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LAND USE PLANNING AND THE PUBLIC: ZONING BY INITIATIVE

Maxon R. Davis

INTRODUCTION

In this time of heightened environmental concern, people everywhere are demonstrating a greater interest in the use of land in their communities, in their states, and across the nation. Piqued by what they perceive as legislative inertia or even antipathy, many such persons have translated their concerns into direct political action. One instrument of change available in many states is the initiative, whereby legislative measures are enacted directly by the electorate.¹ The initiative power commonly extends to statutes of state-wide significance and to local or municipal ordinances.² In terms of land use, one of the oldest devices for local control is zoning. The United States Supreme Court has for half a century upheld properly drawn zoning statutes on the ground that they do not involve a deprivation of property without due process.³ So as to avoid the due process challenge, state zoning statutes universally demand that affected property owners be given a notice and hearing prior to the enactment of a local zoning ordinance.⁴ Within the modern political context, a direct conflict then exists between the broad grant of initiative over local ordinances and the statutory command that zoning ordinances can only be enacted after the requisite notice and hearing. Such powers are "hopelessly inconsistent,"⁵ and courts passing on the public's ability to zone by initiative have traditionally denied it.⁶

THE HURST DECISION

In *Hurst v. City of Burlingame*,⁷ the California supreme court

1. See, e.g., MONT. CONST. art. V, § 1; art. III, § 4; art. XI, § 8.

2. See, e.g., MONT. CONST. art. III, § 4; REVISED CODES OF MONTANA, § 11-1104 (1947) [hereinafter cited as R.C.M. 1947].

3. *Village of Euclid v. Ambler Realty*, 272 U.S. 365 (1926).

4. See, e.g., R.C.M. 1947, § 11-2704.

5. *Hurst v. City of Burlingame*, 207 Cal. 134, 277 P. 308, 311 (1929).

6. *City of Scottsdale v. Superior Court*, 103 Ariz. 204, 439 P.2d 290 (1968); *Hurst v. City of Burlingame*, *supra* note 4; *Taschner v. City Council of Laguna Beach*, 31 Cal. App. 3d 64, 107 Cal. Rptr. 274 (1973); *People's Lobby, Inc. v. Board of Supervisors of the County of Santa Cruz*, 30 Cal. App. 3d 868, 106 Cal. Rptr. 666 (1973); *Laguna Beach Taxpayers' Ass'n. v. City Council*, 187 Cal. App. 2d 412, 9 Cal. Rptr. 775 (1960); *Korash v. Livonia*, 388 Mich. 737, 202 N.W.2d 803 (1972); *Forman v. Eagle Thrifty Drugs and Markets, Inc.*, 89 Nev. 533, 516 P.2d 1234 (1974); *Smith v. Livingston Twp.*, 106 N.J. Super. 444, 256 A.2d 85 (1969), *aff'd*. 54 N.J. 525, 257 A.2d 698 (1969); *Dewey v. Doxey-Layton Realty Co.*, 3 Utah 2d 1, 277 P.2d 805 (1954).

7. *Hurst v. City of Burlingame*, *supra* note 4.

first noted this inconsistency between the zoning laws and the initiative. It concluded: "The Zoning Act is a special statute dealing with a particular subject and must be deemed to be controlling over the initiative, which is general in its scope."⁸ *Hurst* thus follows the general rule as to resolutions of conflicting statutes.⁹ Over the years, the rationale behind this holding was further developed, to the effect that "the method of enactment is the measure of the power to act: and that the initiative process used . . . does not conform to this method."¹⁰ Courts could not conceive that "the Legislature intended to sanction the enactment of such ordinances by a legislative process which bypasses the procedural safeguards of the state law."¹¹ As municipalities have no inherent zoning power and as such authority exists only as a delegation of the state's police power, "the power must be exercised in the manner stated in the grant and not otherwise."¹² Indeed, the public's use of the initiative to rezone was seen as a collateral attack on the validity of the very statute by which the power to zone is claimed.¹³

Hurst and its progeny appear to be firmly based in reason. Yet, the clash between zoning laws and the initiative power reflects more than inconsistent law-making. Underlying policies are in conflict too. The procedures outlined in the zoning law—of public hearings and professional study—are meant to insure not only due process for individual property owners, but also orderly development for the community, typically pursuant to a master plan. Thus, "overall planning would be seriously crippled if the initiative process could be used in this field."¹⁴ Such language, though, indicates a preference for government run by experts and for decision-making being left to representatives or administrators, rather than a lay public considered untrustworthy. No matter how grounded in experience such a preference is, it is essentially alien to our democratic principles.¹⁵

8. *Id.* at 311.

9. *Accord*, *Smith v. Livingston Twp.*, *supra* note 5 at 89.

10. *Laguna Beach Taxpayer's Ass'n. v. City Council*, *supra* note 5 at 777. *See State ex rel. Powers v. Donohue*, 368 S.W.2d 432 (Mo. Sup. Ct. 1963).

11. *Taschner v. City Council of Laguna Beach*, *supra* note 5 at 227. *See 8A McQUILLEN MUNICIPAL CORPORATIONS*, § 25.246 (3d ed. 1965).

12. *City of Scottsdale v. Superior Court*, *supra* note 5 at 293.

13. *Forman v. Eagle Thrifty Drugs and Markets, Inc.*, *supra* note 5 at 1237-38; *Dewey v. Doxey-Layton Realty Co.*, *supra* note 5 at 809.

14. *People's Lobby, Inc. v. Board of Supervisors of the County of Santa Cruz*, *supra* note 5 at 669.

15. *See*, HAGMAN, LARSON AND MARTIN, *CALIFORNIA ZONING PRACTICE*, p. 105 (1969). While *Hurst v. City of Burlingame*, *supra*, and *Laguna Beach Taxpayers' Ass'n. v. City Council of Laguna Beach*, *supra*, are clear enough, the implication of the cases is startling enough that a reexamination might be appropriate. It is inconsistent with California's broad initiative and home-rule provisions that the state legislature

THE SAN DIEGO CASE

Recently, the California supreme court distinguished its much relied upon precedent in *Hurst v. City of Burlingame* and held by a 4 to 3 margin in *San Diego Building Contractors' Association v. City Council of the City of San Diego*¹⁶ that the voters of the chartered city of San Diego could enact a thirty foot building height limitation on coastal property by means of initiative. While the majority opinion relied on the fact that San Diego was a chartered rather than general law city as a basis for distinction with *Hurst*,¹⁷ the Court went on to find that there was no violation of due process. The dissent did find a denial of due process, in that the electoral mechanism—even with all its attendant publicity—provided no substitute for the notice and hearing otherwise afforded affected property owners.¹⁸

The *San Diego* opinion did make much of the fact that the city was chartered, rather than a general law municipality, whose powers are delegated piecemeal by statute. In California, a charter of a city “is the supreme law of the state with respect to municipal affairs.”¹⁹ In San Diego, the grant of initiative in the charter is broad, with no particular type of ordinance excepted. “Included in such legislation are zoning ordinances which represent an exercise of the police power granted cities by California Constitution, article XI, section 7.”²⁰ The requirement elsewhere in the charter of notice and hearing prior to any action by the Planning Commission on a zoning proposal was found not to restrict the initiative power. Cases such as *Hurst* hinging on the conflict between the *state's* grant of initiative and the *state's* zoning statute for localities were held not in point. Apparently, though, the older cases do retain vitality for non-chartered, general law cities in California and for analagous situations elsewhere.

Apart from the distinction between chartered and general law cities, the *San Diego* decision warrants attention both within and out of California for other conclusions reached therein. The court without discussion held that the height limitation—in effect an amendment to a comprehensive zoning plan—was in essence a *legislative* act, therefore properly the subject of an initiative. Fur-

can enable procedures for enacting local zoning regulations and thus defeat the constitutional right to local initiatives. (*Id.*).

16. *San Diego Building Contractors Ass'n. v. City Council of the City of San Diego*, ___ Cal.3d ___, 529 P.2d 570, 118 Cal. Rptr. 146 (1974). [hereinafter referred to as *San Diego*].

17. *Id.* at 571-573.

18. *Id.* at 579-582.

19. *Bayless v. Limber*, 26 Cal. App.3d 463, 102 Cal. Rptr. 647, 649 (1972).

20. *Id.*

thermore, as noted, the property rights of affected landowners were not found to have been appropriated without due process of law on passage of the initiative. Such conclusions—if valid—can lead to a complete rethinking of the concept and scope of the local zoning power.

ADMINISTRATIVE AND LEGISLATIVE ACTS OF LOCAL BODIES

Initiatives and referendums extend only to legislative actions.²¹ In *San Diego*, the zoning ordinance at issue was held to be “unquestionably a general legislative act.”²² The conclusion so expressed is not as easily reached as the lack of discussion accompanying it indicates. Difficulty adheres at the local level in differentiating between administrative and legislative actions, since administrative and legislative functions of the municipality may be combined in the same body, typically the city or town council. “An ‘ordinance’ might be either legislative or administrative.”²³ Distinctions in the increasingly “penumbral area” between the two functions are “inconclusive and flexible.”²⁴ The prevailing test is “whether the act was one creating a new law (legislative) or one executing an already existing law (administrative).”²⁵

There exists a split of authority with respect to ordinances amending zoning laws. Clearly, the decision to enact a comprehensive zoning code in the first place is legislative.²⁶ A subsequent change concerning a particular property owner is “in substance an administrative, not legislative, act.”²⁷ “The process by which they are made . . . is basically adjudicatory.”²⁸ Such a conclusion depends though on the statutory command of notice and hearing, “itself recognition of the fact that the decision making process must be more sensitive to the rights of the individual citizen involved.”²⁹ The underlying rationale again raises the spectre of an unsophisticated public unappreciative of the experts’ wisdom: “[I]f each

21. See, e.g., *City of Billings v. Nore*, 148 Mont. 96, 417 P.2d 458 (1966); *Kelley v. John*, 162 Neb. 319, 75 N.W.2d 713 (1956); *Forman v. Eagle Thrifty Drugs and Markets, Inc.*, *supra* note 5.

22. *San Diego*, *supra* note 16 at 571.

23. Note, *Limitations on Initiative and Referendum*, 3 STAN. L. REV., 497, 503 (1951).

24. Note, 5 UTAH L. REV. 413, 415 (1957).

25. *City of Billings v. Nore*, *supra* note 21 at 463. *Accord*, *West v. City of Portage*, — Mich. —, 221 N.W.2d 303 (1974); *Forman v. Eagle Thrifty Drugs and Markets, Inc.*, *supra* note 5; *Denman v. Quin*, 116 S.W.2d 783 (Tex. Civ. App. 1938); *Kiegley v. Bench*, 97 Utah 69, 89 P.2d 480 (1939).

26. *Accord*, *West v. City of Portage*, *supra* note 25 at 308; *Forman v. Eagle Thrifty Drugs and Markets, Inc.*, *supra* note 5 at 1237.

27. *West v. City of Portage*, *supra* note 25 at 309.

28. *Fleming v. Tacoma*, 81 Wash.2d 292, 502 P.2d 327, 331 (1972).

29. *Id.*

change in a zoning classification were to be submitted to a vote of the city electors, any master plan would be rendered inoperative. Such changes are administrative acts implementing the comprehensive plan and adjusting it to current conditions."³⁰

Emphasis on the affect of the amendment on the land covered thereby can lead to a different conclusion:

The ordinance lays down a new rule of conduct as to the use of this land which every person, including the officials of the city administration, must follow and in no sense, as far as such land is concerned, does it execute or administer a previously enacted law with respect to it. It was a legislative act performed by a legislative body. . . .³¹

In the absence of a dispositive rule, one is finally forced to a case by case examination. As more and more land is covered by the ordinance, the balance shifts toward viewing its enactment as legislative in nature. One can distinguish between the adjudication involved in granting a variance and the policy decision inherent in an amendment to the plan or code itself.³² "Amendments . . . are legislative. Variances . . . , conditional use permits . . . , and exceptions are administrative matters. They remain administrative even if applications for them are heard by the local legislative body."³³ Given the scope of the ordinance in *San Diego*—affecting a large area of coastal property—one comes finally to agree with the court's view. The initiative involved a fundamental question of policy.

ZONING AND DUE PROCESS

Zoning *ipso facto* involves limitations on the use of private property. Such deprivations have always seemed within the prohibition of the Fourteenth Amendment, and the dispensing with notice and hearing before an initiative has been viewed as "an irreconcilable conflict with the due process clause."³⁴ Yet, the state frequently infringes on rights ostensibly within the scope of the Fourteenth Amendment without providing the requisite notice and hearing demanded with zoning. Taxation, health and safety regulations, and pollution controls quickly come to mind. Perhaps the special

30. *Bird v. Sorenson*, 16 Utah 2d 1, 394 P.2d 808 (1964).

31. *Hilltop Realty, Inc. v. City of South Euclid*, 110 Ohio App. 535, 164 N.E.2d 180, 182 (1960). *Accord*, *Johnson v. City of Claremont*, 49 Cal. 2d 826, 323 P.2d 71 (1958); *Rhode Island Home Builders v. Budlong Rose Co.*, 77 R.I. 147, 74 A.2d 237 (1950).

32. See 5 McQUILLEN MUNICIPAL CORPORATIONS, §16.55 (3d ed. 1965):

The power to be exercised is legislative in its nature if it prescribes a new policy or plan; whereas, it is administrative in its nature if it merely pursues a plan already adopted by the legislative body itself, or some power superior to it. (*Id.* at 213-214.)

33. CALIFORNIA ZONING PRACTICE, *supra* note 15 at 107.

34. *City of Scottsdale v. Superior Court*, *supra* note 5 at 293.

status of zoning reflects the historically important position of real property in our legal system. As one observer noted: "Constitutional suspicion immediately arises when any law, regardless of the mode of enactment, regulates the use of private property without affording the owner of that property an opportunity, other than his sole vote, to contest the proposed regulation."³⁵

Prior to *San Diego*, the California supreme court had considered itself governed by such strictures:

[I]t is clear that the individual's interest in his property is often affected by local land use controls, and the "root requirement" of the due process clause is "that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest, except for extraordinary situations where some valid governmental interest . . . justifies postponing the hearing until after the event . . ."³⁶

This language was specifically distinguished in *San Diego*: The dictum from *Scott v. City of Indian Wells* here quoted refers to the situation in which the proceeding is patently adjudicatory and is mandated by the statute; in such a case, an adjoining property owner not within the jurisdiction of the municipality was found a proper participant in the hearing. *Scott* was held inapplicable in a determination as to the necessity of such proceedings in the first place.³⁷

Indeed, if one accepts the premise that the zoning ordinance sought to be placed before the electorate is legislative in nature, different ground rules attach.

Due process in law-making is not the same as due process in the adjudication of controversies. . . . Generally speaking, a hearing on a legislative matter is held for the purpose of informing the law makers regarding relevant facts of individual rights, property or otherwise . . . Unless constitutionally compelled, the requirements for law-making by the legislative process should not be imposed upon lawmaking by the initiative process.³⁸

Decisions of the United States Supreme Court bear out this distinction. *Boddie v. Connecticut*,³⁹ relied on in *Scott* and in *San Diego* by the dissent, emphasizes the interest of the individual in the face of state action. Such concern is central to the idea of due

35. Comment, *Zoning by Initiative to Satisfy Local Electorates: A Valid Approach in California?*, 10 CAL. WES. L. REV. 105, 111 (1973).

36. *Scott v. City of Indian Wells*, 6 Cal.3d 541, 492 P.2d 1137, 1141, 99 Cal. Rptr. 745 (1972), citing *Boddie v. Connecticut*, 401 U.S. 371, 399 (1971).

37. *San Diego*, *supra* note 16 at 577.

38. *Bayless v. Limber*, *supra* note 19 at 650-51.

39. *Boddie v. Connecticut*, 401 U.S. 371 (1971).

process;⁴⁰ yet that interest does not always mandate a notice and hearing.⁴¹ The *Boddie* rule is implicitly limited in scope:

Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by *adjudication* be preceded by notice and opportunity for hearing appropriate to the nature of the case.⁴² (Emphasis added.)

In non-adjudicatory settings, the same requirement does not attach. "The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation."⁴³ Following this line, the *San Diego* majority resurrected a sixty year old opinion by Justice Holmes in *Bi-Metallic Co. v. State Board of Equalization*,⁴⁴ in which a unanimous Supreme Court denied the petitioner's right to a hearing prior to a tax rate increase by the local authorities.⁴⁵ As the *San Diego* court said, "the authoritative decisions of the United States Supreme Court clearly demonstrate that the constitutional principle permitting the enactment of legislation without notice and hearing is as applicable to legislation affecting the value of real property as to any other legislation."⁴⁶

Indeed, one remains hard pressed to explain why zoning has been singled out as such a unique application of the state police power that the procedural safeguards commonly employed are in fact necessary. In *Hurst*, the California supreme court explained:

When the statute requires notice and hearing as to the possible effect of a zoning law upon property rights the action of the legislative body becomes *quasi* judicial in character, and the statutory

40. *Ross v. Moffit*, ___ U.S. ___, 94 S. Ct. 2437 (1974). " 'Due process' emphasizes fairness between the State and the individual dealing with the State, regardless of how other individuals in the same situation may be treated." *Id.* at 2443.

41. Comment, *Zoning by Initiative to Satisfy Local Electorates: A Valid Approach in California?*, *supra* note 35 at 114.

The test expressed by the Scott decision, and suggested by others, suffers from its limited scope. A test of procedural due process which looks only to the nature or degree of the deprived interest is not sound when the initiative clashes with private property rights. (*Id.*)

42. *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 313 (1950).

43. *Cafeteria and Restaurant Workers Union, Local 413 v. McElroy*, 367 U.S. 886, 894 (1961).

44. *Bi-Metallic Co. v. State Board of Equalization of Colorado*, 239 U.S. 441 (1915).

45. "Where a rule of conduct applies to more than a few people, it is impracticable that everyone should have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meeting or an assembly of the whole. General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society, by their power, immediately or remote, over those who make the rule." *Id.* at 445.

46. *San Diego*, *supra* note 16 at 575.

notice and hearing then becomes necessary in order to satisfy the requirement of due process and may not be dispensed with.⁴⁷

Due process is invoked simply because the zoning statute demands a certain procedure. Such reasoning strikes one as circular. *Hurst* seems to state nothing more than that due process is involved because the statute says due process is involved. Were the statute not to call for notice and hearing, the same state deprivation involved in a zoning ordinance would not be quasi-judicial. Rather, it would be legislative, and the same law applying to the same property which issued from the same legislative body would not violate due process. One can only conclude that despite the difficulty the United States Supreme Court has itself evidenced over the years in coming to grips with due process, the doctrine rests on a more solid constitutional foundation than indicated in the *Hurst* opinion. It is not a creature of statute, applicable whenever a legislature deems it appropriate. Therefore, proponents of zoning laws are put on notice by *San Diego* that application of due process in this area awaits a more logical explanation.

CONCLUSION

The conclusion that one can draw from *San Diego* is a guarded one. Other state supreme courts that have faced the question have found the initiative an improper device for the enactment of zoning measures.⁴⁸ *San Diego*, too, seems limited to the factual context of chartered cities in California. Yet, it appears clear that if the conclusions of *San Diego* are valid, no constitutional infirmity attaches to zoning through initiative. To say as much does not imply that notice and hearing are not beneficial. Neither does it imply that they should be dispensed with, nor that legislatures should not try to come up with imaginative accommodations between the usual notice and hearing required and the broad grant of the initiative.

Furthermore, small scale zoning changes are not properly subject to initiative. They are in essence administrative, adjudicatory proceedings. Obviously there exists a grey area between variance-type administrative determinations and wide-scale legislative changes. It no doubt will remain for the courts to determine where the line is drawn, if and when initiatives in this area gain a greater acceptance. For the courts to do so, they must first reach a different resolution of the conflict between the broad grant of power in the initiative and the specific procedures in zoning laws. The underlying policies alone ought to give one pause to reconsider the prevailing

47. *Hurst v. City of Burlingame*, *supra* note 4 at 311.

48. *See cases cited, supra* note 5.

view. As *San Diego* indicates, after that first hurdle, the roadblocks to direct local decision-making in land use are slight.

