be concerned and have a significant amount of knowledge about the problem at hand.

b. The Complexity Objection

Another objection is that the making of land use decisions is too "complex" for voter consideration via an "up or down" vote

113. *See* CRONIN, *supra* note 6, at 83 ("Clearly, the number and kinds of issues on the ballot affect the amount and quality of information generally available.").

114. *See* Oren, *supra* note 10, at 93 ("[C]ourts should consider the unique educational and participatory values represented by the initiative.").

115. Hadwiger, *supra* note 25, at 60 ("The topics of local ballot measures differ from statewide ballot measures and often have a greater immediacy to members of the community.").

on an initiative or a referendum.[116] Some critics cite the complexity of the land use decision itself.[117] Others point to the complexity of ballot language,[118] which may reflect the complexity of the underlying land use matter that the voters must consider.

The complexity objection is, once again, an argument raised broadly as a generic criticism of direct democracy, not just at making land use decisions by initiative and referendum.[119] The objection is a serious one. Considerable empirical evidence supports the conclusion that, in general, voters may be unable to deal with the complexity of choices placed before them."[120]

In one sense, the complexity objection in the land use context has elitist overtones; it implies that the average citizen cannot decide the development future of his or her community.[121] As such, the objection sharply conflicts with the general tendency over the last twenty-five years to favor increased citizen participation in land use decisionmaking. According to the theory, citizens have something unique to offer in the way of information and viewpoint.[122] Direct democracy, by definition, would seem

116. DUBOIS & FEENEY, *supra* note 1, at 2 ("Others question the wisdom of the initiative. In their view, societal problems have become much too complicated for the black and white kind of solutions they believe possible through use of the initiative process.").

117. Callies & Curtin, *supra* note 50, at 222 ("[L]and use decisions, particularly as they affect a particular parcel of land, are generally vastly more complex than can be explained in a simple proposition to be voted up or down. To attempt to explain it in depth is to invite ballots that are pages and pages long, and to encourage voting in a marginally informed way.").

118. Reber & Mika, *supra* note 75, at 279 ("With limited voter turnouts and the complexity of ballot language on zoning issues, voters may knowingly or unknowingly regulate a neighbor's property use, and additionally may knowingly or unknowingly hinder the efforts of city planners who have painstakingly attempted to regulate land use in compliance with what would otherwise be regarded as constitutionally acceptable guidelines.").

119. *See* CRONIN, *supra* note 6, at 210 ("Noting that [c]ritics of direct democracy are fond of saying that many issues are too complicated to be decided by a simple yes-or-no –vote," but suggesting that this is "an exaggerated contention—for legislators, judges, and elected public executives are forced, in the final analysis, to make yes-or-no decisions."). *See also* Todd Donovan & Shaun Bowler, *Overview of Direct Democracy*, *in* CITIZENS AS LEGISLATORS: DIRECT DEMOCRACY IN THE UNITED STATES 1, 11 (Shaun Bowler et al. eds., 1998) (noting that objections about "voter competency" were raised in the early 1900's as states debated whether to adopt "direct democracy").

120. *See* Donovan & Bowler, *supra* note 119, at 12-13 (summarizing the studies).

121. Bruce W. McClendon, *An Alternative Proposal*, J. AM. PLAN. ASS'N 224 (1990) (suggesting that those who object to initiatives and referenda "believe that planning is too important to be left to people").

122. *See, e.g.*, Craig Anthony (Tony) Arnold, *Planning Milagros: Environmental Justice and Land Use Regulation*, 76 DENV. U. L. REV. 1, 137-38 (1998) ("Most im-

to be consistent with enhanced citizen participation, since citizens must initiate the initiative and referenda process and will play a key role in the campaign.[123] The complexity objection, however, suggests that this is citizen participation of the wrong kind, because citizens are incapable of either understanding[124] or using the information generated to make an appropriate land use decision.

The underlying question, then, is whether land use decisions are so complex as to be beyond the ken of the average voter. In this respect, critics of direct democracy have not flushed out the complexity objection in much detail. One possibility might be that voters do not understand the full consequences of the decision that is before them. For example, they may not understand the economic repercussions if they adopt a growth control ordinance, or they may not fully comprehend the tax benefits if voters approve a shopping center, and the effect of these benefits on the provision of municipal services. Relatedly, voters may not be able to envision the future so as to project the consequences of their actions, a task in which land use planners specialize.

On the other hand, a useful tool in making land use decisions is the ability to undertake a "site visit." Because local voters can actually see the land in question, they certainly are capable of understanding the existing land use conditions in the particular jurisdiction. Indeed, they *live* those conditions daily. It is their knowledge of existing land use conditions that leads citizens to go through the considerable work necessary to qualify initiatives and referenda for the ballot.

This knowledge constitutes the baseline information necessary for rational decisionmaking about the effects of a vote on a land use matter. The knowledge is important in evaluating the complexity objection. It suggests that most local voters have the basic information needed for any land use decision, and thus the

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portantly, not only does land use planning and regulation theoretically embrace neighborhood-based citizen participation, but empirical evidence shows that citizen participation can make a difference....") (footnote omitted); Richard O. Brooks, *A New Agenda for Modern Environmental Law*, 6 J. ENVTL. L. & LITIG. 1, 4 (1991) (pluralism prevalent in land use regulation "is accompanied by a high degree of participation by citizens in the local land use process").

123. *See, e.g.*, SCHMIDT, *supra* note 14, at 26-27 (citing "Greater Citizen Participation" as a principal argument for initiatives).

124. DUBOIS & FEENEY, *supra* note 1, at 121 ("One critical problem with initiatives today is whether it is possible for the average voter, or even the extremely sophisticated voter, to understand the issues and the policy choices as they are presented on the ballot and in the ballot pamphlet.").

initial information needed to untangle even the most complex land use questions that might appear on a ballot.

Moreover, it is quite clear that a significant percentage of the land use measures considered by voters simply are not overly complex. Indeed, the problem is just the opposite: they are often small-scale decisions, such as rezonings for single pieces of property. As is discussed below,[125] only in rare instances do measures like these have significant policy consequences. Measures of this type may be unsuitable for decision by initiative or referendum for other reasons, such as unfairness to the landowner, but they are not objectionable because of their complexity.

In sum, the complexity objection has some merit. Land use decisions can involve complex analysis, a rational task unsuited to the short attention span of the voter. Nonetheless, as residents of a jurisdiction, voters usually possess the baseline information about the site involved needed to begin consideration of even the most difficult questions. Furthermore, many land use decisions do not involve complicated policy questions, and the complexity objection has little force in these situations.

c. The Balancing Objection

Yet another line of the criticism directed at land use decisionmaking through direct democracy argues that voters are incapable of properly balancing the types of competing considerations that underlie many modern land use decisions. This "balancing" objection is related to the complexity objection. The latter is focused on voter comprehension of issues, while the balancing objection suggests that voters are incapable of objectively weighing factors to properly decide land use issues.

The balancing objection actually encompasses two slightly different strands. One branch of the criticism suggests that the substantive decisions arrived at by voters will often be unwise and at worst will be arbitrary.[126] For example, one critic has suggested that direct democracy is inconsistent with the "wise use of land."[127]

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125. *See infra* text accompanying note 226.

126. *See* Forest City Enters., Inc. v. City of Eastlake, 324 N.E.2d 740, 746-47 (Ohio 1975), *rev'd*, 426 U.S. 668 (1976) (Eastlake ordinance, which had a provision requiring a mandatory referendum on zone changes, "blatantly delegated legislative authority, with no assurance that the result reached thereby would be reasonable or rational.").

127. Callies & Curtin, *supra* note 50, at 222 ("[P]lanning and zoning by popular vote is fraught with peril for the wise use of land . . . .").

The second branch of this objection suggests that voters bring improper prejudices to their evaluation of issues, considering extraneous or irrelevant factors, or giving undue weight to one factor. Thus, in juxtaposing voter decisions with those made by elected officials, one critic characterizes the former as "lean[ing] more heavily toward stable property values and personally pleasing land uses."[128] In contrast, the latter decisions by elected officials are seen as leaning "toward the long-term good of the community."[129] According to others, voters will not properly balance competing objectives,[130] while public officials will do so.[131] The result, so the objection goes, is the increased likelihood of an arbitrary outcome because voters do not have the true public interest in mind, while elected officials do.[132]

At the core of this objection, which applies principally to land use initiatives rather than referenda,[133] is the assumption that an impartial evaluator of direct democracy is capable of discerning the proper "balance," i.e. the appropriate outcome, in particular

128. Kublicki, *supra* note 11, at 155.

129. *Id.*

130. *See* Bldg. Indus. Ass'n of S. Cal. v. City of Camarillo, 718 P.2d 68, 75-77 (Cal. 1986) ("How can one prove that the voters weighed and balanced the regional housing needs against the public service, fiscal, and environmental needs?").

131. Alperin & King, *supra* note 95, at 28 ("Because self-interested persons generally sponsor most land use initiatives, it is less likely that ballot measures, as opposed to regulatory schemes devised by local agencies, will reflect a balancing of competing policy concerns."); *cf.* Kaiser Haw. Kai Dev. Co. v. City and County of Honolulu, 777 P.2d 244, 250 (Haw. 1989) (Nakamura, J., dissenting) ("I neither share the majority's distrust of democracy nor subscribe to the notion that political decisions rendered directly by the electorate invariably are devoid of civic virtue . . . .").

132. *See* ZIMMERMAN, *supra* note 15, at 172 ("The greatest danger associated with the joint use of the direct initiative and the referendum is their potential employment by numerous single-interest groups concerned only with their individual proposals and failing to understand the need for integrating the proposals into logical and consistent policies for the governmental jurisdiction.").

133. Some courts have reasoned that the danger of arbitrary action is less if the referendum rather than the initiative is used. *See* R.G. Moore Bldg. Corp. v. Comm. for the Repeal of Ordinance R(C)-88-13, 391 S.E.2d 587, 590 (Va. 1990) ("The referendum only serves to ratify or reject action taken by elected representatives which has not yet become effective. The original zoning on the landowner's property remains in place; the landowner is merely prevented from obtaining a new use for the land in a different zoning classification. The referendum provisions can never be used to rezone property, so the anticipated danger of 'piecemeal' alterations to the City's comprehensive plan does not exist."). This reasoning is generally logical, provided that the original zoning was not hopelessly out of date or the new zoning measure was not part of a comprehensive overhaul of the zoning in the jurisdiction. In those instances, the use of a referendum to return to the original zoning could be arbitrary.

cases where competing land use considerations are at issue. It also assumes that the evaluator can then compare this proper outcome with the choice by made by the voters, and thereby determine whether voters have acted properly or improperly.

This assumption is doubtful. There is simply no easy way to determine when a land use decision has struck the proper balance between various interests. That goal seems particularly unachievable if the local jurisdiction does not even have a master or general plan in place to guide land use decisions. The plan at least provides a minimum identification of the policy choices that the jurisdiction has made, thus narrowing the parameters in which an appropriate balance may be struck in some situations.

Perhaps the most significant feature of modern land use regulation is the vast scope of discretion exercised by local regulators.[134] Assuming that the relevant facts are properly arrayed for consideration and then actually evaluated, the decisionmaker often is still left with a large amount of discretion in determining an appropriate use of land.[135] Indeed, the existence and exercise of this discretion has been a principal concern of land use commentators.[136]

Determining whether one choice in a land use decision is more reasonable than another (i.e. how the balancing ought to come

134. *See* Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725, 738 (1997) (requirement that landowner must seek a final determination in the land use process before bringing a takings claim "responds to the high degree of discretion characteristically possessed by land use boards in softening the strictures of the general regulations they administer"); Alan Romero, *Two Constitutional Theories for Invalidating Extortionate Exactions*, 78 NEB. L. REV. 348, 358 (1999) ("Ordinarily the government has wide discretion in applying land-use regulations."); James A. Kushner, *Smart Growth: Urban Growth Management and Land-Use Regulation Law in America*, 32 URB. LAW. 211, 211 (2000) ("The combination of vague principles and the extraordinary degree of discretion in the decision-making process makes lawyering ability a critical factor in the land-use field.").

135. One commentator has suggested that "one can determine from the text of a measure whether or not the relevant interests have been balanced." In most situations, however, the text of the matter will reveal which interests have been favored, but it will not reveal whether a proper balancing has occurred. Nikitman also concluded that "[o]bviously, an ordinance adopted by a city council includes intrinsic evidence of balancing, or lack thereof, in transcripts of council meetings." Again, however, the transcript itself will rarely reveal whether the balance struck is appropriate, as decisionmakers are not required to explain orally the reasons for their legislative decisions. Nitikman, *supra* note 11, at 533.

136. Daniel R. Mandelker & A. Dan Tarlock, *Shifting the Presumption of Constitutionality in Land-Use Law*, 24 URB. LAW. 1 (1992) (supporting the increasing tendency of judges to refuse to follow the traditional presumption that local land use decisions are constitutional, a tendency that has arisen in response to perceived abuses of discretion by regulators).

out) is not impossible in all cases. However, that task cannot be carried out solely by considering the information available to the decisionmaker. A land use decision may be termed desirable, or undesirable, only by applying normative criteria to evaluate that decision.[137] Thus, before it can be concluded that the "balance" struck by the voters in an election is unreasonable, one must first identify the criteria used to evaluate that balancing. Most criticisms of the balancing carried out by voters make no attempt to do so.

The second branch of the balancing objection, the allegation of improper voter influences, focuses on voters' motivations. Because determining the reasonableness of the outcome—the actual balance struck—is difficult, one might use voters' motivations as a surrogate for determining reasonableness. If voters have improper motivations, the analysis would conclude that the outcome of the voting was *per se* invalid.

Such an inquiry, however, raises significant questions. First, legislative motivations are normally deemed irrelevant to the determination of the validity of legislation for a variety of reasons.[138] In the case of land use decisions, one of those reasons is particularly important: a legislative outcome might be acceptable from a policy standpoint even if the legislators' motivations were suspect. In the case of land use elections, the old aphorism that voters could be "right for the wrong reasons" might apply.

Assuming that an inquiry into voter motivation is allowable, the question then becomes whether those motivations can be identified. There is no question that voters in land use elections have motivations, but empirical evidence on those motivations is quite thin. In particular, there is no evidence that voters passing on land use propositions repeatedly act from improper purposes. Thus, broad conclusions about voters' "improper" motivations stand on shaky ground.

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137. *See* Donovan & Bowler, *supra* note 119, at 20 ("But what is responsible public policy? It is easier to document responsiveness—in terms of who uses the process, how people are motivated to vote, which things pass—than it is to assess how responsible the outcomes might be.... There is simply no easy, straightforward way to define responsible policy without offering normative considerations.").

138. *See, e.g.*, Kuhn v. Dep't of Treasury, 183 N.W.2d 796, 798-99 (Mich. 1971) ("Courts are not concerned with the motives which actuate the members of the legislative body in enacting a law but only in the results of their actions.") (quoting C.F. Smith Co. v. Fitzgerald, 259 N.W. 352, 360 (Mich. 1935)); Brown v. City of Lake Geneva, 919 F.2d 1299, 1302 (7th Cir. 1990) (motives of legislators are irrelevant to rational basis scrutiny).

There does exist, however, some secondary knowledge about the voters themselves that can shed some light on this objection. First, supporters of recent land use ballot measures—usually ones that attempt to restrict growth—apparently represent a broad range of political views, not just a single political or ideological motivation.[139] In political parlance, land use decisions apparently do not sharply "lean" Democratic or Republican.

Secondly, citizens utilizing the initiative and referendum cite voter dissatisfaction with the overall effect of land use decisions made in their jurisdiction as a principal motivation for their resort to these devices.[140] The employment of direct democracy reflects citizen displeasure with local government officials who make the land use decisions.[141]

The voters, then, are concerned with the impacts of development and believe that these impacts occur because the land use decisions of local elected officials are skewed in favor of development. In other words, local elected officials are not exhibiting the type of "balance" that would occur if they were impartially and evenhandedly considering land use decisions.

Does any evidence support the conclusion that local elected officials are not acting evenhandedly? The traditional political theory of municipal actions would reject such a conclusion. That theory posits a pluralist model in which various interest groups

139. Glickfield et al., *supra* note 47, at 136 ("There are some indications that voters supporting recent ballot measures have tended to represent broad-based societal groups, transcending political and economic categories."). Another study found that voters with liberal/environmentalist political leanings are more supportive of such measures but that "preferences over growth control are a function of material interests." Dubin et al., *supra* note 99, at 209. The authors note that "previous studies have hardly yielded an unbroken pattern of support" for their hypothesis that "homeowners are more likely than renters to support growth controls." *Id.* at 197.

140. Callies & Curtin, *supra* note 50, at 222 (citing "outrage over particularly sensitive decisions, frustration over rampant and seemingly unplanned development, or anger at seemingly unresponsive officials over the inability of communities to provide the necessary infrastructure to support new development."); *See* CAVES, *supra* note 12, at 40-41 ("Ultimately, a list of reasons behind the increased use of ballot box planning would be endless. However, it can be stated that citizens are becoming increasingly upset with traffic congestion and land use changes that propose to either increase density or alter an area's quality of life. In the end, citizens will turn to the ballot box if they feel the elected politicians are ignoring their opinions, or if they feel that some activity or activities will negatively impact their lives.").

141. Rosenberg, *supra* note 11, at 426 (referendum zoning requirements "reflect a lack of trust in the judgment of local elected officials").

compete with one another for influence at the local level.[142] In a government possessing widespread discretionary authority, various groups vigorously seek power, and this very competition ensures that none can become overly dominant.[143]

However, an influential 1976 article[144] followed by a 1987 book[145] offered a sharply contrasting model of local government operation. The model places growth at the center of modern local politics: "[T]he political and economic essence of virtually any given locality, in the present American context, is growth."[146] The theory posits that people and organizations with interests in "place" seek to maximize "exchange values" by "attracting investment to their sites, regardless of the effects this may have on urban residents."[147] As a result:

> [T]he pursuit of exchange values so permeates the life of localities that cities become organized as enterprises devoted to the increase of aggregate rent levels through the intensification of land use. The city becomes, in effect, a "growth machine." The growth ethic pervades virtually all aspects of local life, including the political system, the agenda for economic development, and even cultural organizations . . . .[148]

The shared value of the desire for growth, as this theory asserts, creates consensus among a range of elite groups within the

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142. *See, e.g.*, EDWARD C. BANFIELD, POLITICAL INFLUENCE (Free Press ed., 1965) (1961); ROBERT ALAN DAHL, WHO GOVERNS? DEMOCRACY AND POWER IN AN AMERICAN CITY (1961).

143. John R. Logan et al., *The Character and Consequences of Growth Regimes: An Assessment of Twenty Years of Research*, *in* THE URBAN GROWTH MACHINE: CRITICAL PERSPECTIVES, TWO DECADES LATER 73, 74 (Andrew E. G. Jonas & David Wilson eds., 1999):

> [P]olitical scientists . . . viewed the city as a bastion of American pluralism. One city might be run by a political machine and another led by an entrepreneurial mayor, but in the end one could count on the multiplicity of issues and fragmentation of elites to prevent any single coalition from dominating a locality. Cities varied in the extent of pluralism, to be sure, and a task of political sociology was to explain the social roots of this variation. Yet the main paradigm was well established . . . . (citation omitted).

144. Harvey L. Molotch, *The City as a Growth Machine: Toward a Political Economy of Place*, 82 AM. J. SOC. 309 (1976).

145. JOHN R. LOGAN & HARVEY L. MOLOTCH, URBAN FORTUNES: THE POLITICAL ECONOMY OF PLACE (1987).

146. Molotch, *supra* note 144, at 309-10.

147. Molotch, *supra* note 145, at 50 ("It has not been very apparent from the scholarship of urban social science that land, the basic stuff of place, is a market commodity providing wealth and power, and that some very important people consequently take a keen interest in it.").

148. LOGAN & MOLOTCH, *supra* note 131, at 13.

city.[149] These elites then "use their growth consensus to eliminate any alternative vision of the purpose of local government or the meaning of community."[150]

This model, known in the literature as the "growth machine" model, has at its core a central, simple insight: "The people who use their time and money to participate in local affairs are the ones who—in vast disproportion to their representation in the local population—have the most to gain or lose in land-use decisions."[151] Under the current structure of local government prevalent in the United States, regulatory authority over land use is the principal power remaining within the discretion of local government. Thus, business people concerned with land are highly motivated to organize politically as a means of affecting those land use decisions.[152] They will, for example, support local officials through substantial campaign contributions.[153] Other participants in local government have a less direct interest in the

149. Thomas R. Dye, *Community Power and Public Policy*, *in* COMMUNITY POWER: DIRECTIONS FOR FUTURE RESEARCH 29, 31 (Robert J. Waste ed., 1986) ("[T]hese community elites . . . share a consensus about intensifying the use of land."); Gary P. Green et al., *Local Dependency, Land Use Attitudes, and Economic Development: Comparisons Between Seasonal and Permanent Residents*, 61 RURAL SOC. 427, 428 (1996) ("According to growth machine theory, land-based elites, such as local businesses and real estate developers, are active promoters of growth because they benefit from the increasing exchange value of land.").

150. Dye, *supra* note 149, at 51 (In that sense, these local "elites" are markedly different from those seeking power at the national level.). *See* G. William Domhoff, *The Growth Machine and the Power Elite*, *in* COMMUNITY POWER: DIRECTIONS FOR FUTURE RESEARCH 53, 56-57 (Robert J. Waste ed., 1986) ("A local power structure is an aggregate of land-based interests that make their money from the increasingly intensive use of their land. Contrary to what some of us used to think, it is not a junior-sized edition of the national-level power elite, which is rooted in a nationwide corporate community that sells goods and services for a profit.").

151. LOGAN & MOLOTCH, *supra* note 145, at 62.

152. Andrew E. G. Jonas & David Wilson, *The City as a Growth Machine: Critical Reflections Two Decades Later*, *in* THE URBAN GROWTH MACHINE: CRITICAL PERSPECTIVES, TWO DECADES LATER 3 (Andrew E. G. Jonas & David Wilson eds., 1999). *See also* Harvey Molotch & Serena Vicari, *Three Ways to Build: The Development Process in the United States, Japan, and Italy*, 24 URB. AFF. Q. 188, 190 (1988):

> Unlike ordinary people who own only the house in which they live, property entrepreneurs invest substantial time and financial resources in structuring governmental decisions that affect their holdings. Given the opportunities to get rich through changes in spatial relations, those with property interests remain the most consistently motivated and powerful urban actors.

153. Jonas & Wilson, *supra* note 152, at 3 ("Business people's continuous interaction with public officials (including supporting them through substantial campaign contributions) gives them *systemic* power"). *See also* LOGAN & MOLOTCH, *supra* note 145, at 67 ("Virtually all politicians are dependent on private campaign financing, and it is the real estate entrepreneurs—particularly the large-scale structural

decisions of local government officials, less ability to organize, or less resources. As a result, they are not represented in the local political structure to the same extent as those whose purpose is to promote the development of land.[154]

In short, "political structures are mobilized to intensify land uses for private gain of many sorts,"[155] and this outcome affects the planning process.[156] Planning is not an inherently neutral endeavor. Because of their political power, elites with political control are necessarily favored as this process unfolds,[157] and they will play a leading role in it.[158]

The growth machine model is not universally accepted.[159] Some criticisms of the theory have been offered,[160] and during

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speculators—who are particularly active in supporting candidates.") (citations omitted).

154. Green et al., *supra* note 149, at 428 ("Local residents, primarily homeowners, who are more interested in the use-value of land frequently are opposed to, or at least less supportive of, growth.").

155. LOGAN & MOLOTCH, *supra* note 145, at 65.

156. John R. Logan et al., *The Character and Consequences of Growth Regimes: An Assessment of Twenty Years of Research*, *in* THE URBAN GROWTH MACHINE: CRITICAL PERSPECTIVES, TWO DECADES LATER 73, 80 (Andrew E. G. Jonas & David Wilson eds., 1999) ("The bureaucracy has been typically portrayed [in the academic growth machine literature] as a stabilizing force in pro-growth regimes, maintaining a predictable tilt in favor of development proposals despite minor shifts in the governing coalition.").

157. *Id.* at 157 (concluding that "[z]oning restrictions provide for 'symbolic rituals' in a 'zoning game' that inconveniences, but typically does not thwart, the entrepreneurs willing to invest time and money in the local political process").

158. Kee Warner & Harvey Molotch, *Power to Build: How Development Persists Despite Local Controls*, 30 URB. AFF. REV. 378, 394-95 (1995) ("The larger development companies have staff committed to achieving political goals.... Smaller development firms and their consultants are active in support organizations such as the building industry associations, chambers of commerce, local development authorities, boards of realtors, and ad hoc associations. In part through these groups, they gain appointments to various commissions and task forces that also help fashion local attitudes and policies.").

159. *See* THE URBAN GROWTH MACHINE: CRITICAL PERSPECTIVES, TWO DECADES LATER (Andrew E. G. Jonas & David Wilson eds., 1999) for an overview of both the development of and the criticism of the growth machine theory. *See also* Arnold Fleischmann & Carol A. Pierannunzi, *Citizens, Development Interests, and Local Land-Use Regulation*, 52 J. POL. 838, 840 (1990) ("There are conflicting assertions about how much influence citizens and business interests have on the local governing body's rezoning decisions."). The authors also conclude that "citizen advisory boards can have a significant effect on the behavior of local governing bodies," a conclusion "contrary to the general finding that public hearings have little impact on policy decisions." *Id.* at 848-50.

160. *See, e.g.*, Albert Schaffer, *The Houston Growth Coalition in "Boom" and "Bust"*, 11 J. URB. AFF. 21, 35 (1989) ("Growth machine theory, which emphasizes consensus on growth's desirability, overlooks several possible areas of conflict among coalition participants.").

the period since the theory was first published, other approaches to urban politics have been suggested.[161] Furthermore, citizen opposition to growth has greatly increased over the past two decades, a development suggesting that the growth coalition's power has waned, at least to some degree.[162]

In short, the growth machine theory has not been proven true,[163] and perhaps it is not capable of definitive "proof." As a theory,[164] however, it has proved remarkably influential among academics as an explanation for the actions of local governments. As one recent work notes, "There is a remarkable consensus today among urban theorists that growth is at the core of local politics."[165]

Furthermore, the theory comports well with the nature of the power now placed at the local government level. In the late twentieth century, a variety of developments have limited the authority of local governments. For example, limits on budgetary resources[166] have constrained local power, a development in some states ironically caused by use of the initiative. At the same time, local government authority over land use has mark-

161. *See, e.g.*, Clarence N. Stone, *Urban Regimes and the Capacity to Govern: A Political Economy Approach*, 15 J. URB. AFF. 1 (1993) (suggesting an "urban regime" theory).

162. *See* Robyne S. Turner, *Growth Politics and Downtown Development: The Economic Imperative in Sunbelt Cities*, 28 URB. AFF. Q. 3 (1992) (suggesting a continuity of regimes). *See also* Alan DiGaetano & John S. Klemanski, *Restructuring the Suburbs: Political Economy of Economic Development in Auburn Hills, Michigan*, 13 J. URB. AFF. 137 (1991).

163. Logan, *supra* note 143, at 75 ("[W]e find considerable evidence for the influence of pro-growth coalitions in local government, particularly in places where their potential opponents lack the resources for effective mobilization. But their impact on development within their jurisdictions has not been clearly documented. We suggest an alternative hypothesis: that the principal effect of growth machines is to bend the policy priorities of localities toward developmental rather than redistributional goals."); *See also id.* at 92 ("[W]e have to take seriously the possibility that growth regimes and growth policies do not affect development outcomes."); Terry Nichols Clark & Edward G. Goetz, *The Antigrowth Machine: Can City Governments Control, Limit or Manage Growth?*, *in* URBAN INNOVATION: CREATIVE STRATEGIES FOR TURBULENT TIMES 105 (Terry Nichols Clark ed., 1994).

164. Harvey Molotch, *The Political Economy of Growth Machines*, 15 J. URB. AFF. 29 (1993) ("The argument for the growth machine model is empirical; it explains a lot.").

165. Logan *et al.*, *supra* note 143, at 75 ("There is a remarkable consensus today among urban theorists that growth is at the core of local politics . . . .").

166. *See, e.g.*, Suellen M. Wolfe, *Municipal Finance and the Commerce Clause: Are User Fees the Next Target of the "Silver Bullet"?*, 26 STETSON L. REV. 727, 732 (1997) (Noting that "[t]hroughout the 1970s and 1980s, while the public demanded more public services, local government budgets were being limited.").

edly expanded.[167] The result is that local government's principal power is the ability to control land use.[168] As that power has increased, it seems logical to conclude that, as posited by the growth machine model, the influence of individuals whose businesses or livelihood are connected to land development would correspondingly increase.[169]

The growth machine model also correlates well with certain empirical observations about local government practices. For example, observers have noted evidence of some bias in municipal planning bodies toward development,[170] while other commentators have periodically suggested that the real estate industry unduly influences the land use decisionmaking process.[171] There is also at least some evidence of outsized campaign contributions made by development interests to local officials in jurisdictions that are growing.[172]

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167. *See* James E. Holloway & Donald C. Guy, *A Limitation on Development Impact Exactions to Limit Social Policy-Making: Interpreting the Takings Clause to Limit Land Use Policy-Making for Social Welfare Goals of Urban Communities*, 9 DICK. J. ENVTL. L. & POL'Y 1, 98 (2000) (Noting, for purposes of takings analysis, "the expansion of both means and ends by municipal, county, and state governments" and that one example of this expansion "has been the use of land use regulations to implement varieties of social policy goals."); Mandelker & Tarlock, *supra* note 136, at 6 (noting the "vast expansion of sensitive land-use controls" caused by environmental activism).

168. Paul Peterson, CITY LIMITS (1981) ("Urban politics is above all the politics of land use.").

169. DOMHOFF, *supra* note 150, at 62 ("The growth machine hypothesis leads to certain expectations about the relationship between power structures and local government. Obviously, the primary role of government is to promote growth according to this view.").

170. *See* Linda C. Dalton, *The Limits of Regulation: Evidence from Local Plan Implementation in California*, 55 J. AM. PLANNING ASSN. 151, 153 (Spring 1989):

> Studies of planning practice provide some evidence that planning bodies involved in the administration of land use regulations identify more with the industry being regulated than with other interests. . . . Also, the professions involved in physical development have been historically over-represented on "citizen" planning commissions, boards of adjustments, and the like. (citation omitted)

See also id. at 160-61 ("The evidence further supports the designation of land use regulation as a 'balancing policy' that leans toward capture because any serious disruption of the development industry is clearly not in the organizational interest of the local planning agency.").

171. *See* Donald Hagman, *A New Deal: Trading Windfalls for Wipeouts*, 40 PLANNING 11 (Sept. 1974) (suggesting that members of the real estate industry "are unduly interested in public service" and that "too many are there with private interests in public clothing").

172. Ron Curren & Lewis MacAdams, *The Selling of L.A. County*, L.A.WEEKLY, Nov. 22-28, 1985, at 24-49 (detailing contributions of large developers to members of the board of supervisors). *But see* Arnold Fleischmann & Lana Stein, *Campaign Contributions in Local Elections*, 51 POL. RES. Q. 673 (1998) (Examination of dona-

The growth machine model has significant implications for the balancing objection to initiatives and referenda. First, it suggests that initiatives and referenda may act as a political counterweight to the tendency of local politicians to act favorably toward development proposals.[173] That conclusion is important, for, if accurate, it means that the initiative and referenda are being used for precisely the purposes intended by their initiators in the progressive movement: as a means of overcoming partisan interests[174] and concentrations of wealth.[175] Most progressives thought the initiative was valuable because it allowed the enactment of legislation that special interests had blocked.[176] Direct democracy in the land use context may be used for just that purpose.

Second, the land use system requires developers to secure entitlements from the local government and, by applying for those entitlements, developers establish the agenda of issues that the local government must decide.[177] As a result, those who disfavor growth are usually in a defensive posture, forced to object to proposals in which a developer has invested substantial sums of money.[178] The initiative process provides a means of establishing a counter-agenda.

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tion patterns for municipal elections in Atlanta and St. Louis reveal that, while businesses were the main contributors, development interests were not the dominant force portrayed in the urban political economy literature.).

173. Glickfield *et al.*, *supra* note 47, at 132 ("We can speculate that the growth in ballot measures may be a reaction to significant increases in density, congestion, or other indications of change in the immediate environment or community.").

174. Donovan & Bowlers, *supra* note 119, at 2 ("To its advocates, then, direct democracy would provide an end-run around partisan legislatures, mitigating the corrupting influences thought to operate within them . . . .").

175. GERBER, *supra* note 16, at 4 ("Like the Populists, the Progressives were concerned about the increasing political power of concentrated wealth.").

176. DUBOIS & FEENEY, *supra* note 1, at 223 n. 1. The authors note that Hiram Johnson and other early proponents of the initiative saw it primarily as a way of bypassing the legislative process when that process was blocked. The book notes, however, that a recent German observer "found the central feature of the American initiative to be its routine nature".

177. Dalton, *supra* note 170, at 153 ("[A] critical problem with relying on a regulatory approach to plan implementation [is that] it yields ultimate control to private property owners. Because agencies involved in development regulation cannot initiate development, they cannot make it occur where demand is absent. Thus, they adopt a reactive posture, allowing developers to establish the agenda for the planning agency.").

178. *See* Molotch, *supra* note 164, at 32 ("While we tend to think of neighborhood leaders, environmentalists, and 'no growthers' as inciting conflict over land use issues, it is the developers who are omnipresent activists. That we think of develop-

Direct democracy, however, also has another use: it provides a check on the decisionmaking process that can be viewed as skewed because of a structural pro-growth imbalance in local government. The expanded use of the initiative and referendum arguably has a leveling effect that counteracts, at least to some degree, the overly dominant influence of the development industry on local politics.[179] The advantage of those favoring development is largely economic; opponents, in contrast, find their strength in electoral numbers.[180]

To summarize, no evidence has definitively demonstrated that voter balancing of factors in making land use, as a whole, is irrational. Outcomes of local elections on land use issues may not be appropriate in every instance, but without employing normative values to judge those outcomes, they cannot be condemned *per se*.

An examination of voter motivations also suggests that local voters see themselves as counteracting pro-growth forces that have prevailed in the local political process. This motivation is supported by a body of well-accepted political theory about the structure of local government and the motivations of local elected officials. As such, the use of direct democracy at the local level may play the important role of providing a legitimate counter-weight to that aggregation of political power.

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ers' maneuvers as the baseline of urban process, rather than as 'disruption' or even 'activism,' shows just how much we take their political presence for granted.").

179. *See* GERBER, *supra* note 16, at 142 (Suggesting that, "[t]o the extent that one agrees that those same sorts of narrow economic interests are overrepresented in state legislatures today, the normative implication of citizen group dominance [of the direct democracy process] is favorable.").

180. It is also less expensive for the voters to mount an initiative or a referendum than it is to organize and fund a new political slate to replace other board members. Glickfield *et al.*, *supra* note 47, at 133 ("The funding required to pass most local initiatives or referenda is relatively modest, particularly in comparison to the costs of efforts to defeat them or to elect a candidate to public office."). Elisabeth Gerber has used the "profit-maximizing" firm analogy to demonstrate that interest groups will attempt to maximize their political influence by choosing between alternative political strategies. GERBER, *supra* note 16, at 7. She states: "Both interest groups and firms evaluate the expected costs and benefits of alternative courses of action and choose those that promise the greatest net benefits."). Citizens groups face a more difficult time than development interests in seeking to sustain a long-term political agenda by electing officials who are less favorably inclined toward growth. It will appear easier to pass an initiative that seems to lock needed reforms in place, a one-time proposition. Similarly, if the opposition coalesces around a development proposal that has already been approved, the referendum is the only mechanism available. The project will likely be built, or at least be vested, before the next election is held.

C. *Objections To the Effects of Decisionmaking*

The discussion above examined the objections to the use of direct democracy as a process for making land use decisions. In the following section, the article turns to the consequences of those decisions. In particular, it analyzes the objection that direct democracy interferes with plans, is insufficiently flexible, and operates unfairly upon individuals.

1. Planning Interference Objections

One of the principal objections to the use of direct democracy in the land use context is that it interferes with "planning," i.e. the "planning objection." For example, in *Kaiser Hawaii Kai Development Co. v. City and County of Honolulu*,[181] the Hawaii Supreme Court rejected an initiative measure that sought to downzone property located next to a beach park. The court declared that use of the initiative to rezone was "inconsistent with the goal of long-range comprehensive planning."[182]

The concept of "planning," however, is not self-defining. Indeed, planners themselves are in some disagreement as to what the "planning process" is and the role that various parties, including the public, should play in it.[183] Accordingly, to determine whether this objection is valid, some elaboration on what planning means is necessary.

The planning objection could refer to interference with the procedures used in planning, an objection that was discussed above.[184] However, the outcome of the planning process is some sort of plan, and the planning objection instead may posit undue interference with either the plan itself or the implementation of

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181. 777 P.2d 244 (1989).

182. *Id.* at 247. The Court continued:

> Among other things, the social, economic, and physical characteristics of the community should be considered. The achievement of these goals might well be jeopardized by piecemeal attacks on the zoning ordinances if referenda were permissible for review of any amendment. Sporadic attacks on a municipality's comprehensive plan would tend to fragment zoning without any overriding concept. (quoting Township of Sparta v. Spillane, 125 N.J. Super. 519, 526, 312 A.2d 154, 157 (App. Div. 1973).)

183. *See* Linda C. Dalton & Raymond J. Burby, *Mandates, Plans and Planners: Building Local Commitment to Development Management*, 60 J. AM. PLAN. ASS'N. 444 (Fall. 1994) ("theorists and practitioners have waged intense debates over the planning process, emphasizing different roles for professionals, elected officials and the affected public").

184. *See supra* text accompanying notes 87-101.

the plan.[185] The interference could occur in two ways. First, the voters may approve a land use that is inconsistent with the uses called for by the plan. Second, an initiative or a referendum might result in an unacceptable interference with the content of the plan itself. For example, in jurisdictions where a statute establishes the content of the master or general plan, an initiative or referendum might change the plan itself so that the plan no longer meets the minimum statutory requirements. Both possibilities are examined below.

a. The Inconsistency Objection

The voters might make a land use decision that is inconsistent with a general or master plan that the jurisdiction previously had adopted after a comprehensive planning process. The inconsistency could arise because voters are unfamiliar with the plan, a form of the information deficiency objection considered above.[186] Alternatively, the voters may have some knowledge of the plan but choose simply to ignore it,[187] with the result that the plan's efficacy is compromised.[188]

Some states follow the Standard Zoning Enabling Act, which does not mandate a separate master or general plan but requires that zoning be "in accordance with a comprehensive plan."[189] Many states have adopted this language verbatim.[190] If a state does not require a jurisdiction to adopt a separate master or gen-

185. *See* Kublicki, *supra* note 11, at 103 ("It is doubtful that the general electorate of a community possesses sufficient information and understanding of the comprehensive plan with which to enact zoning ordinances that conform to the plan."); Callies, *supra* note 11, at 84 ("[A] number of state courts have recognized that the process of initiative and/or referendum is irreconcilable with plans and the planning process."); Wilson v. Manning, 657 P.2d 251, 254 (Utah. 1982) ("'If each change in a zoning classification were to be submitted to a vote of the city electors, any master plan would be rendered inoperative.'") (quoting Bird v. Sorenson, 394 P.2d 808, 808 (Utah 1964).

186. *See supra* text accompanying notes 56-71.

187. Reber & Mika, *supra* note 75, at 287 ("the general electorate tends not to have any comprehensive plan in mind when voting on a particular issue").

188. *See* Citizens Lobby of Port Huron, Michigan, Inc.v. Port Huron City Clerk, 347 N.W.2d 473, 477 (Mich. Ct. App. 1984) ("To permit the electorate to initiate piecemeal measures affecting land development is as inconceivable to us as allowing the electorate to initiate ordinances affecting the fiscal affairs of the city without regard to the budget or to the overall fiscal program.").

189. Standard State Zoning Enabling Act of 1926, U.S. Department of Commerce, reprinted in 8 Patrick J. Rohan, Zoning and Land Use Controls § 53.01[1] (1998).

190. *See, e.g.*, Ala. Code § 11-52-9 (1994); Colo. Rev. Stat. § 30-28-131 & § 31-23-207 (1986); Mo. Rev. Stat. § 89.350 (1998); Va. Code Ann. § 15.1-447 (Michie 1996).

eral plan, the "plan" may be the comprehensive scheme implicit in the zoning ordinance itself.[191] The planning objection then would posit that an initiative or referendum would interfere with the implicit plan in the zoning ordinance.[192]

In this latter type of jurisdiction, direct democracy is unlikely to permanently imperil the local plan in any realistic sense. Because no separate plan exists, the inquiry into whether a rezoning by initiative or referendum has impaired the plan is necessarily general. The question devolves into a comparison of the land use approved by the voters with the surrounding land uses apparent from the zoning map, and there are no normative standards to utilize in making that comparison. Accordingly, the only real inquiry can be whether the land use approved by the voters is so inconsistent with surrounding land uses as to be labeled arbitrary. Indeed, it may be that the comprehensive plan is impaired only if the court concludes that the voters have approved a use that amounts to spot zoning.[193]

In any event, the voters will possess considerable discretion in deciding land uses. Because of that broad discretion, it is less likely that a voted land use will be "inconsistent" with the plan.

The situation is different if a statute requires a jurisdiction to prepare a separate master or general plan, or if the jurisdiction's planning has resulted in the adoption of such a plan even though no statute mandates it. In this case, the more specific nature of the separate plan will reduce the discretion available to the electorate and thus increase the chance that a land use approved by the voters will impair the plan.

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191. *See, e.g.*, Wolf v. City of Ely, 493 N.W.2d 846 (Iowa 1992).

192. *See* Leonard v. Bothell, 557 P.2d 1306, 1309-10 (Wash. 1976) ("To say that administrative determinations are subject to referendum could defeat the very purposes of zoning. The uniformity required in the proper administration of a zoning ordinance could be wholly destroyed by referendum. A single decision by the electors by referendum could well destroy the very purpose of zoning where such decision was in conflict with the general scheme fixing the uses of property in designated areas.") (quoting Kelley v. John, 75 N.W.2d 713, 716 (Neb. 1956)).

193. Kublicki suggests that a local jurisdiction can meet the planning requirement for a rezoning simply by showing that the planning commission previously considered the rezoning, and the city council in turn took cognizance of that review. If that were true, there is no separate, substantive requirement that the rezoning be "in accordance with a comprehensive plan." "Because city councils consider planning commission hearings and analyses of proposed zonings, it is easy for city council zoning decisions to meet the comprehensive plan requirement." Kublicki, *supra* note 11, at 103. The "comprehensive plan" requirement simply devolves into process and is met by the normal planning commission review of rezonings.

However, other factors bearing on the possibility of unacceptable interference with the plan also must be considered. One factor is a fundamental difference in state laws. Some states require land use decisions to be consistent with the adopted general plan, while others do not.[194] The impact that direct democracy will have on planning will vary depending on whether a state has adopted a consistency requirement.

In those states without such a requirement, local elected officials can disregard the plan without legal sanction. If they do follow the plan in making land use decisions, they might do so only out of respect for the efficacy of the planning process. In particular, if the process involved large numbers of local citizens, elected officials could view the plan as a concrete expression of local wishes. Alternatively, they might simply follow the plan to the point where political considerations rise to a level where they would prevail over the plan's content.

Local voters will stand in precisely the same position as the elected officials. If the voters choose a land use that is inconsistent with the master or general plan, that choice obviously will impair the plan's effectiveness. However, there seems little reason to allow voters less discretion than the discretion given to local elected officials in determining whether to follow that plan if the legislature in the jurisdiction has chosen not to require consistency.

In a jurisdiction that does require consistency between zoning and the general plan, the consistency requirement will limit the discretion of the electorate to adopt uses that conflict with the plan. An initiative or referenda, like any other enactment by a local elected body, will be subject to the statutory requirement of consistency with the plan.[195] Courts have not hesitated to invalidate local initiatives and referenda that are inconsistent with the

194. *Compare* Adelman v. Town of Baldwin, 750 A.2d 577, 585 (Me. 2000) (statute requires "all rezoning ordinances to be consistent with the comprehensive plan adopted by the town's legislative body . . . .") with Smith v. Winhall Planning Comm'n, 436 A.2d 760, 762 (Vt. 1981) (zoning regulations need not be totally consistent with town's plan).

195. Kaiser Hawaii Kai Development Co. v. City and County of Honolulu, 777 P.2d 244, 254 (Haw. 1989) (Nakamura, J., dissenting) ("A zoning amendment enacted by the City Council is subject to judicial review for conformity with standards enunciated in the general plan, and so is a zoning amendment enacted by initiative.").

local plan, thus ensuring that direct democracy cannot impair the plan.[196]

In these consistency states, the only possible difference between actions by the voters and those by elected officials might be that voters, lacking the expert input from the local planning staff, are more likely to approve uses that are inconsistent with the plan. Then, if these uses are not challenged in court, the result will be a greater number of illegal land uses that violate the consistency requirement and impair the plan.

This possibility seems speculative. No empirical evidence exists that voters are more likely to adopt land uses that are inconsistent with the plan. Furthermore, given the effort that it takes to pass an initiative or referenda, it seems likely that citizens will usually investigate the impact of their proposal on the local plan before acting. To do otherwise would place the initiative or referenda at risk of a lawsuit claiming that it is inconsistent with the plan and thus jeopardize the entire political effort. Finally, and most importantly, voters in a consistency jurisdiction would likely attempt to amend the plan itself rather than to amend the zoning, thereby avoiding the consistency problem entirely, a possibility discussed immediately below.

In these states, then, there is little reason to fear that direct democracy will imperil the master plan to a greater degree than would occur when local elected officials adopt rezonings.

b. The Substantive Plan Objection

The second possibility of interference with the plan arises when, in a jurisdiction with a consistency requirement, voters attempt to amend the plan itself. This is "ballot box planning" in its truest case, the actual creation of a plan by the electorate. The possibilities for error are evident. The electorate cannot utilize the normal planning processes to create a plan and, as a result, does not have available to it anything like the information available to local elected officials when they adopt a plan.

Nonetheless, some important ameliorative factors are at work. First, most states with consistency requirements also have detailed statutes that set forth the plan's requirements. They often

196. *See, e.g.*, Lesher Communications, Inc. v. City of Walnut Creek, 802 P.2d 317 (Cal. 1990) (zoning ordinance passed by initiative was invalid because it was inconsistent with the general plan); DeBottari v. City of Norco, 217 Cal. Rptr. 790 (Ct. App. 1985) (invalidating referendum which put old zoning back in place that was inconsistent with general plan).

include various elements that the plan must contain.[197] These statutes do not ensure that any plan voted by the electorate will be "good." They do, however, establish a set of planning standards that will channel the voters' efforts in drafting the initiative in very specific directions. At the same time, the statutory standards also provide criteria against which to measure the voters' efforts.

Second, in almost every instance voters are not creating entire plans from scratch; they are attempting to amend existing plans. To do so, drafters of citizen initiatives are forced to carefully consider the existing plan. Close consideration is particularly needed if a statute requires that the elements of the general plan must be internally consistent.[198]

In short, the exercise of amending a plan serves to focus the initiative drafters on the specifics of the existing plan; they cannot just insert any change they wish into the plan. As a result, the likelihood increases that the changes to the plan enacted by the voters will not be totally at odds with the existing plan, or at least will not contradict those parts of the plan that the voters do not amend.

Even under these conditions, however, the citizen advocate must take pause at the difficulties posed by drafting an amendment to the master or general plan. Proponents of such initiatives are well aware that any citizen-initiated plan amendment is likely to be the subject of litigation filed by those opposed to it, and any drafting flaw in the initiative could lead to an adverse judicial decision. At least in California, concern over drafting flaws has increasingly led citizen advocates to engage the help of planning professionals in drafting initiatives.

Involving a professional planner does not transform the direct democratic process into the equivalent of a normal municipal planning process. To take just one difference, the planner's work will not be critiqued by others or by the public in the way that a staff planner's work would be examined. Thus, flaws in the work are not as likely to be detected. Nonetheless, the involvement of a planner does increase the likelihood that the end product, most likely a plan amendment, at least will conform to the norms of the planning profession and will more likely comply with statutory requirements.

197. *See, e.g.*, CAL. GOV'T CODE § 65302 (West 1997 & Supp. 2001); N.J. Stats. Ann. § 40.55D-28 (1991 & Supp. 2000).

198. *See, e.g.*, CAL. GOV'T CODE § 65300.5 (West 1997).

Finally, and perhaps most importantly, plans are intended to be policy documents. The point of creating them is to set forth the policy determinations that should guide development in the jurisdiction.[199] If direct democracy has an appropriate role in the land use regulatory process, the use of that tool is at its most legitimate when voters are asked to pass upon clear-cut policy choices. Thus, votes on general plans are usually decisions that are more fit for the electorate to make than decisions on other types of land use decisions, such as site-specific rezonings.

2. The Flexibility Objection

Another objection to the substantive outcomes of land use decisionmaking by direct democracy is that the voters' decision can unduly reduce the flexibility of the land use process.[200] This situation occurs when changes in land use become more difficult to make as a result of the election. One example is a requirement, upheld by the Supreme Court in the *City of Eastlake* decision, that all changes to municipal zoning must automatically be submitted to the voters for approval.[201] Another is a provision, inserted in an initiative, requiring that any future changes to the jurisdiction's general plan must be submitted to the voters.[202]

These types of provisions may be termed "mandatory referrals." They require that, before any change to zoning or a plan becomes effective, the electorate must approve it. Mandatory referrals essentially express a preference for the *status quo* in land use regulation. They place an additional procedural barrier, approval by the voters, in the way of change to the existing scheme of land use regulation. That barrier will discourage some applicants who fear that they will spend considerable resources in first

199. *See, e.g.*, Wash. Rev. Code §36.70A.030(4) (West 2000) (a "comprehensive plan" is a "generalized coordinated land use policy statement of the governing body of a county or city"); Fla. Stat. Ann. § 163.3177(5)(b) (West 2000) (the comprehensive plan and its elements "shall contain policy recommendations for the implementation of the plan and its elements").

200. Rosenberg, *supra* note 11, at 412 ("The Court did not view municipal planning and zoning as a gradually evolving process requiring periodic legislative reexamination and change.") *See also id.* at 433 ("The process of community planning and land use regulation is a dynamic one. Referendum zoning seemingly would force a municipality to adhere to conceptions of desirable community form and zoning structure not because they represent the best plan for local growth, but rather because they constitute a known and accepted use of the land within the locality.").

201. City of Eastlake v. Forest City Enterprises, 426 U.S. 668, 681 (1976).

202. DeVita v. County of Napa, 889 P.2d 1019 (Cal. 1995) (upholding 30-year voter approval requirement).

getting the local elected officials to approve a change but then will not be able to convince a perhaps disinterested electorate to approve that change.

Critics have decried this barrier as institutionalizing a lack of "flexibility" and have argued that the land use system needs such flexibility to operate properly.[203] For example, some have stated that good planning must be "flexible and responsible to changing circumstances and values,"[204] and that mandatory referrals interfere with that flexibility. Another critic foresees the perpetuation of "stale" land uses.[205]

Proponents and opponents of mandatory referrals hold widely differing views about the nature of plans and the need for flexibility in planning. Proponents of mandatory referrals view themselves as supporters of plans. They insist that a plan must be viewed as a long-range document that will be implemented as initially adopted unless good reason exists to change it.[206] Thus, they see no problem in making a plan difficult to amend, such as by requiring voter approval for such an amendment.

In contrast, opponents of mandatory referrals emphasize the need for flexibility in plans. They see plans as imperfect mechanisms in constant need of readjustment as circumstances change. They also view rezonings as beneficial exercises that should be

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203. *See* City of Eastlake v. Forest City Enterprises, 426 U.S. 668, 681 (1976) (Stevens, J., dissenting) ("As land continues to become more scarce, and as land use planning constantly becomes more sophisticated, the needs and the opportunities for unforeseen uses of specific parcels of real estate continually increase. For that reason, no matter how comprehensive a zoning plan may be, it regularly contains some mechanisms for granting variances, amendments or exemptions for specific pieces of property.").

204. Daniel J. Curtin Jr. & M. Thomas Jacobson, *Growth Control By Ballot Box: California's Experience*, 24 LOYOLA L.A.L. REV. 1073, 1102 (1991). *See also* Don Solem, *Local Initiatives in the 90s: A Developer's Perspective*," 1 LAND USE FORUM 105 (Winter 1992) ("Initiatives are also inflexible; they can only be altered or repealed by another initiative. This limitation takes away a city's or county's ability to cope with vital planning issues."); Elaine Costello, *Local Initiatives in the 90s: A Planner's Perspective*, 1 LAND USE FORUM 108 (Winter 1992) ("Initiatives are inflexible solutions . . . This rigidity runs counter to good planning practice, where the best results are achieved by continually reassessing and refining plans and regulations based on experience and the communities' changing needs.").

205. Sager, *supra* note 51, at 1419 ("[T]he Eastlake ordinance is obviously and heavily loaded against any change at all; the arbitrary quality of a land use restraint grown stale is perpetuated by the unlikelihood of any change in zoning status.").

206. This view is somewhat similar to those jurisdictions following a rule that requires a "change or mistake" in the existing zoning before a zoning amendment will be proper. *See* People's Counsel for Baltimore County v. Beachwood Ltd. Partnership, 670 A.2d 484 (Md. Ct. Spec. App. 1995).

favored as responding to unforeseen circumstances.[207] Thus, viewed from a slightly different perspective, the dispute over the need for flexibility in plans is between those who favor a stronger government role in directing the future growth of cities, and those who favor market forces. The former place more emphasis on the implementation of plans, while market-supporters believe that ever-changing market forces should receive recognition in the form of easily amendable land use plans.

The strongest judicial assertion of the need for flexibility is found in Justice Arabian's dissent in the California Supreme Court decision in *DeVita v. County of Napa.*[208] He argues that the general plan process "places the ultimate premium on comprehensiveness and consistency." In his view, consistency in turn requires flexibility: "As transportation conditions change, for example, noise, air quality, safety and housing patterns are affected."[209]

But how much need for flexibility is there? A strong case can be made against the need for great flexibility. Unlike the initial enactment of the jurisdiction's zoning ordinance or comprehensive plan, which the public agency is likely to initiate, the vast majority of rezonings and plan amendments are privately initiated.[210] They almost always originate from an individual landowner's desire to develop the property in a way not allowed by the existing regulation. Properly prepared plans necessarily will make tough choices about how development should proceed.[211] If that choice is adverse to a landowner's wish, the landowner's impulse will not be to comply with the plan, but to change it.

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207. *See* Note, *supra* note 59, at 842 ("Rezoning decisions are integral to comprehensive city planning. In cities like Eastlake that are undergoing rapid, unforeseen change, the rezoning decisions both implement the plan and shape its future direction.").

208. DeVita v. County of Napa, 889 P. 2d 1019 (Cal. 1995).

209. *Id.* at 1046 (Arabian, J., dissenting).

210. Glenn, *supra* note 54, at 271 ("[T]he zoning amendment process differs from the legislative model in that a significant number of zoning amendment decisions are initiated by private land developers rather than by members of the city council or planning board.").

211. *See* Daniel R. Mandelker, *Should State Government Mandate Local Planning? . . . Yes*, 44 PLANNING 14 (July 1978) ("We simply cannot satisfy all these conflicting demands on our physical resources at the same time without making tough and mutually exclusive choices. . . It should be clear that the most reasonable way to moderate these conflicts is to sort them out before decisions have to be made about the use of land resources.").

These changes are overwhelmingly piecemeal in nature[212] and thus pose a danger to the integrity of comprehensive planning. The literature is replete with criticism of the existing land use system as one rife with *ad hoc*, unreasoned land use changes.[213] The system, one commentator charged, allows deals that "gut the local plan (if indeed any exists) and are merely ad hoc impulse choices."[214] From this perspective, building procedures into the land use system that inhibit piecemeal change—such as by requiring voter approval—is not necessarily a bad idea.

This is not to say that flexibility in the system is totally unnecessary. For example, there are certainly instances in which the land use system unfairly impacts an individual property owner, and some remedy is needed. In that instance of true unfairness, however, the owner may well have recourse to a variance that would alleviate the problem.

In sum, the available evidence indicates that the vast majority of individual land use changes do not originate from some deficiency in the existing plan so much as from a desire to increase market value. Jurisdictions often adopt landowner-initiated changes in a piecemeal manner. These features of the current land use system offer a basis for concluding that a high level of flexibility in the land use system is not essential to the system's well-being, as the critics of direct democracy have insisted. In-

212. Paris, *supra* note 59, at 842-843 ("Because rezoning proposals tend to be made sporadically and not as part of a single, coherent development pattern, effective land use planning requires extensive study of each proposal by the city council in close interaction with the planning commission."). In West v. City of Portage, the Supreme Court of Michigan noted that in the eight and one quarter years since the city had adopted its zoning ordinance, "[T]he zoning map of this relatively small community was changed 128 times." West v. City of Portage, 221 N.W.2d 303, 309 (Mich. 1974). The court continued, "We are not informed of the number of proposed changes on individual grounds which were considered and rejected during that period of time." *Id.*

213. Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 CAL. L. REV. 837, 841 (1983) (summarizing these objections).

214. Professor Rose's summary continues:

> These critics object most to the piecemeal changes in local land regulations: the all-pervasive "variance," the "conditional use permit," or the small-scale "rezoning" ordinance. These small adjustments are the everyday fare of local land regulations. Whatever the formal designation, any of these ad hoc adjustments alters preexisting general regulations governing the use of some individual parcel or other finite area within the community.

Id.; *see also* DeVita v. County of Napa, 889 P.2d 1019, 1036 (Cal. 1995) ("Commentators have noted the tension between the ideal of the general plan as a long-range vision of local land use, and the reality that general plans are often amended in a fragmentary fashion to accommodate new development.").

deed, that level of flexibility may well be inimical to the system's proper operation. If this conclusion is accurate, the effect of the mandatory referral provisions, which is to make such changes more difficult and provide stability,[215] may largely be beneficial.

Flexibility, however, is not the only consideration in evaluating mandatory referrals. They implicate another broader objection to land use decisionmaking by direct democracy: the fairness objection.

3. The Fairness Objection

A serious objection to the use of direct democracy generally is that it can endanger civil liberties.[216] One criticism repeatedly leveled at statewide initiatives is that majorities can utilize them in an invidious manner to subject minorities.[217] It is, of course, possible to use them in the same invidious manner at the local level in land use matters. For example, a concurring judge in the Ohio Supreme Court's decision in *City of Eastlake* found that the Eastlake provision requiring a mandatory referendum was intended to block the construction of multifamily housing within that jurisdiction.[218] Similarly, a California court found that a rezoning referendum was intended to block needed moderate cost housing.[219]

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215. *See* DeVita v. County of Napa, 889 P.2d 1019, 1036 (Cal. 1995) ("There is no doubt that some degree of flexibility is desirable in the planning process. On the other hand, it is also desirable that plans possess some degree of stability so that they can be 'comprehensive [and] long-term' guides to local development." (alteration in original)(quoting Gov. Code § 65300)).

216. CRONIN, *supra* note 6, at 11 (Some critics of direct democracy "prefer the deliberations and the collective judgment of elected representatives" because that process "takes better account of civil liberties."); *see also id.* at 92 ("Proposals to adopt direct democracy procedures have always prompted fears that the system of checks and balances and the filtering effects of the legislative process would be bypassed, opening up even greater possibilities for abuses of minority rights and civil liberties."). *But see* Donovan & Bowler, *supra* note 119, at 17 (Suggesting that it is "wrong to point to these high-profile initiatives and conclude that policy outcomes from direct democracy are more abusive of minorities than are outcomes from legislatures.").

217. *See, e.g.*, Derrick A. Bell, Jr., *The Referendum: Democracy's Barrier to Racial Equality*, 54 WASH. L. REV. 1 (1978) (analyzing the referendum and low-income housing).

218. Forest City Enters. v. City of Eastlake, 324 N.E.2d 740, 748 (Ohio 1975) (Stern, J., concurring) ("There is no subtlety to this; it is simply an attempt to render change difficult and expensive under the guise of popular democracy."), *rev'd*, 426 U.S. 668 (1976). *See also id.* (Eastlake also raises specter of the chronic electoral exclusion of proposed lower income housing construction.).

219. *See, e.g.*, Arnel Dev. Co. v. City of Costa Mesa, 178 Cal. Rptr. 723, 727 (Ct. App. 1981) (properties were included in the initiative "purely because they are adja-

The vast majority of land use decisions made by initiative and referenda, however, are not directed against suspect classes and do not raise discrimination issues. The fact that discrimination issues arise relatively rarely suggests that discrimination is not, in and of itself, a sufficient reason to entirely deprive local electors of their power to use the initiative and referendum process for land use decisions. A more tailored statutory remedy could preserve direct democracy at the local level while addressing the discrimination problem. For example, a state statute could directly target land use decisions—whether made by elected officials or voters—that have discriminatory outcomes.[220]

There is, however, a related aspect of the discrimination issue as it relates to direct democracy. When land use decisions are made by direct democracy, an individual landowner's property can be the subject of a jurisdiction-wide vote. In such instances, the landowner is a minority who is, in a sense, at the whim of the majority of citizens in the local jurisdiction.[221]

The objection to this situation often is termed a lack of "fairness" to the landowner. In some instances the word fairness is employed as a surrogate for other objections to direct democracy, discussed above,[222] such as lack of public hearings or failure to employ expertise. These objections apply whether or not a landowner is "singled out."[223] Other critics, however, emphasize the power imbalance that can exist in an election; the electorate, composed of all voters in a city, passes judgment on one individual landowner's use of land.[224] For example, some have criti-

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cent to the Arnel property and for the sole and specific purpose of precluding any future development that would include moderate income apartments.").

220. One solution is to shift the burden of proof to the initiative or referendum proponents in certain instances. *See* Cal. Gov't Code § 669.5(a) (shifting the burden of proof to the local government agency when an initiative "directly limits, by number, the building permits that may be issued for residential construction or the buildable lots which may be developed for residential purposes . . . .").

221. *See* Callies, *supra* note 11, at 62 ("The concern over majority tyranny is especially relevant when the subject of an initiative or referendum is the rezoning of a particular parcel of land affecting a very small minority—frequently one person.").

222. *See supra* notes 72-101.

223. *See* Callies, *supra* note 11, at 78 ("The California courts do not address the lack of fairness to a property owner caused by the elimination of statutory hearing, notice, and expert review procedures required of local governments.").

224. *See*, e.g., Leonard v. City of Bothell, 557 P.2d 1306, 1308 (Wash. 1976) (en banc) ("Although important questions of public policy may permeate a zoning amendment, the decision has a far greater impact on one group of citizens than on the public generally." (quoting Fleming v. Tacoma, 502 P.2d 327, 331 (Wash. 1972))).

cized popularly passed measures that are "aimed at one particular landowner."[225]

The imbalance created when the electorate decides the use of a single piece of property suggests that this is not an appropriate use of direct democracy. The issue, however, is not that simple. Because most rezonings do not have profound policy implications, little would be lost if the initiative and referendum were unavailable for such decisions. However, the decision over the use of a single property can raise important policy issues.[226] Justice Stevens noted this possibility in his dissent in *City of Eastlake*, observing that a small development could be sufficient to arouse the legitimate interest of the entire community.[227] For example, authorizing a rezoning that will allow a new building may have few ramifications if the building is in or near an area with similar structures. If, however, the new building would be precedent-setting for an area, it can pose important policy questions.[228]

It must also be recognized that, in the land use field, important policy decisions cannot be reversed in the same manner as they can in other legislative areas. In the usual case, a newly passed law is subject to later reconsideration and review; if it does not

225. Nitikman, *supra* note 11, at 517.

226. *See* Callies, *supra* note 11, at 83 ("rezoning amounts to the implementation of a policy, usually in connection with a particular parcel of land with one owner"). *See also* Greens at Fort Missoula v. City of Missoula, 897 P.2d 1078, 1081 (Mont. 1995) ("We are unable to say in the present case that only part of the City electorate would be affected by what transpires on this tract of land. The land in question here has historical and social significance for the entire City . . . Thus, the community as a whole is affected by what happens to this property, despite not every member of the community abutting the property in question."); Township of Sparta v. Spillane, 312 A.2d 154, 156 (N.J. App. 1973) ("Undeniably, zoning issues often are of great public interests and some, as in the present case, may concern the entire population of the municipality involved.").

227. However, he then stated that it was equally conceivable that most of the voters would be uneducated and uninformed about the proposal, thus leading to a fundamentally unfair procedure. City of Eastlake v. Forest City Enters., Inc., 426 U.S. 668, 694 (1975) (Stevens, J., dissenting).

228. This hypothetical is presented in Glenn, *supra* note 54, at 293. Professor Glenn posits the issue as follows: "Should Elkind's land be rezoned to permit construction of [new] office buildings?" As he points out, this decision "requires different types of factual inquiry," including "assessment of the externalities likely to be associated with Elkind's proposal, the relationship between those externalities and existing and proposed patterns of land use in both the neighborhood and the larger community, and the social and economic benefits likely to be derived from the project." *Id.* That summary is accurate, as far as it goes. But what if the new building will be the first to significantly raise the height limit in an area? That question poses important policy implications that could be suitable for decision by voters.

work out properly, it can be amended or repealed. In the case of a land use enactment, however, the likelihood is that the decision will thereafter result in the actual development of the parcel. Once buildings are constructed, the chances of reversing that decision, should it prove erroneous, are nonexistent in the short-run and unlikely in the long-run.[229] Because of this consequence, the fact of single ownership should not automatically trump the public's right to make that policy decision through the initiative or referendum.

Nonetheless, in the vast majority of situations, small parcel rezonings and plan amendments do not involve larger policy questions.[230] If the rezoning raises no issues of general jurisdic-

229. There are instances of some major decisions being reversed over the long-term. For example, the decision to build a freeway along the waterfront in San Francisco resulted in a two-level freeway that spoiled the view of the Ferry Building down Market Street. After the 1989 earthquake in that area imperiled the structural integrity of the freeway, officials determined to tear it down permanently rather than repair or reconstruct it. *See* John King, *Paving the Way: Harry Bridges Plaza Will Provide Elegant Footpath from Market to Ferry Building*, S.F. CHRON., May 9, 2000, at E1. ("Ever since the earthquake-damaged Embarcadero Freeway was torn down in 1991, people strolling on Market Street have had a clear view of one of San Francisco's true landmarks—the Ferry Building.").

230. Wilson v. Manning, 657 P.2d 251, 256 (Utah 1982) (Howe, J., dissenting) (noting that "zoning changes usually only affect a relatively small area of property and only a relatively small number of people."); Glenn, *supra* note 54, at 305 ("small-scale rezoning decisions are hardly the type of governmental decision for which the direct legislation devices were designed. These rezonings rarely involve statements of general public policy . . ."). Some critics have opposed the use of the initiative and referendum to make land use decisions on the basis that most rezoning decisions implement rather than make policy, and thus are unsuited to direct democracy. *See* Callies, *supra* note 11, at 54 ("[P]opular voting on whether to undertake zoning or planning would be a proper policy issue, but how that policy is implemented . . . would not.") Some courts have agreed that many rezonings are not legislative in nature, and thus that direct democracy is unavailable. *See, e.g.*, West v. City of Portage, 221 N.W.2d 303, 308 (Mich. 1974) ("We reach that conclusion [that the referendum is unavailable] on the ground that a zoning amendment affecting particular property is an administrative, not a legislative, act."). The majority rule among the states, however, defines all rezonings as quasi-legislative, and thus as potentially subject to direct democracy, if that state authorizes the use of direct democratic methods. *See, e.g.*, Taylor v. Union County, 583 N.W.2d 638, 642 (S.D. 1998) ("We find that a rezoning amendment is not merely the carrying out of a previously adopted plan, but the creation of a new rule."); Simpson v. Comm. Against Unconstitutional Takings, 972 P.2d 1027, 1031 (Ariz. App. Div. 1999) ("The Council's decision to rezone the golf courses was a legislative act."); R.G. Moore Building Corp. v. Comm. for the Repeal of Ordinance R(C)-88-13, 391 S.E.2d 587, 590-591 (Va. 1990) ("[W]e now hold that rezoning ordinances are legislative acts, and not administrative, and thus are subject to referendum."); Margolis v. District Court, 638 P.2d 297, 304 (Colo. 1981) ("We do not believe that, for the purposes of determining whether it is subject to referendum and initiative, rezoning may be characterized as other than a legislative decision subject to referen-

tion-wide importance, but only the lesser question of the appropriate land use of one parcel, the use of direct democracy to make that choice is at its most questionable. For two reasons, in this situation a serious mismatch exists between the decision considered by the voters and the appropriate parameters of the initiative or referenda.

First, most voters in the city have no legitimate interest in this decision,[231] and the lack of interest may well manifest itself in a lower voter turnout.[232] In that situation, the fate of the landowner's proposal depends upon the electorate's approval, but the proposal has not received the consideration that it deserves.

Second, the landowner must expend a large amount of personal resources to reach the voters in the jurisdiction and to convince them of the change's merits. Because that population can be quite large, these costs can be substantial. Furthermore, the costs are in addition to those incurred by the landowner in securing the city officials' approval before the matter even comes before the voters.

In sum, while using direct democracy to make single parcel decisions is unfair in many instances, situations remain in which the decision will mark a major policy choice for the jurisdiction. The question thus becomes whether there is any way to differentiate those single-landowner decisions that raise broader policy implications, and thus are more suitable for direct democracy, from the majority of such decisions that do not have these implications. Devising a test for this determination is not simple. It is similar to drawing the line between legislative-type actions, which presumably raise policy issues, and administrative or adjudicative ones, which do not.[233]

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dum and initiative. It seems entirely inconsistent to hold that an original act of general zoning is legislative, whereas an amendment to that act is not legislative.").

231. A concurring opinion in the Ohio Supreme Court's *City of Eastlake* decision focused on this defect. *See* Forest City Enters., Inc. v. City of Eastlake, 324 N.E.2d 740, 748 (Ohio 1975), *rev'd*, 426 U.S. 668 (1976) (Stern, J., concurring) ("A mandatory, city-wide referendum which applies to any zoning change must, of necessity, submit decisions that affect one person's use of his property to thousands of voters with no interest whatever in that property.").

232. *See* Reber & Mika, *supra* note 75, at 277 ("Although the purpose of mandatory referenda has been to provide a 'check' on the powers of such a governmental entity," this check loses its efficacy when poor voter turnout occurs.).

233. *See* Oren, *supra* note 10, at 89 ("The use of the adjudicative-legislative distinction to decide the scope of the initiative's application to zoning presupposes that a logical line can be drawn between adjudication and legislation. This has not proven to be the case, even where the initiative is not involved."). *See also* Arnel Dev. Co. v. City of Costa Mesa, 620 P.2d 565, 572 (Cal. 1980) ("Plaintiffs propose . . . no test

One court has arguably suggested that the issue is whether a rezoning has marked a "basic departure" from the city's zoning policy.[234] The major drawbacks of such a test are the difficulty in isolating the factors that determine whether the land use change poses a major a "policy" issue, and the lack of predictability that ensues from this difficulty. Another commentator has suggested focusing on the size of the parcel; the larger the size, the more reasonable the conclusion that the decision on the parcel's use poses policy questions.[235] Size, however, is at best an imperfect proxy for whether the decision in question raises the type of policy issues that are suitable for decision by the public.[236]

Perhaps a better solution is to use signature requirements as a proxy for citywide interest. In most states, even those in which the initiative or referendum is constitutionally guaranteed, the legislature may prescribe the number of signatures required to place a matter on the ballot.[237] Under current signature requirements, less than ten percent of the voters often may suffice to place a matter on the ballot.[238] Where the initiative or referendum affects a single landowner, these percentages could be increased. The fact that a larger percentage of the jurisdiction's citizenry signed would provide at least some indication that this was not just a minor, local dispute unsuited for determination by the larger electorate.

Another solution might be to reform the petition gathering process. For example, some sort of geographic distribution re-

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to distinguish legislative and adjudicative actions with reasonable certainty."); State *ex rel.* Srovnal v. Linton, 346 N.E.2d 764, 767 (Ohio 1976) (rejecting plaintiff's argument that, while the administrative procedures for a zoning use exception were followed, "the effect of the action was to amend or rezone a use district.").

234. *See* Wilson v. Manning, 657 P.2d 251, 254 (Utah 1982) (alteration in original): Appellants' brief refers to the rezoning of this ten acres as "a basic departure from the [City's] contemplated zoning policy" to "de-emphasize commercial establishments along the length of Highway 89," but there is no evidence of such a policy in the "Masterplan & Zoning Map," in the stipulated facts, in appellants' complaint, or elsewhere in the record.

235. *See* Note, *supra* note 59, at 847 (suggesting a minimum size limitation on parcels of land for which rezonings could be referred to the electorate).

236. *See* Citizen's Awareness Now v. Marakis, 873 P.2d 1117, 1126-27 (Utah 1994) (Howe, J., dissenting) ("I do not think that the amount of acreage of the property rezoned is relevant [here it was 2,400 acres] or that the property is described in more than one legal description because it consists of more than one parcel.").

237. *See, e.g.*, Price v. Dahl, 912 P.2d 541, 543 (Alaska 1996) (construing Alaska Stats. 29.26.130, which establishes locational requirements for those signing initiative and referendum provisions).

238. *See* DUBOIS & FEENEY, *supra* note 1, at 34 (listing signature requirements at the state level).

quirement could be imposed, mandating that signers reside throughout the community.[239] This requirement would ensure that, in the case of a referendum, all signers would represent a broader cross-section of the community. The theory would be that if a land use decision did not raise citywide issues, voters unaffected by the decision would not be willing to sign the petition.

Each of these solutions would at least begin to address the problem of separating those rezonings which fairly pose community-wide issues, and thus are more suitable for direct democracy, from those not posing such issues, where the fairness objection makes the use of direct democracy unsuitable.

The burdens imposed on individual landowners when referenda and initiatives are used to make single-parcel decisions also call into question the use of "mandatory referrals,"[240] at least in certain instances. Mandatory referrals automatically place before the voters both rezonings that have broad policy implications and those that do not, with the latter predominating. This situation is exemplified by the ordinance in *City of Eastlake* that required all rezonings to be submitted to the voters. Not every project or rezoning presents citywide implications, yet the automatic referral system requires a jurisdiction-wide vote for its approval.[241]

In sum, the weakest case for use of direct democracy occurs when the initiative or referendum is used to make decisions on single pieces of property. Mandatory referral mechanisms, which automatically refer large categories of decisions to the voters, raise the same problem. Nonetheless, because major policy decisions can arise when decisions are made concerning small parcels, excluding them from direct democracy would disenfranchise voters from making these policy-oriented decisions. The best solution would be to adopt mechanisms that attempt to screen out small parcel decisions without policy consequences from those with significant policy consequences.

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239. Certain states now have such requirements. *See* GERBER, *supra* note 16, at 40 ("Thirteen states also have a geographic distribution requirement, mandating that signatures be collected from several counties, legislative districts, or regions of the state.").

240. *See supra* text accompanying note 202.

241. *See* Forest City Enters., Inc. v. City of Eastlake, 324 N.E.2d 740, 743 (Ohio 1975), *rev'd*, 426 U.S. 668 (1976) (noting that the cost of the required election, including the cost of the requisite advertising, must be borne by the applicant). The Ohio Court of Appeals had invalidated this provision.

4. The Administrative Interference Objection

Finally, mandatory referrals to the voters also raise another concern: interference with the routine administration of the land use system. This concern is related to the general principle that the initiative and referendum are available only for legislative actions, but not for "administrative" actions.[242] The policy is that the government must have the ability to manage its routine business without undue interference.[243] Government cannot function if all of its decisions are second guessed through the referendum. Mandatory referrals ensure that the "second guessing" will occur often.[244]

Once again, however, the case against mandatory referrals is not overwhelming. There are countervailing considerations, particularly where the voters have put in place a jurisdiction-wide policy through direct democracy. For example, they may have approved a comprehensive amendment to the local general plan, or re-adopted by vote the existing plan. Then, to make sure that the jurisdiction-wide policy is not impaired through subsequent piecemeal amendments by the local elected officials, who may be hostile to the overall policy, the voters may have included a mandatory referral provision. For example, in the ordinance considered by the California Supreme Court in its 1996 decision *DeVita v. County of Napa*,[245] the voters ratified an urban growth boundary designed to locate intensive development within that boundary and to preserve Napa's world famous agricultural resources outside those limits. The ordinance required that indi-

242. *See, e.g.*, Christensen v. Carson, 533 N.W.2d 712, 716-717 (S.D. 1995) (initiative regarding airport was legislative rather than administrative where city had retained discretionary authority for approving the site of the airport, no land had been acquired, and no construction plans approved).

243. See Oren, *supra* note 10, at 94 ("The adjudicative-legislative distinction is designed to protect the procedural rights of individuals, while the administrative-legislative doctrine attempts to protect government from 'unwarranted harassment' or 'disruption' by the initiative and referendum process.").

244. *See* Wolfstone, *supra* note 51, at 85 ("The exemption of administrative matters from the referendum grows out of the recognized need of local governments to engage in their ordinary business with some degree of insulation from the disruptive effects of public participation."). *See, e.g.,* Friends of Mount Diablo v. County of Contra Costa, 139 Cal. Rptr. 469, 473 (Cal. Ct. App. 1977) ("The reason for withholding referendum in cases of administrative decision is that to allow referendum to annul or delay executive or administrative conduct would destroy the efficient administration of government.").

245. DeVita v. County of Napa, 889 P.2d 1019 (Cal. 1995).

viduals seeking to change the boundary, or develop outside of it, must submit to a vote of the people.[246]

Subsequent decisions of this type have at least the potential of raising significant policy issues, for they can call into question the basic policy choice made by the voters in establishing the boundary. Accordingly, because these exceptions implicate the basic policy decision, requiring voters to pass on them seems reasonable. The landowner's attempt to seek an exemption from or alter the core policy provision of the overall scheme is the critical fact.[247] The case is strong here for allowing a mandatory referral, even though some of the specific decisions referred to the voters may not always rise to the level of implicating the basic, fundamental policy choice.

In short, the possibility that major policy choices are made through decisions on small tracts justifies the continued exposure of such decisions to the initiative and referendum, and it justifies the judicial holdings upholding mandatory referrals.

IV.
CONCLUSION

This article suggests that while direct democracy is certainly not the preferred mechanism for making land use decisions, the arguments against its use are not as one-sided as the critics suggest. Indeed, in many instances, a closer examination reveals that many of the objections are not persuasive, or at least that there are substantial counter-arguments to those objections. Furthermore, a body of social science research supports the use direct democracy as a counterweight to a local political structure that may well have become overly deferential toward development interests and, thus, on that issue, potentially unrepresentative of the local electorate as a whole.

Finally, because direct democracy can serve an important function at the local level, greater thought must be given to how its use can be optimized. When the initiative and referendum are

246. *Id.* at 1023 ("[U]ntil December 31, 2020, the provisions of the general plan and map readopted by Measure J can be amended only on a vote of the people . . ." with minor exceptions).

247. This situation seems analogous to the one described by Justice Stevens in his dissent in *City of Eastlake.* Justice Stevens found that if there was a "potential conflict with the public interest in preserving the city's basic zoning plan," and if that aspect of the controversy "were predominant," then "the referendum would be an acceptable procedure." City of Eastlake v. Forest City Enters., Inc. 426 U.S. 668, 693 (Stevens, J., dissenting).

used at the state level, there is little opportunity to change their use to ensure better decisionmaking.[248] At the local level, however, the legislature has more ability to shape the circumstances of its use so as to improve the possibility of better decisions. For example, the legislature can require information to be produced, and it can design requirements for qualifying initiatives and referenda that better reflect the underlying considerations of when such measures are appropriate.

In sum, the objections to direct democracy do not present an overwhelming case against its use to make land use decisions, and the circumstances of its use can and should be improved.

248. *See* Frank I. Michelman, *"Protecting the People from Themselves," Or How Direct Can Democracy Be?*, 45 UCLA L. REV. 1717, 1725 (1998) (noting the argument that "in the case of plebiscitary legislation, the judiciary itself is the only checker-and-balancer in the picture; judicial review itself is the only remaining institutional brake against legislative rashness and injustice.") (emphasis omitted).