COMMENTS

Shattered Plans: Amending a General Plan Through the Initiative Process

INTRODUCTION

California cities rapidly expanded in the 1980s.[1] Cities often encouraged this expansion by drafting general plans[2] that promoted urban development.[3] However, citizens of these cities now find traffic congestion and overcrowding in their communities.[4]

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[1] *See, e.g.*, Stuart L. Deutsch, *Land Use Growth Controls: A Case Study of San Jose and Livermore, California*, 15 SANTA CLARA LAW. 1, 11-13 (1974) (tracing history of growth in San Jose and Livermore from 1950 to 1970).

[2] A general plan is a "comprehensive, long-term general plan for the physical development of the county or city." CAL. GOV'T CODE § 65300 (West Supp. 1993). In California, all cities must have a general plan. *Id.* In addition, all zoning laws must conform to this plan. *Id.* § 65860 (West 1983). General plans are also known as comprehensive or master plans. *See* BLACK'S LAW DICTIONARY 286, 976 (6th ed. 1990). For consistency, this Comment uses the term general plan. For a detailed analysis of the general plan and its role in zoning, see *infra* notes 38-52 and accompanying text.

[3] *See, e.g.*, Lesher Communications, Inc. v. City of Walnut Creek, 802 P.2d 317, 319 (Cal. 1990). The city of Walnut Creek had a growth-oriented general plan that called for municipal expansion to accommodate the projected population increases in nearby communities. *Id.* Under the plan, Walnut Creek encouraged the development of additional residential, commercial, and retail areas. *Id.* Voters attempted to limit growth under the plan by passing an ordinance. *Id.* Ultimately, the California Supreme Court invalidated the ordinance. *Id.* at 326. For a further discussion of *Lesher*, see *infra* notes 186-90 and accompanying text.

[4] *See Lesher*, 802 P.2d at 319 (describing "Traffic Control Initiative" that imposed building moratorium along congested roadways); *infra* notes 186-90 and accompanying text (discussing *Lesher*).

As a result, citizens throughout California have used the initiative process[5] to put growth-control[6] initiatives on the ballot.[7]

Problems arise when growth-control initiatives conflict with a city's general plan.[8] This Comment examines California citizens'

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[5] Under the California Constitution, citizens delegate power to enact laws to the legislature, but reserve for themselves the power to legislate directly. *See* CAL. CONST. art. IV, § 1. Citizens legislate by voting on initiatives that are either proposed statutes or constitutional amendments. Cynthia L. Fountaine, Note, *Lousy Lawmaking: Questioning the Desirability and Constitutionality of Legislating by Initiative*, 61 S. CAL. L. REV. 735, 735 (1988). Voters may also vote on a referendum, a process whereby the electorate approves a law that the legislative body has already passed. BLACK'S LAW DICTIONARY 1281 (6th ed. 1990). If an initiative or referendum passes by a majority vote, the proposed statute or constitutional amendment becomes law. Peter G. Glenn, *State Law Limitations on the Use of Initiatives and Referenda in Connection with Zoning Amendments*, 51 S. CAL. L. REV. 265, 266 n.8 (1978). This Comment focuses on zoning initiatives and how the initiative process applies to amending general plans. For a discussion of the initiative process in general, see *infra* notes 53-65 and accompanying text.

[6] Municipal growth-control plans limit development by putting an absolute cap on the number of new houses that developers may build. DANIEL R. MANDELKER & ROGER A. CUNNINGHAM, PLANNING AND CONTROL OF LAND DEVELOPMENT: CASES AND MATERIALS 600-01 (3d ed. 1990). Such controls may also halt new developments until the municipality builds the necessary public facilities, such as highways and sewer systems, to accommodate population increases. *Id.*

[7] *See, e.g.*, Deutsch, *supra* note 1, at 4-8 (noting new willingness in California and other states to limit growth through land use controls).

[8] The California Government Code requires each city to have a general plan for the physical development of the city. CAL. GOV'T CODE § 65300 (West Supp. 1993). All zoning ordinances and land use actions must be consistent with this general plan. STATE OF CALIFORNIA, OFFICE OF PLANNING AND RESEARCH, GENERAL PLAN GUIDELINES 216 (1987). These guidelines are not mandatory, but they provide courts with guidance in determining whether zoning ordinances conform to the general plan. *See* Twain Harte Homeowners Ass'n v. County of Tuolumne, 188 Cal. Rptr. 233, 258 (Ct. App. 1982).

In the past, California courts have upheld the voters' right to hold a referendum or initiative vote on a general plan amendment. *See, e.g.*, Yost v. Thomas, 685 P.2d 1152, 1160 (Cal. 1984) (allowing referendum on general plan); Duran v. Cassidy, 104 Cal. Rptr. 793, 803 (Ct. App. 1972) (allowing initiative to amend general plan in charter city); O'Loane v. O'Rourke, 42 Cal. Rptr. 283, 289 (Ct. App. 1965) (requiring city council to submit general plan to referendum). This Comment argues that the California Legislature should deem general plan amendments matters of statewide concern and therefore outside the initiative process. *See infra* notes 259-62 and accompanying text (discussing legislative proposal to deem general plans matters of statewide concern outside initiative process).

right to use their initiative power to amend a municipal general plan. California voters have a constitutional right to legislate by initiative.[9] Unfortunately, the initiative process does not lend itself to the complex policy considerations involved in drafting and amending a general plan.[10] The California Legislature intended cities and counties to base their general plans on careful scientific study and consideration of future social and economic development.[11] If citizens can amend the general plan with an initiative measure, one vote could destroy this carefully drafted document.[12]

Another problem with general plan amendment initiatives is that affected landowners have no right to notice and a hearing.[13] When local legislative bodies[14] propose general plan amendments, California law mandates that affected landowners receive notice and a hearing.[15] General plan amendments enacted

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9 CAL. CONST. art. IV, § 1.

10 *See* Fountaine, *supra* note 5, at 738-42 (arguing that voters often do not have enough information to make informed decisions on complex ballot measures); Mark A. Nitikman, Note, *Instant Planning—Land Use Regulation by Initiative in California*, 61 S. CAL. L. REV. 497, 518-19 (1988) (expressing doubt that enacting land use measures by direct democracy provides for needed scientific study and consideration of entire community's interests).

11 *See* Nitikman, *supra* note 10, at 501 & n.20.

12 *See infra* notes 226-38 and accompanying text (examining problems with initiative process).

13 Legislatively proposed general plan amendments do provide for notice and a hearing. *See infra* notes 48-50 and accompanying text (discussing statutory due process requirements for general plan amendments); *see also infra* notes 66-77 and accompanying text (discussing due process), notes 100-46 and accompanying text (discussing California Supreme Court cases striking down notice and hearing requirements for initiatives). Failure to provide notice and a hearing for general plan amendments may violate due process. *See infra* notes 227-30 and accompanying text (noting that those affected by initiative, but outside municipality, have no voice in general plan amendment process), note 238 and accompanying text (arguing that land developers could use initiative process to circumvent notice and hearing requirements for general plan amendments). Both the United States and California Constitutions guarantee due process under the law. U.S. CONST. amend. V; CAL. CONST. art. I, § 13. The Fourteenth Amendment to the United States Constitution makes the Fifth Amendment applicable to state action. U.S. CONST. amend. XIV, § 1.

14 *See* 11 C.J.S. *Body* § 381 (1938) (defining "legislative body" as "[a]ny body of persons authorized to make laws or rules for the community represented by them"). This Comment uses the term "local legislative body" to refer to either a city council or board of supervisors.

15 CAL. GOV'T CODE § 65353 (West Supp. 1993); *see infra* notes 48-50 and

through the initiative process, however, have no such due process requirements.[16] The failure to provide notice and a hearing allows voting majorities to use the general plan amendment process to impose their will on minority interests or those outside the voting community.[17]

The California Supreme Court has not yet indicated whether citizens may use initiatives to directly amend general plans.[18] This Comment argues that general plan initiatives do not adequately protect the due process rights of affected landowners.[19] Therefore, this Comment proposes legislation amending the Government Code to define general plan amendments as matters of statewide concern that are outside the initiative process.[20] Part I explores the statutory and legal framework for zoning, general plans, and the initiative process.[21] Part I also explores due process concerns vis-à-vis the initiative process.[22] Part II reviews California case law addressing initiatives and zoning, and uses these cases as a means of analyzing initiatives amending general

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accompanying text (describing due process requirements for general plan amendments).

16 *Cf.* Arnel Dev. Co. v. City of Costa Mesa, 620 P.2d 565, 569 (Cal. 1980) (characterizing all zoning actions as legislative in nature and therefore subject to initiative process); Associated Home Builders v. City of Livermore, 557 P.2d 473, 481 (Cal. 1976) (finding that due process requirements do not apply to zoning initiatives); San Diego Bldg. Contractors Ass'n v. City Council, 529 P.2d 570, 573 (Cal. 1974) (holding that notice and hearing requirements do not apply to zoning initiatives in charter cities), *appeal dismissed*, 427 U.S. 901 (1976). For a discussion of *Arnel*, *Associated Home Builders*, and *San Diego Bldg. Contractors Ass'n*, see *infra* notes 100-46 and accompanying text.

17 *See infra* notes 227-30 and accompanying text (discussing majority use of political power to detriment of those outside community), notes 237-38 and accompanying text (arguing that those with financial clout can control process).

18 The court had an opportunity to address this issue in a recent case, but failed to do so. *See* Lesher Communications, Inc. v. City of Walnut Creek, 802 P.2d 317 (Cal. 1990); *infra* notes 186-90 and accompanying text (discussing *Lesher*).

19 *See infra* note 230 and accompanying text (arguing that general plan initiatives do not give affected citizens adequate voice in amendment process).

20 *See infra* notes 259-62 and accompanying text (outlining legislative proposal).

21 *See infra* notes 28-65 and accompanying text.

22 *See infra* notes 66-77 and accompanying text.

plans.[23] In California, zoning laws must comport with general plans,[24] just as California statutes must comply with the state's constitution. Because of this close connection between zoning laws and general plans, this Comment uses the case law on zoning as a mode of analyzing general plan initiatives.[25] Part III explores the scant case law on initiatives and general plans, analyzes policy issues on land use initiatives, and considers possible solutions.[26] Finally, Part IV proposes legislation to place general plan amendments outside the initiative process by characterizing them as matters of statewide concern.[27]

I. LEGAL FRAMEWORK OF ZONING, GENERAL PLANS, THE INITIATIVE PROCESS, AND DUE PROCESS

A. Zoning

Zoning is the process by which municipalities divide a region into districts and prescribe certain types of land use within each district.[28] In California, the local legislative body enacts zoning

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[23] *See infra* notes 78-179 and accompanying text. In California, zoning laws and general plans together govern local land use law. *See* Joseph F. DiMento, *Developing The Consistency Doctrine: The Contribution of the California Courts*, 20 SANTA CLARA L. REV. 285, 286 (1980) (arguing that consistency requirement for land use plan and zoning creates nexus between them). One case has interpreted general plans to function as a land use constitution because they are the framework to which zoning must adhere. *See* O'Loane v. O'Rourke, 42 Cal. Rptr. 283, 288 (Ct. App. 1965) (defining general plan as constitution for municipal development because all zoning ordinances must comply with plan).

[24] CAL. GOV'T CODE § 65860 (West 1983).

[25] *See infra* notes 78-79 and accompanying text (exploring connection between general plan and zoning).

[26] *See infra* notes 180-255 and accompanying text.

[27] *See infra* notes 256-62 and accompanying text.

[28] *See* 1 ROBERT M. ANDERSON, AMERICAN LAW OF ZONING § 1.13 (3d ed. 1986). Cities and counties derive zoning powers from their police power. *Id.* § 2.01. Pursuant to their police power, municipalities act to protect the health, safety, and welfare and maintain the morals of the local community. *Id.* § 3.06. Before the advent of zoning, municipalities often used their police power to enjoin certain land uses deemed to be public nuisances. *Id.* § 3.03.

All states have adopted enabling legislation that delegates the zoning power to municipalities. *Id.* § 2.19. State statutes refer to this type of legislation as a zoning enabling act. *Id.* §§ 2.19-.29. Many states have

ordinances.[29] Under the California Government Code, local officials must give notice[30] and hold public hearings[31] before they enact zoning ordinances[32] or amend existing ordinances.[33] Further, all city or county zoning ordinances must conform to the municipality's general plan.[34]

Little case law exists on general plan initiatives.[35] Therefore,

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adopted the Standard State Zoning Enabling Act, first published by the United States Department of Commerce in the 1920s. *Id.* § 2.21.

The Standard State Zoning Enabling Act has been instrumental in the widespread use of zoning throughout the United States since its enactment. *Id.* The United States Supreme Court legitimized the use of comprehensive zoning in Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395-96 (1926). In *Euclid*, the Village of Euclid enacted a comprehensive zoning plan that prohibited industrial uses on the plaintiff's property. *Id.* at 384. The plaintiff brought suit, claiming the restrictive zoning deprived him of property without due process of law in violation of the Fourteenth Amendment to the Constitution. *Id.* The Court upheld the zoning restriction even though the zoning decreased the value of plaintiff's property. *Id.* at 396-97. Since *Euclid*, zoning has become a major tool in municipal planning. *See* ANDERSON, *supra*, § 1.14.

[29] CAL. GOV'T CODE § 65850 (West Supp. 1993).

[30] *Id.* § 65854. The notice must include the time and place of the hearing, a general description of the zoning law local officials are considering, and a general description of the geographic area affected. *Id.* § 65094. Officials must publish the notice in a newspaper of general circulation at least 10 days before the hearing. *Id.* § 65090(a). Any person who has filed a written request for notice must receive such notice by mail or hand delivery. *Id.* § 65092.

[31] *Id.* § 65854. A "public hearing" is a fair and impartial hearing at which parties may present evidence to a fair and impartial tribunal. Saks & Co. v. City of Beverly Hills, 237 P.2d 32, 36 (Cal. Ct. App. 1951).

[32] CAL. GOV'T CODE § 65850 (West Supp. 1993). Under its power to zone, a local legislative body may pass zoning ordinances that, inter alia, regulate building heights and uses, establish requirements for offstreet parking and loading, and create civic districts around civic centers and other public property. *Id.*

[33] *Id.* § 65854. When officials pass zoning amendments that change property from one zone to another or impose any regulation under § 65850, they must follow the same procedure prescribed for enacting zoning ordinances. *Id.* § 65853 (West 1983). Additionally, officials must give written or hand-delivered notice to all landowners within 300 feet of the property subject to the zoning change. *Id.* § 65091(a)(3) (West Supp. 1993). The local legislative body may enact emergency interim zoning ordinances without providing notice and a hearing if necessary to protect public safety, health, or welfare. *Id.* § 65858.

[34] *Id.* § 65860 (West 1983).

[35] *See* Lesher Communications, Inc. v. City of Walnut Creek, 802 P.2d 317, 322-23 (Cal. 1990) (striking down initiative on ground it was not

this Comment explores cases addressing the general role of initiatives in zoning.[36] It then applies the analytic framework of these zoning cases to general plan amendments.[37]

B. General Plan

A general plan is a city's statement of its general plans and goals for the future physical development of the city.[38] Before 1971, the California courts considered the general plan merely advisory.[39] In 1971, however, the California Legislature adopted legislation mandating that all cities adopt comprehensive, long-term general plans for the physical development of the city.[40]

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general plan amendment, but instead zoning amendment that was inconsistent with general plan); Duran v. Cassidy, 104 Cal. Rptr. 793, 801 (Ct. App. 1972) (finding that voters could use initiative process to amend general plan in charter city); *infra* notes 186-98 and accompanying text (discussing *Lesher* and *Duran*).

[36] *See* Arnel Dev. Co. v. City of Costa Mesa, 620 P.2d 565, 569 (Cal. 1980) (characterizing all zoning actions as legislative in nature and therefore subject to initiative process); Associated Home Builders v. City of Livermore, 557 P.2d 473, 480-81 (Cal. 1976) (finding that due process requirements do not apply to zoning initiatives); San Diego Bldg. Contractors Ass'n v. City Council, 529 P.2d 570, 578 (Cal. 1974) (holding that notice and hearing requirements do not apply to zoning initiatives in charter cities), *appeal dismissed*, 427 U.S. 901 (1976); Hurst v. City of Burlingame, 277 P. 308, 311 (Cal. 1929) (holding that zoning initiatives must conform to due process requirements of zoning), *overruled by* Associated Home Builders v. City of Livermore, 557 P.2d 473 (Cal. 1976); Dwyer v. City Council, 253 P. 932, 936 (Cal. 1927) (finding that legislature could not impose due process requirements on people's initiative power); *infra* notes 96-146 and accompanying text (discussing *Arnel*, *Associated Home Builders*, *San Diego Bldg. Contractors Ass'n*, *Hurst*, and *Dwyer*).

[37] *See infra* notes 144-45, 205-06 and accompanying text (predicting that California Supreme Court would not require notice and hearing for general plan initiatives given court's holdings in zoning initiative cases).

[38] MANDELKER & CUNNINGHAM, *supra* note 6, at 25.

[39] DANIEL J. CURTIN, JR., CALIFORNIA LAND-USE AND PLANNING LAW 9 (1991). The majority of jurisdictions outside California still considers such plans merely advisory. *See, e.g.*, Haines v. City of Phoenix, 727 P.2d 339, 342 (Ariz. Ct. App. 1986) (holding that general plan need not have all required elements to be in compliance with statutory definition of general plan); Kozesnik v. Montgomery Township, 131 A.2d 1, 7 (N.J. 1957) (holding that "in accordance with a general plan" requirement did not demand actual comprehensive plan in some "physical form" outside zoning ordinance).

[40] *See* CAL. GOV'T CODE § 65860 (West 1983). In passing this statute, the legislature determined that cities would benefit from formulating general plans that reflected their long-range plans and objectives for development.

Since 1971, the general plan has been the "constitution" for land development in California cities and counties.[41] Once a city adopts a general plan, all zoning and other land uses must be consistent with the plan.[42]

The general plan details the physical development of the city and its outlying areas.[43] The plan must include certain elements, such as plans for traffic flow and affordable housing.[44] If the plan is internally consistent,[45] both among the various elements and within each element, the courts will deem the plan adequate.[46]

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58 Op. Att'y Gen. 21, 23 (Cal. 1975). For an overview of general plans, see Alan R. Perry, *Local "General Plan" in California*, 9 SAN DIEGO L. REV. 1 (1971).

41 CURTIN, *supra* note 39, at 9.

42 *Id.* Consistency is an important aspect of the general plan concept. *See* MANDELKER & CUNNINGHAM, *supra* note 6, at 478. Zoning regulations that are consistent with the general plan are usually immune to successful legal challenges. *See id.*

43 CAL. GOV'T CODE § 65300 (West Supp. 1993).

44 *Id.* § 65302. The general plan must include a diagram setting forth its general objectives. *Id.* It must also contain the following mandatory elements: land use (describing general distribution and intensity of various land uses), circulation (identifying major thoroughfares), housing (projecting needs, stating general goals), conservation (prescribing use of natural resources), open space (setting forth preservation measures), noise (identifying problems), and safety (defining policies and programs to protect public from natural and man-made disasters). *Id.* These elements must meet all of the criteria outlined in the statute. *See* CURTIN, *supra* note 39, at 17. If the general plan does not contain all the mandatory elements that state law requires, the court will deem it legally inadequate. *Id.* If the plan is inadequate, the local legislative body may not pass any zoning amendments relating to the inadequate or missing element(s). *Id.* The plan may also contain optional elements that relate to physical development the city considers appropriate. CAL. GOV'T CODE § 65303 (West Supp. 1993).

45 CAL. GOV'T CODE § 65300.5 (West 1983). "[T]he general plan and elements and parts thereof [must] comprise an integrated, internally consistent and compatible statement of policies for the adopting agency." *Id.* This requirement is also known as internal or horizontal consistency. CURTIN, *supra* note 39, at 26.

46 8 BERNARD E. WITKIN, SUMMARY OF CALIFORNIA LAW § 831 (9th ed. 1988). If a general plan is not internally integrated and consistent, the court may invalidate the land use elements of the general plan. *See, e.g.*, Concerned Citizens v. Calaveras County Bd. of Supervisors, 212 Cal. Rptr. 273, 281-82 (Ct. App. 1985) (invalidating county's general plan in which one portion of circulation element indicated roads sufficient for projected traffic increases, while land use element described worsening traffic conditions); Sierra Club v. Kern County Bd. of Supervisors, 179 Cal. Rptr. 261, 264 (Ct. App. 1981) (finding Kern County General Plan internally

A local planning agency drafts the general plan.[47] The Government Code requires the planning agency to provide for public participation during the preparation or amendment of the general plan.[48] If the adoption or amendment of the general plan would affect permitted uses of land, the Code requires the agency to hold at least one public hearing.[49] The agency must also give adequate notice of the hearing.[50] Once the hearing phase is complete, the local legislative body may adopt the general plan.[51] Because California voters have the right to legislate directly, voters may also attempt to enact or amend general plans through the initiative process.[52]

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inconsistent because land use and open space elements designated conflicting land uses for same property).

47 CAL. GOV'T CODE § 65300 (West Supp. 1993).

48 *Id.* § 65351.

49 *Id.* § 65353(a).

50 *Id.* § 65353(b).

51 *Id.* § 65301.5 (West 1983). "The adoption of the general plan . . . or the adoption of any amendment to such plan . . . is a legislative act which shall be reviewable pursuant to Section 1085 of the Code of Civil Procedure." *Id.* This law codified a California appellate court decision deeming amendment of a general plan a legislative act. *See* Karlson v. City of Camarillo, 161 Cal. Rptr. 260, 266 (Ct. App. 1980).

In *Karlson*, plaintiff-appellant sought a writ of mandate to set aside two city council amendments to the city's general plan. *Id.* at 263. Because the city council considered the amendments' effect on the whole city, the court held that the amendments were a legislative act. *Id.* at 266. The court applied an arbitrary and capricious standard of review, the appropriate scope of review for legislative acts under California Code of Civil Procedure § 1085. *Id.* at 265. Under this standard, the court must determine whether the city council disregarded the relevant facts and acted in a willful and unreasonable fashion when it passed the general plan amendments. *See* BLACK'S LAW DICTIONARY 105 (6th ed. 1990) (defining "arbitrary and capricious"). The *Karlson* court determined that the council acted properly in this case and upheld the general plan amendments. *Karlson*, 161 Cal. Rptr. at 267-68.

The local legislative body may also later amend the general plan if it deems an amendment necessary for the public interest. CAL. GOV'T CODE § 65358(a) (West Supp. 1993). However, it may not amend a general plan more than four times per year. *Id.* § 65358(b). This Comment focuses on initiatives amending general plans because most cities and counties already have general plans in place as required by the Government Code. *See id.* § 65300 (requiring general plan for all cities and counties).

52 *See infra* notes 53-65 and accompanying text (describing California initiative process).

C. Initiative Process

The California Constitution grants citizens the power to legislate by initiative.[53] With this power, citizens may place proposed constitutional amendments,[54] state statutes,[55] or local ordinances[56] on the ballot. If a majority of the electorate votes in favor of the ballot measure, the constitutional amendment, statute, or ordinance becomes law.[57]

The California Elections Code outlines the general procedural requirements for the initiative process.[58] Under section 4013, when a majority of municipal voters passes an initiative, it becomes a valid and binding city ordinance.[59] Only a majority of municipal voters may repeal or amend the initiative-created ordinance.[60]

Regardless of the academic debate over the wisdom of legislating directly through initiatives,[61] the initiative power remains

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53 CAL. CONST. art. IV, § 1. Voters may also legislate using referenda, and the California Supreme Court has already ruled that voters may hold a referendum vote on general plan amendments. Yost v. Thomas, 685 P.2d 1152, 1160-61 (Cal. 1984); *see infra* note 80 (discussing *Yost*). Therefore, this Comment focuses on a statutory analysis of the initiative process.

Citizens may use the initiative power only for legislative acts, and not in administrative proceedings that involve individual citizens. MICHAEL P. DURKEE ET AL., LAND-USE INITIATIVES AND REFERENDA IN CALIFORNIA 40 (1990). In administrative or quasi-judicial proceedings, the government must provide individual notice and a hearing to those affected by the proposed amendment. Nitikman, *supra* note 10, at 504-05. A "quasi-judicial" proceeding is one in which public administrative officers must investigate facts, weigh evidence, and draw conclusions upon which they base official actions. BLACK'S LAW DICTIONARY 1243 (6th ed. 1990).

For a general overview of the initiative and referendum process, see Howard Eastman, *Squelching Vox Populi: Judicial Review of the Initiative in California*, 25 SANTA CLARA L. REV. 529 (1985); Nick Brestoff, Note, *The California Initiative Process: A Suggestion for Reform*, 48 S. CAL. L. REV. 922 (1975); Donald S. Greenberg, Comment, *The Scope of Initiative and Referendum in California*, 54 CAL. L. REV. 1717 (1966).

54 CAL. ELEC. CODE § 3500 (West 1977).

55 *Id.*

56 *Id.* § 4000.

57 CAL. CONST. art. II, §§ 8-9 (providing for initiative and referendum powers).

58 CAL. ELEC. CODE §§ 4001-4011 (West 1977 & Supp. 1993).

59 *Id.* § 4013 (West 1977).

60 *Id.*

61 Commentators debate the merits of the initiative process. Some argue that the initiative process is an inappropriate means of legislating and cite

firmly entrenched in California politics.[62] Californians will continue to use this power to shape the laws of their towns, cities, and state.[63] Furthermore, if the public feels that local legislators inadequately address the land use problems facing local citizens, voters will use the polls to directly shape the future of land development.[64] However, this direct participation creates conflicts with the due process requirements of the United States Constitution.[65]

D. Due Process

Under the Due Process Clause of the United States Constitution, the government may not deprive a person of property without due process of law.[66] Thus, a government entity must provide notice and a hearing if its actions will impair a person's property rights.[67] Zoning implicates due process because zoning may affect property uses and deprive the owner of property rights.[68]

Because of the due process requirements of zoning, the Califor-

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several procedural flaws as support. *See, e.g.*, Eastman, *supra* note 53, at 532-35; Nitikman, *supra* note 10, at 514 & n.96. One commentator, however, favors use of the initiative for legislation, citing the advantages of allowing the people to participate in the legislative process. Eastman, *supra* note 53, at 530-32.

62 DURKEE, *supra* note 53, at 136.

63 *See id.* at 141.

64 *Id.*

65 *See* U.S. CONST. amend. V (providing that federal government may deprive no citizen of life, liberty, or property without due process of law). Under the Fourteenth Amendment, this due process requirement also applies to state governments. *Id.* amend. XIV, § 1; *see also infra* notes 227-30 and accompanying text (illustrating how some citizens affected by land use initiative may have difficulty voicing their opinions).

66 *See supra* note 65. A full discussion of due process rights is beyond the scope of this Comment. For a complete discussion of due process, see Edward L. Rubin, *Due Process and the Administrative State*, 72 CAL. L. REV. 1044 (1984).

67 *See* BLACK'S LAW DICTIONARY 500-01 (6th ed. 1990) (defining due process of law). Procedural due process requires notice and a hearing. David G. Andersen, Comment, *Urban Blight Meets Municipal Manifest Destiny: Zoning at the Ballot Box, the Regional Welfare, and Transferable Development Rights*, 85 NW. U. L. REV. 519, 525 (1991). By contrast, substantive due process protects a person from unreasonable and arbitrary acts of the government. *Id.* at 531.

68 *See* James R. Kahn, *In Accordance with a Constitutional Plan: Procedural Due Process and Zoning Decisions*, 6 HASTINGS CONST. L.Q. 1011, 1018 (1979)

nia Government Code requires notice and a hearing when municipalities enact or amend zoning ordinances.[69] Those requirements give the public a voice in the zoning process and allow those affected to influence the outcome of that process.[70] The California Elections Code, however, does not impose due process requirements on zoning by initiative.[71] Furthermore, the California Supreme Court has reasoned that zoning initiatives are legislative acts and as such, are not subject to specific notice and hearing requirements.[72] Therefore, California case law does not accord landowners procedural due process for zoning initia-

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(arguing that most courts considering constitutional challenges to zoning decisions assume landowners have right to due process protections).

69 CAL. GOV'T CODE § 65854 (West Supp. 1993); *see supra* notes 28-34 and accompanying text (describing zoning process).

70 Perry, *supra* note 40, at 15 (noting that general plan includes hearing provision to provide affected individuals with voice in planning process).

71 *See* CAL. ELEC. CODE §§ 3700-3720 (West 1977 & Supp. 1993) (imposing no procedural due process requirements on initiative process).

72 Arnel Dev. Co. v. City of Costa Mesa, 620 P.2d 565, 573 (Cal. 1980); Associated Home Builders v. City of Livermore, 557 P.2d 473, 475 (Cal. 1976); San Diego Bldg. Contractors Ass'n v. City Council, 529 P.2d 570, 574 (Cal. 1974), *appeal dismissed*, 427 U.S. 901 (1976). In *San Diego Building Contractors Ass'n*, the court cited as "black letter constitutional law" the proposition that due process does not require notice and a hearing for legislative acts. *Id.* at 573. For a full discussion of these cases, see *infra* notes 100-46 and accompanying text.

Many commentators have criticized the court's characterization of zoning initiatives as legislative acts as an overly simplistic approach that emphasizes form over substance. *See* Kahn, *supra* note 68, at 1031; Gregory A. Hile, Comment, *Zoning By Initiative in California: A Critical Analysis*, 12 LOY. L.A. L. REV. 903, 919-20 (1979). One commentator has urged courts to protect due process rights by repudiating the legislative characterization of zoning initiatives altogether. *See id.* at 921 (arguing that zoning change is really administrative act entitling affected landowner to due process protections). Alternatively, analysts argue that courts should apply the balancing test proposed in Mathews v. Eldridge, 424 U.S. 319, 335 (1976). Hile, *supra*, at 922; Kathryn A. Dunwoody, Note, Arnel Development Co. v. City of Costa Mesa: *Rezoning by Initiative and Landowners' Due Process Rights*, 70 CAL. L. REV. 1107, 1129-30 (1982). This test involves balancing three factors: the nature of the private interests affected by the government's action, the risk of erroneous deprivation of rights, and the fiscal and administrative burdens of requiring additional procedural safeguards. *Mathews*, 424 U.S. at 335.

tives,[73] even though the Government Code prescribes due process for zoning ordinances.[74]

The Government Code also provides procedural due process to landowners when general plan amendments affect their property.[75] Initiatives amending general plans deny such landowners their due process rights in the same manner zoning initiatives deny such rights.[76] Given the California Supreme Court's unwillingness to sustain procedural due process challenges to zoning initiatives, the court will also likely strike down such challenges to general plan initiatives.[77]

II. THE INITIATIVE PROCESS AND ZONING

Little case law exists in California regarding voters' use of the initiative process to amend general plans.[78] In contrast, many litigants have challenged the legality of zoning initiatives.[79] General

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[73] *See* Hile, *supra* note 72, at 922-23 (arguing that zoning by initiative fails to protect landowners' constitutional rights to due process under three-part test U.S. Supreme Court proposed in *Mathews*). For a discussion of the three-part test, see *supra* note 72.

[74] CAL. GOV'T CODE § 65353 (West Supp. 1993); *see supra* notes 49-50 and accompanying text (describing due process requirements for enacting or amending zoning ordinances).

[75] CAL. GOV'T CODE § 65353 (West Supp. 1993); *see supra* notes 49-50 and accompanying text (describing due process requirements for enacting or amending general plan); *see also* Kahn, *supra* note 68, at 1012 (citing statutory efforts to create fair procedural requirements in zoning actions).

[76] *See infra* notes 227-30 and accompanying text (discussing due process arguments against land use initiatives).

[77] *See infra* notes 100-46 and accompanying text (discussing zoning initiative cases holding that due process does not apply to initiative process).

[78] *See* Lesher Communications, Inc. v. City of Walnut Creek, 802 P.2d 317, 322-23 (Cal. 1990) (striking down initiative on ground it was not general plan amendment, but instead zoning amendment that was inconsistent with general plan); Duran v. Cassidy, 104 Cal. Rptr. 793, 801 (Ct. App. 1972) (finding that voters could use initiative process to amend general plan in charter city); *infra* notes 186-98 and accompanying text (discussing *Lesher* and *Duran*).

[79] *See* Arnel Dev. Co. v. City of Costa Mesa, 620 P.2d 565, 569 (Cal. 1980) (characterizing all zoning actions as legislative in nature and therefore subject to initiative process); Associated Home Builders v. City of Livermore, 557 P.2d 473, 480-81 (Cal. 1976) (finding that due process requirements do not apply to zoning initiatives); San Diego Bldg. Contractors Ass'n v. City Council, 529 P.2d 570, 578 (Cal. 1974) (holding that notice and hearing requirements do not apply to zoning initiatives in charter cities), *appeal dismissed*, 427 U.S. 901 (1976); Hurst v. City of

plans and zoning laws are closely related, much like the relationship between constitutions and statutes. Therefore, the case law on zoning initiatives provides a useful analogy in an analysis of general plan amendments through the initiative process.

A. Background on Initiatives and Zoning

The cases discussed in this section address whether the initiative process should apply to zoning ordinances and zoning amendments.[80] In California, the zoning enabling statute dele-

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Burlingame, 277 P. 308, 311 (Cal. 1929) (holding that zoning initiatives must conform to due process requirements of zoning), *overruled by* Associated Home Builders v. City of Livermore, 557 P.2d 473 (Cal. 1976); Dwyer v. City Council, 253 P. 932, 936 (Cal. 1927) (finding that legislature could not impose due process requirements on people's initiative power); *infra* notes 100-46 and accompanying text (discussing *Arnel*, *Associated Home Builders*, *San Diego Bldg. Contractors Ass'n*, *Hurst*, and *Dwyer*).

[80] *See Arnel*, 620 P.2d at 569 (characterizing all zoning actions as legislative in nature and therefore subject to initiative process); *Associated Home Builders*, 557 P.2d at 480-81 (finding that due process requirements do not apply to zoning initiatives); *San Diego Bldg. Contractors Ass'n*, 529 P.2d at 578 (holding that notice and hearing requirements do not apply to zoning initiatives in charter cities); *Hurst*, 277 P. at 311 (holding that zoning initiatives must conform to due process requirements of zoning); *Dwyer*, 253 P. at 936 (finding that legislature could not impose due process requirements on people's initiative power); *infra* notes 100-46 and accompanying text (discussing *Arnel*, *Associated Home Builders*, *San Diego Bldg. Contractors Ass'n*, *Hurst*, and *Dwyer*).

The California Supreme Court has already upheld the use of referenda to amend general plans. *See* Yost v. Thomas, 685 P.2d 1152, 1160-61 (Cal. 1984). In *Yost*, the Santa Barbara City Council amended the general plan to allow for construction of a hotel. *Id.* at 1154. Opponents of the project proposed a referendum on the issue. *Id.* When the city clerk refused to place the referendum on the ballot, the opponents petitioned for a writ to compel the clerk to act. *Id.* The supreme court held that the amendment of a general plan was a legislative act and therefore subject to the referendum process. *Id.* at 1158. However, the supreme court has not yet decided if voters may adopt or amend a general plan by initiative. *See infra* notes 186-90 and accompanying text (discussing Lesher Communications, Inc. v. City of Walnut Creek, 802 P.2d 317 (Cal. 1990)). General plan initiatives raise more due process concerns than general plan referenda because the initiative process provides affected landowners with neither notice nor a hearing. *See* Judith W. Wegner, *Moving Toward the Bargaining Table: Contract Zoning, Development Agreements, and the Theoretical Foundations of Government Land Use Deals*, 65 N.C. L. REV. 957, 1011 & n.310 (1987) (concluding that zoning initiatives create more due process concerns than zoning referenda because, unlike referenda, affected landowners receive neither notice nor hearing prior to initiatives).

gates the zoning authority to the municipality's legislative body.[81] It also sets forth detailed procedures that the legislative body must follow when zoning.[82] These procedures provide for notice and a hearing on the proposed zoning law before enactment.[83]

In contrast, when voters zone by initiative, landowners receive no public hearing before the initiative vote.[84] If the initiative petition has the requisite number of signatures, the board of supervisors or city council must either pass the petition or submit it to a vote of the people.[85] Once a majority of voters approves the zoning initiative, it becomes a valid and binding ordinance.[86]

Although zoning initiatives do affect individual landowners' property rights,[87] the California Supreme Court has held that zoning initiatives are not subject to the notice and hearing requirements of the zoning statutes.[88] California courts have generally upheld the power to zone by initiative because the state constitution guarantees voters this right.[89] Zoning by initiative

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81 CAL. GOV'T CODE § 65850 (West Supp. 1993); *see supra* note 28 (defining zoning enabling statute).

82 CAL. GOV'T CODE §§ 65850-65863.12 (West 1983 & Supp. 1993); *see supra* notes 30-34 and accompanying text (detailing statutory procedural requirements for zoning legislation).

83 *See supra* notes 30-31 and accompanying text (outlining notice and hearing procedures for enacting zoning ordinances).

84 *See Associated Home Builders*, 557 P.2d at 480-81 (holding that notice and hearing requirements do not apply to zoning initiatives). For a full discussion of this case, see *infra* notes 109-21 and accompanying text.

85 CAL. ELEC. CODE §§ 3709-3711 (West Supp. 1993). Initiative proponents must initially submit the proposal to the county clerk to verify the number of signatures collected. *Id.* §§ 3705-3708.

86 *Id.* § 3716.

87 *See* Hile, *supra* note 72, at 904 (implying that zoning initiatives substantially affect landowners' use of their property).

88 *See* Arnel Dev. Co. v. City of Costa Mesa, 620 P.2d 565, 569 (Cal. 1980) (characterizing all zoning actions as legislative in nature and therefore subject to initiative process); *Associated Home Builders*, 557 P.2d at 480-81 (finding that due process requirements do not apply to zoning initiatives); *infra* notes 109-46 and accompanying text (discussing *Associated Home Builders* and *Arnel*). For a discussion of due process requirements for zoning statutes, see *supra* notes 30-31 and accompanying text.

89 *See infra* notes 91-146 (discussing California cases). In other states, the state statutes or municipal charters grant the people the power to legislate through initiative, and a separate zoning enabling act grants the municipalities the power to zone. In these cases, courts have generally struck down zoning initiatives as inconsistent with the detailed amendment procedures set forth in the zoning enabling act. *See* J.R. Kemper,

affords landowners no right to public hearings, and therefore, unlike the state zoning laws, fails to guarantee landowners' rights to notice and a hearing.[90]

B. California Case Law

No California Supreme Court case directly addresses the issue of how the initiative process applies to general plan amendments.[91] However, the zoning initiative cases illustrate the court's reasoning in this area and provide an analogy which is useful in analyzing general plan initiatives.[92] These cases demonstrate the supreme court's rejection of due process challenges to the initiative process.[93]

California zoning laws mandate notice and a hearing when the local legislative body adopts zoning laws.[94] In contrast, the California Constitution does not require notice and a hearing for initiative measures.[95] Therefore, in the early cases, the California Supreme Court had difficulty reconciling state zoning laws that required notice and a hearing with the initiative process.[96] How-

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Annotation, *Adoption of Zoning Ordinance or Amendment Thereto Through Initiative Process*, 72 A.L.R. 3D 991, 994, 1001-02 (1976).

90 *See* Hile, *supra* note 72, at 922-23 (arguing that zoning by initiative fails to protect landowners' constitutional rights to due process under three-part test U.S. Supreme Court proposed in Mathews v. Eldridge, 424 U.S. 319, 335 (1976)). For a discussion of the three-part test, see *supra* note 72.

91 The California Supreme Court had the opportunity to address the issue in one case, but failed to do so. *See* Lesher Communications, Inc. v. City of Walnut Creek, 802 P.2d 317, 321 (Cal. 1990) (concluding that court need not address issue of whether citizens could amend general plan using initiative process); *infra* notes 186-90 and accompanying text (discussing *Lesher*).

92 *See supra* notes 24-25 and accompanying text (discussing relationship between general plan and zoning).

93 *See infra* notes 116-21, 136-38 and accompanying text (presenting court's reasons for rejecting due process challenge to initiatives).

94 CAL. GOV'T CODE § 65854 (West Supp. 1993); *see supra* notes 30-31 and accompanying text (discussing statutory due process requirements for zoning laws).

95 *See* CAL. CONST. art. II, § 1.

96 At first, the California Supreme Court upheld zoning by initiative. Dwyer v. City Council, 253 P. 932, 934-35 (Cal. 1927). The court reasoned that the legislature could not impose procedural requirements on the people's constitutional power to legislate by initiative. *Id.* at 936. Two years later, the court reversed itself, citing due process concerns with zoning. Hurst v. City of Burlingame, 277 P. 308, 311 (Cal. 1929), *overruled by* Associated Home Builders v. City of Livermore, 557 P.2d 473 (Cal. 1976).

ever, in the mid-1970s the court decided that the statutory requirements of notice and a hearing[97] do not limit the constitutional power to zone by initiative.[98] For many years courts used the procedural due process argument to bar zoning by initiative.[99] However, the California Supreme Court rejected the constitutional due process rationale in 1974.[100] In *San Diego Building Contractors Ass'n v. City Council*, the city of San Diego enacted a building height ordinance after voters had passed it by initiative.[101] The plaintiffs challenged the zoning initiative as a violation of the Due Process Clause of the Fourteenth Amendment.[102] In granting the plaintiffs' summary judgment motion, the trial court held that enacting zoning ordinances through the initiative process violated due process.[103]

The California Supreme Court reversed, finding that the United States Constitution did not mandate notice and a hearing for legislative acts.[104] Therefore, the court reasoned that notice and a hearing only apply when a statute specifically mandates

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According to the *Hurst* court, a landowner must receive notice and a hearing in any action that affects that landowner's property rights. *Id.* Thus, the court determined that the city could not circumvent these notice and hearing requirements with a zoning initiative. *Id.*

97 *See supra* notes 30-31 and accompanying text (discussing notice and hearing requirements under California zoning law).

98 *Associated Home Builders*, 557 P.2d at 481; *see infra* notes 109-21 and accompanying text (discussing *Associated Home Builders*).

99 *See, e.g.*, Scott v. City of Indian Wells, 492 P.2d 1137, 1142 (Cal. 1972) (declaring that zoning initiative violated due process because it did not give landowner opportunity for hearing before initiative deprived him of property interest); Taschner v. City Council, 107 Cal. Rptr. 214, 231 (Ct. App. 1973) (holding that voters may not enact zoning regulation by initiative because initiative process violated state zoning law and due process clause).

100 San Diego Bldg. Contractors Ass'n v. City Council, 529 P.2d 570 (Cal. 1974), *appeal dismissed*, 427 U.S. 901 (1976).

101 *Id.* at 571.

102 *Id.* at 570. The plaintiffs also asserted that the zoning initiative violated the San Diego City Charter. *Id.* For a discussion of charter cities and general law cities, see *infra* note 106.

103 *See San Diego Bldg. Contractors Ass'n*, 529 P.2d at 571. The court also found that zoning initiatives violated the city charter. *Id.* For a discussion of charter cities and general law cities, see *infra* note 106.

104 *See San Diego Bldg. Contractors Ass'n*, 529 P.2d at 576. The opinion distinguishes between adjudicative actions, for which notice and a hearing are required, and legislative actions, which have no such requirements. *Id.* at 573.

them.[105] According to the court, the notice and hearing requirements of the zoning statute only apply to cities not organized under a municipal charter.[106] Because San Diego is a charter city, the court held that statutory due process requirements did not apply to the zoning initiative.[107] The *San Diego Building Contractors Ass'n* opinion reflected the court's growing sentiment in favor of an unrestricted right to legislate by initiative.[108]

In 1976, the California Supreme Court eliminated all procedural due process challenges to initiatives in *Associated Home Builders v. City of Livermore*.[109] Livermore voters passed a zoning initiative that prohibited the city council from issuing residential building permits until municipal services complied with specified standards.[110] The superior court issued a permanent injunction against enforcement of the initiative after the plaintiffs, an association of contractors and subdividers, brought suit.[111]

In reversing the trial court, the California Supreme Court overruled prior case law.[112] The court held that statutory notice and

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105 *Id.* at 576.

106 *Id.* Under the California Constitution, cities may organize under a charter. CAL. CONST. art. XI, § 3(a). The city charter supersedes inconsistent state law on matters of exclusively municipal concern. 45 CAL. JUR. 3D *Municipalities* § 95 (1978). Cities that are not organized under a charter are general law cities. *Id.* § 93. These cities are subject to general state laws even on matters of local concern. *Id.*

107 *San Diego Bldg. Contractors Ass'n*, 529 P.2d at 576. The plaintiffs relied on a previous case that struck down a zoning initiative because initiatives do not provide the notice and hearing required in enacting zoning ordinances. *Id.* (citing Hurst v. City of Burlingame, 277 P. 308, 311 (Cal. 1929), *overruled by* Associated Home Builders v. City of Livermore, 557 P.2d 473 (Cal. 1976)). However, Burlingame is a general law city, and San Diego is a charter city. *Id.* The court noted that the notice and hearing requirements of the state zoning law relate to exclusively municipal affairs; therefore, the court held these requirements inapplicable to a charter city. *Id.*

108 *See id.* at 578 (noting that other courts have held that citizens may enact legislation using initiative process and need not provide notice and hearing). The court would later reject all procedural due process arguments against use of the initiative process in Associated Home Builders v. City of Livermore, 557 P.2d 473 (Cal. 1976). *See infra* notes 109-21 and accompanying text (discussing *Associated Home Builders*).

109 557 P.2d 473, 480-81 (Cal. 1976).

110 *Id.* at 475.

111 *Id.* When voters pass an initiative, it becomes an enforceable ordinance. *See* CAL. CONST. art. IV, § 1 (reserving power of people to use initiative power to enact laws).

112 In *San Diego Building Contractors Ass'n*, the court did not explicitly

hearing provisions only apply to city council actions and not to the initiative process.[113] The court observed that initiative and referendum powers are not rights that the California Constitution grants to the people.[114] Rather, the people reserved these powers to themselves in enacting the state constitution.[115]

The court stated that the zoning law cannot limit the initiative power reserved by the people.[116] According to the court, the state legislature may specify the manner in which general law cities enact land use ordinances.[117] However, the legislature may not enact legislation that permits council action, but effectively bars initiative action.[118] According to the court, the notice and hearing provisions of the zoning law[119] conflict with the initiative power granted in the constitution.[120] Because the legislature could not enact laws that limit the initiative power, the court concluded that notice and hearing requirements do not apply to the initiative process.[121]

Four years later, the California Supreme Court reaffirmed its *Associated Home Builders* holding in *Arnel Development Co. v. City of Costa Mesa*.[122] In *Arnel*, the court characterized all zoning actions as legislative in nature[123] and therefore subject to the initiative

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overrule prior case law, specifically *Hurst*. However, in *San Diego Building Contractors Ass'n*, the court felt that the holding in *Hurst* rested on an interpretation of the zoning statute, not constitutional principles. *See San Diego Bldg. Contractors Ass'n*, 529 P.2d at 576 (citing Hurst v. City of Burlingame, 277 P. 308, 311 (Cal. 1929), *overruled by* Associated Home Builders v. City of Livermore, 557 P.2d 473 (Cal. 1976)).

113 *Associated Home Builders*, 557 P.2d at 478.

114 *Id.* at 477.

115 *Id.* The court noted that California courts had liberally construed the people's right to legislate by initiative and referendum in previous cases. *Id.* Therefore, the court concluded that it had to resolve any doubts in favor of the initiative process. *Id.*

116 *Id.* at 479.

117 *Id.* at 480.

118 *Id. But see infra* notes 165, 227-30 and accompanying text (arguing that general plan amendments have regional impact and should therefore be outside initiative process).

119 CAL. GOV'T CODE §§ 65853-65857 (West 1983 & Supp. 1993).

120 *Associated Home Builders*, 557 P.2d at 481.

121 *Id.* at 479. Based on this decision, the notice and hearing provisions of the general plan amendment process would also not apply to initiative measures amending the general plan.

122 620 P.2d 565 (Cal. 1980).

123 *Id.* at 566-67. Courts in other jurisdictions have held that determining whether a zoning action is legislative or adjudicative depends

process.[124] In this case, landowners challenged the validity of an initiative measure that rezoned a small parcel of property from multi-family residential use to single-family residential use.[125] The court of appeal reversed the trial court, reasoning that rezoning of such a small parcel was an adjudicative act not subject to the initiative process.[126]

The California Supreme Court reversed, however.[127] The court upheld the initiative, finding that the appellate court incorrectly characterized the zoning initiative as adjudicative in nature.[128] The plaintiffs contended that the zoning initiative was adjudicative, and therefore, denied them their due process protections of notice and a hearing.[129] Relying on an earlier United States Supreme Court decision[130] and California precedent,[131] the court rejected the plaintiffs' argument and held that all zoning ordinances are legislative acts.[132] When a zoning action affects only a few persons, the court indicated that a legislative body

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on whether the action involves a specific parcel. *See* Fasano v. Board of County Comm'rs, 507 P.2d 23, 26-27, 30 (Or. 1973) (characterizing rezoning of specific plot of land as adjudicative rather than legislative act and therefore subject to due process requirements).

[124] *Arnel*, 620 P.2d at 571; *see infra* notes 127-38 and accompanying text (discussing court's reasoning in *Arnel*).

[125] *Arnel*, 620 P.2d at 566. Plaintiffs filed a petition for mandamus, injunctive, and declaratory relief. *Id.* at 567.

[126] *Id.* at 567-68; *cf. Fasano*, 507 P.2d at 26-27, 30 (characterizing rezoning of 32-acre plot of land as adjudicative rather than legislative act and therefore subject to due process requirements).

[127] *Arnel*, 620 P.2d at 566.

[128] *Id.* at 567.

[129] *Id.* at 570.

[130] City of Eastlake v. Forest City Enters., Inc., 426 U.S. 668 (1976). In *Eastlake*, the Supreme Court held that the citizens of Eastlake, Ohio could pass a city charter amendment requiring a referendum vote on any land changes approved by the city council. *Id.* at 672. Under the Ohio Constitution, the Court found that Ohio citizens had reserved the right to legislate through a referendum. *Id.* at 673. Thus, the Court concluded that it could not characterize a referendum vote as an unconstitutional delegation of power because that power ultimately rests with the people. *Id.* at 672.

[131] *Arnel*, 620 P.2d at 568 (citing, inter alia, Associated Home Builders v. City of Livermore, 557 P.2d 473 (Cal. 1976) and San Diego Bldg. Contractors Ass'n v. City Council, 529 P.2d 570 (Cal. 1974), *appeal dismissed*, 427 U.S. 901 (1976)).

[132] *Id.* at 566-67. The court concluded that characterizing all zoning actions as legislative would simplify future land use decisions and prevent judicial challenges of those decisions. *See id.* at 572.

should grant the affected persons a hearing if possible.[133] However, the court concluded that neither the United States nor the California Constitutions required such hearings.[134]

The court derived a number of rules from its conclusion.[135] The most critical rule for the purposes of this Comment is that voters may enact zoning ordinances by initiative without providing due process to affected landowners.[136] The court noted that when voters enact zoning by initiative, landowners have an opportunity to present their case to the electorate.[137] The court also reasoned that landowners need no protection from voters imposing their own interests on the city because landowners still have constitutional protections against arbitrary zoning ordinances.[138] However, the court failed to consider the cost and difficulty of mounting a campaign to oppose a zoning initiative.[139] Overall, the court's decision reflected more concern for protecting the initiative process than for protecting the rights of landowners affected by zoning initiatives.[140]

Arnel and *Associated Home Builders* illustrate the court's hostility toward procedural due process challenges to land use initiatives.[141] The court's decision in *Arnel*, characterizing zoning initiatives as legislative in nature, eliminated all further due process

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133 *Id.* at 571.

134 *Id.*

135 *Id.* at 572.

136 *See id.* at 571-72. The other rules include: voters may subject zoning ordinances to referendum votes; zoning ordinances are reviewable under ordinary mandamus; zoning ordinances do not require explicit findings as do administrative decisions; and zoning ordinances are valid if reasonably related to the public welfare. *Id.* at 572.

137 *Id.* at 573.

138 *Id.* The court noted that landowners were constitutionally protected against arbitrary or unreasonable zoning that deprived them of substantially all use of their land. *Id.*

139 *See* Hile, *supra* note 72, at 923 (arguing that fighting initiative action may bankrupt landowner); *see also infra* note 237 and accompanying text (discussing fact that those with financial resources can influence electorate).

140 *See* Arnel Dev. Co. v. City of Cosa Mesa, 620 P.2d 565, 573 (Cal. 1980) (concluding that landowners have same opportunity as their opponents to present their case when electorate votes on zoning initiative).

141 *See id.* at 567-73 (holding that zoning is legislative act not subject to notice and hearing requirements); Associated Home Builders v. City of Livermore, 557 P.2d 473, 479-81 (Cal. 1976) (holding that legislature cannot restrict initiative power with notice and hearing requirements).

challenges to land use initiatives.[142] In *Associated Home Builders*, the court held that the legislature may not impose any limits on the use of the initiative process in zoning enactments or amendments.[143] The court appears unsympathetic to due process attacks on zoning initiatives.[144] Given the court's holdings in these cases, it would likely uphold general plan initiatives despite due process concerns.[145] Therefore, those opposed to using initiatives to amend general plans must use a different approach to challenge such initiatives.[146]

C. The Statewide Concern Doctrine: A Substantive Limitation on Zoning by Initiative

Although the California Supreme Court has taken an expansive view of zoning by initiative,[147] the California electorate does not

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142 *See Arnel*, 620 P.2d at 573 (concluding that zoning is legislative act, and therefore, electorate can enact zoning using initiative process).

143 *Associated Home Builders*, 557 P.2d at 480. The holding in this case effectively eliminated any rights to notice or a hearing with zoning initiatives. *See id.* at 479-81. Thus, cities could circumvent these requirements by submitting zoning ordinances to a vote of the people. *Cf.* Nitikman, *supra* note 10, at 520 (arguing that cities could use initiative process to circumvent prohibition against allowing small percentage of population to decide land use issues). Nitikman points out that if voter turnout for an initiative is low, the few neighboring landowners voting may actually control the resulting decision. *Id.* In such a case, the outcome of the vote would only reflect the views of the neighboring landowners who voted. *Id.* It is illegal for cities to allow a small percentage of the population to decide zoning matters. *Id.* (citing Washington *ex rel.* Seattle Title Trust Co. v. Roberge, 278 U.S. 116 (1928)). However, in reality, zoning initiatives may allow a small minority to decide zoning matters due to low voter turnout. *Id.* at 520 (arguing that initiative vote reflects will of only small section of community).

144 *See Arnel*, 620 P.2d at 573 (concluding that zoning is legislative act, and therefore, electorate may enact zoning using initiative process); *Associated Home Builders*, 557 P.2d at 480 (holding that legislature may not impose procedural due process requirements on zoning initiatives).

145 *See supra* notes 109-21, 136-38 and accompanying text (discussing court's rejection of due process challenges to initiative process).

146 *See infra* notes 259-62 and accompanying text (outlining legislative proposal to place general plan amendments outside initiative process by characterizing them as matters of statewide concern).

147 *See Arnel*, 620 P.2d at 569 (characterizing all zoning actions as legislative in nature and therefore subject to initiative process); *Associated Home Builders*, 557 P.2d at 480-81 (finding that due process requirements do not apply to zoning initiatives); *supra* notes 109-46 and accompanying text (discussing *Associated Home Builders* and *Arnel*).

have unlimited zoning power.[148] The supreme court and appellate courts have placed substantive limitations[149] on the initiative process. The most important of these limitations[150] disallows initiatives or referenda on matters of statewide concern.[151] The legislature can use this doctrine to place general plan amendments outside the initiative process.[152]

Under the statewide concern doctrine, municipal voters may not decide issues over which the state legislature has granted the local legislative body exclusive authority.[153] Therefore, if the legislature has granted the local legislative body exclusive authority

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148 *See infra* note 150 and accompanying text (outlining other substantive limitations on initiative power in addition to statewide concern doctrine).

149 The terms "substantive limit" or "substantive limitation" are terms of art distinguishing fundamental or essential limits from those that are merely procedural. *See* WEBSTER'S NEW INTERNATIONAL DICTIONARY (UNABRIDGED) 2279 (3d ed. 1986) (defining "substance" as "a fundamental part, quality, or aspect" and quoting Virginia Law Review article which distinguishes substantive question from procedural question); *see also* Bank of the Orient v. Town of Tiburon, 269 Cal. Rptr. 690, 697 (Ct. App. 1990) (reasoning that while legislature could impose substantive limits on initiative process, it could not impose procedural limits); California Beer & Wine Wholesalers v. Department of Alcoholic Bev. Control, 247 Cal. Rptr. 60, 65 (Ct. App. 1988) (holding that judge's task is to apply intelligible language of statute, whether language is substantive limitation or boundaries of delegation of rulemaking authority).

150 One limitation involves the statutory requirements for growth-control ordinances. In *Building Industry Ass'n v. City of Camarillo*, the building industry challenged the validity of a growth-control ordinance. Building Indus. Ass'n v. City of Camarillo, 718 P.2d 68, 70 (Cal. 1986). The California Supreme Court held that sponsors of a growth-control initiative must prove the ordinance is necessary to the public welfare as required under California Evidence Code § 669.5. *Id.* at 72.

Another substantive limitation involves the statutory time constraints on emergency ordinances. In an appellate case, the court of appeal struck down a temporary development ordinance enacted by initiative. *Bank of the Orient*, 269 Cal. Rptr. at 699. The ordinance at issue exceeded the 45 day limit on emergency interim ordinances. *Id.* at 692. The court conceded that several procedural requirements of the Government Code such as notice and a hearing were unworkable for an initiative measure. *Id.* at 696. However, it held that the substantive limits of statutes apply with the same rigor to initiatives as they do to city council actions. *Id.* at 697.

151 *See infra* notes 153-79 and accompanying text (discussing statewide concern doctrine).

152 *See infra* notes 256-62 and accompanying text (outlining legislative proposal to characterize general plan amendments as matters of statewide concern and therefore outside initiative process).

153 DURKEE, *supra* note 53, at 41.

to decide an issue, an initiative measure covering that issue would unlawfully impair that power.[154] In general law cities, the legislature can place any matter within the exclusive jurisdiction of the local legislative body.[155] In charter cities, however, the statewide concern doctrine only limits the initiative power if the issue is one of statewide or regional concern.[156]

The California Supreme Court used the statewide concern doctrine to limit a charter city's initiative power in *Committee of Seven Thousand (COST) v. Superior Court*.[157] Voters in Irvine, California qualified an initiative that would have prohibited the city from imposing certain fees[158] on developers without voter approval.[159] Opponents of the initiative[160] petitioned for a writ of mandate[161] prohibiting the city clerk and city council from placing the mea-

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154 *Id.* The courts have used this concept to limit the initiative power in the area of transportation corridor construction. *See infra* notes 157-69 and accompanying text (discussing Committee of Seven Thousand (COST) v. Superior Court, 754 P.2d 708 (Cal. 1988)). The courts have also used this concept to strike down initiative measures regarding territorial annexations. *See* L.I.F.E. Comm. v. City of Lodi, 262 Cal. Rptr. 166, 167 (Ct. App. 1989); *infra* notes 171-76 and accompanying text (discussing *L.I.F.E.*); *see also* Ferrini v. City of San Luis Obispo, 197 Cal. Rptr. 694, 699 (Ct. App. 1983) (invalidating initiative requiring voter approval before annexation). City or county redevelopment projects under the Community Redevelopment Law are also outside the initiative process under this doctrine. *See* Redevelopment Agency v. City of Berkeley, 143 Cal. Rptr. 633, 638 (Ct. App. 1978); Kehoe v. City of Berkeley, 135 Cal. Rptr. 700, 706 (Ct. App. 1977). The Community Redevelopment Law, California Health and Safety Code §§ 33000-33855, authorizes the rehabilitation of blighted urban areas using public and/or private funds. CAL. HEALTH & SAFETY CODE §§ 33020 (West Supp. 1993), 33037 (West 1973).

155 *See* DURKEE, *supra* note 53, at 41-42 (stating that voters in general law cities cannot use initiative power on issues for which legislature intends to delegate exclusive power to local legislative body).

156 *See id.* at 42 (indicating that charter cities have exclusive control over purely municipal affairs).

157 754 P.2d 708, 721 (Cal. 1988).

158 The fees in this case were for the construction of new transportation corridors. *Id.* at 711.

159 *Id.*

160 Opponents of the initiative included two Irvine residents, Irvine taxpayers, various builder organizations, and the Chambers of Commerce of Irvine and Orange County. *Id.*

161 A "writ of mandate" is a judicial order directing a certain official or officials to enforce a judicial decree. *See* BLACK'S LAW DICTIONARY 962, 1608 (6th ed. 1990) (defining "mandate" and "writ").

sure on the ballot.[162] The trial court granted the peremptory writ, and the court of appeal upheld this action.[163] The appellate court found that the initiative violated Government Code section 66484.3, which grants local legislative bodies exclusive control over imposing developer fees.[164] The court reasoned that the imposition of such fees was a matter of statewide concern under exclusive control of the city council and board of supervisors.[165]

The California Supreme Court upheld the appellate decision.[166] It noted that courts have upheld municipal use of the initiative and referendum only when the matter was of local, rather than statewide, concern.[167] The court interpreted the word "statewide" to mean "all matters of more than local concern."[168] Therefore, matters with regional impact have statewide concern.[169] Because general plans also have regional impact, the regional distinction in the statewide concern doctrine can limit use of initiatives in amending general plans.[170]

In *L.I.F.E. Committee v. City of Lodi*,[171] the appellate court found that the annexation of territory was also a matter of statewide concern, and therefore, outside the local initiative process.[172] In this case, an ordinance required voter approval of an amendment to the general plan's land use element before the city could annex

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162 The superior court granted petitioners a peremptory writ commanding Irvine's city council to refuse to adopt the initiative and to refrain from placing it on the ballot. Committee of Seven Thousand (COST) v. Superior Court, 754 P.2d 708, 712 (Cal. 1988). The city council then adopted an ordinance to collect development fees from builders to finance a new transportation corridor. *Id.* Voters opposed to the fees then qualified a referendum for the ballot. *Id.* Before the city council could act on the referendum, those in favor of the fees responded with an action to invalidate the referendum. *Id.* In an effort to end the legal maneuvering, the superior court issued a stay order pending resolution of the present action. *Id.*

163 *Id.*

164 *See id.*

165 *Id.*

166 *Id.* at 715.

167 *Id.*

168 *Id.* at 716.

169 *Id.*

170 *See infra* note 257 and accompanying text (discussing regional impact of general plans).

171 262 Cal. Rptr. 166 (Ct. App. 1989).

172 *Id.* at 172.

land in a one-mile greenbelt around the city.[173] The appellate court affirmed a lower court ruling which invalidated the ordinance.[174] The court reasoned that city annexation of territory was a legislative matter of statewide concern.[175] Therefore, the city electorate did not have an absolute right to vote on annexation.[176]

Generally, California voters have the right to enact zoning initiatives.[177] In certain instances, however, courts will limit the initiative power in zoning cases that involve statewide matters.[178] Therefore, if the legislature amends the Government Code to reflect the regional impact of general plans, courts would likely invalidate initiatives that amend general plans.[179]

III. The Initiative Process and General Plan Amendments

A. California Case Law

California courts may exempt general plan amendments from the initiative process if the California Legislature deems such amendments matters of statewide concern.[180] One early appellate case did hold that the general plan was within the scope of the initiative process.[181] However, more recent opinions reflect the growing sentiment that issues of statewide concern are

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173 *Id.* at 168.

174 *Id.* at 167.

175 *Id.* at 168.

176 *Id.* at 168-69. Although the court acknowledged it must liberally construe the initiative power, it reasoned that this power did not apply to issues of "paramount statewide concern." *Id.* at 172. The *L.I.F.E.* court indicated that the city council could not condition the power to enact a general plan and zoning ordinances by requiring voter approval of such ordinances. *Id.* Thus, this court appeared more willing to characterize general plan amendments as an area of "statewide concern" outside the scope of the initiative process. *See id.*

177 *See supra* notes 141-44 and accompanying text (summarizing California Supreme Court's hostility toward procedural due process challenges to zoning initiatives).

178 *See, e.g., supra* notes 153-76 and accompanying text (discussing statewide concern doctrine).

179 *See infra* notes 259-62 and accompanying text (outlining legislative proposal to characterize general plan amendments as matters of statewide concern and therefore outside initiative process).

180 *See infra* notes 256-58 and accompanying text (arguing that characterizing general plans as regional in nature would make them an issue of statewide concern outside the initiative process).

181 *See* Duran v. Cassidy, 104 Cal. Rptr. 793, 804 (Ct. App. 1972)

outside the initiative process.[182] Also, the California Supreme Court in one case indicated that it would seek an alternative to the referendum process if that process would frustrate any feasible implementation of a local land use plan.[183] Disallowing notice and a hearing for general plan amendments would frustrate the legislature's goal of providing due process to landowners affected by such amendments.[184] Therefore, the court should also disallow general plan initiatives that frustrate legislative intent in general plan implementation. Because the supreme court has not yet fully addressed the applicability of the initiative process to general plan amendments, the issue is still open for debate.[185]

The California Supreme Court has had limited opportunities to address the applicability of the initiative process to general plan amendments.[186] In a recent case, *Lesher Communications, Inc. v. City of Walnut Creek*, the court failed to resolve the issue.[187] The court construed a growth-control initiative as an amendment to a zon-

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(upholding initiative proposing change to general plan that would bar city from owning golf course).

182 *See, e.g.*, Committee of Seven Thousand (COST) v. Superior Court, 754 P.2d 708, 716-17 (Cal. 1988) (striking down initiative involving developer fees because imposition of such fees was matter of statewide concern); L.I.F.E. Comm. v. City of Lodi, 262 Cal. Rptr. 166, 172 (Ct. App. 1989) (finding that city's annexation of territory was matter of statewide concern and therefore outside initiative process); *see also supra* notes 157-76 and accompanying text (discussing *COST* and *L.I.F.E.*).

183 *See* Yost v. Thomas, 685 P.2d 1152, 1160 (Cal. 1984) (indicating that court would have to find alternative to referendum if process frustrated implementation of local land use plan); *see also supra* note 80 (discussing *Yost*).

184 *See* CAL. GOV'T CODE § 65353 (West Supp. 1993) (imposing notice and hearing requirements when city or county government takes action on general plan amendment).

185 *See infra* notes 186-90 and accompanying text (discussing Lesher Communications, Inc. v. City of Walnut Creek, 802 P.2d 317 (Cal. 1990)).

186 Lesher Communications, Inc. v. City of Walnut Creek, 802 P.2d 317 (Cal. 1990). *Lesher* is the only case in which the California Supreme Court has considered whether voters might use initiatives to amend general plans. DANIEL J. CURTIN, JR., CALIFORNIA LAND-USE AND PLANNING 1 (Supp. 1991).

187 *Lesher*, 802 P.2d at 324. In this case, voters in Walnut Creek passed a no-growth initiative (Measure H) that contravened the city's growth-oriented general plan. *Id.* at 319-20. The court did not rule on the issue of whether the voters could amend the general plan by initiative. *Id.* at 324. Instead, the court simply construed the initiative as an invalid zoning ordinance because it did not conform to the general plan. *Id.* at 324-26.

ing ordinance rather than as a general plan amendment.[188] The court struck down the measure because, as a zoning ordinance amendment, the measure was inconsistent with the city's pro-growth general plan.[189] Thus, the supreme court has still not resolved the issue of amending a general plan through the initiative process.[190]

One appellate court has upheld the validity of an initiative seeking to amend the general plan of a charter city.[191] In *Duran v. Cassidy*, the county board of supervisors amended the general plan to include a proposed park and publicly owned golf course in Visalia, California.[192] Those opposed to the golf course drafted an initiative petition to bar the city from owning a golf course.[193] When the city clerk refused to accept the petition, the plaintiffs sought a writ of mandate to compel the clerk to perform his duties.[194] The trial court denied the petition for the peremptory writ.[195]

The court of appeal granted the writ, finding that the decision to own a golf course was legislative and therefore subject to the initiative.[196] The court also rejected the argument that the initiative measure was invalid because it failed to conform to the procedural requirements specified in the state zoning laws.[197] Because Visalia is a charter city, the court held the procedural requirements of state zoning law inapplicable.[198]

Although this case upholds the use of initiatives to amend general plans, courts today could use the statewide concern doctrine

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188 *Id.* at 322. The court reasoned that because drafters of the measure did not label it as a general plan amendment, the court had to deem the measure a zoning ordinance amendment. *Id.* at 322-23.

189 *Id.* at 324-26.

190 *See id.*

191 Duran v. Cassidy, 104 Cal. Rptr. 793, 802 (Ct. App. 1972). For a discussion of charter cities, see *supra* note 106.

192 *Duran*, 104 Cal. Rptr. at 796.

193 *Id.*

194 *Id.* at 797. Pursuant to the Elections Code, the city clerk must submit the initiative petition bearing the requisite number of signatures to the county board of supervisors. CAL. ELEC. CODE § 3707 (West Supp. 1993). The board of supervisors then places the initiative on the ballot for the next statewide election or holds a special election. *Id.* §§ 3709-3711.

195 *Duran*, 104 Cal. Rptr. at 797.

196 *Id.* at 798.

197 *Id.* at 800.

198 *Id.*

to find general plans outside the initiative process.[199] In recent years, California courts have been more willing to place substantive limitations on use of the initiative process.[200] While courts may not hold initiatives subject to the procedural requirements of state zoning law,[201] initiatives are subject to the substantive limitations.[202] Even charter cities are subject to limitations on initiatives which concern statewide matters.[203] Thus, under current case law, courts could hold that general plan amendments are outside the initiative process in charter cities, general law cities, and all counties.[204] However, given the California Supreme Court's broad interpretation of the initiative power,[205] the court

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199 *See infra* notes 256-58 and accompanying text (arguing that characterizing general plans as regional in nature would make them an issue of statewide concern outside the initiative process).

200 *See, e.g.*, Committee of Seven Thousand (COST) v. Superior Court, 754 P.2d 708, 716-17 (Cal. 1988) (striking down initiative involving developer fees because imposition of such fees was matter of statewide concern); L.I.F.E. Comm. v. City of Lodi, 262 Cal. Rptr. 166, 172 (Ct. App. 1989) (finding that city's annexation of territory was matter of statewide concern and therefore outside initiative process); *supra* notes 157-76 and accompanying text (discussing *COST* and *L.I.F.E.*).

201 *See* Arnel Dev. Co. v. City of Costa Mesa, 620 P.2d 565, 569 (Cal. 1980) (characterizing all zoning actions as legislative in nature and therefore subject to initiative process); Associated Home Builders v. City of Livermore, 557 P.2d 473, 480-81 (Cal. 1976) (finding that due process requirements do not apply to zoning initiatives); San Diego Bldg. Contractors Ass'n v. City Council, 529 P.2d 570, 573 (Cal. 1974) (holding that notice and hearing requirements do not apply to zoning initiatives in charter cities), *appeal dismissed*, 427 U.S. 901 (1976); *supra* notes 100-46 and accompanying text (discussing *Arnel*, *Associated Home Builders*, and *San Diego Bldg. Contractors Ass'n*).

202 *See supra* notes 153-79 and accompanying text (discussing statewide concern doctrine and other substantive limitations on zoning initiatives).

203 45 CAL. JUR. 3D *Municipalities* § 95 (1978).

204 The California Attorney General has expressed the opinion that voters could use the initiative process to amend the general plan in a general law county. 66 Op. Att'y Gen. 258, 259 (Cal. 1983). However, the amendment would need to comply with the substantive requirements for a general plan. *Id.* Under this opinion, deeming general plan amendments matters of statewide concern, a substantive characterization, would place them outside the initiative process.

205 *See Arnel*, 620 P.2d at 569 (characterizing all zoning actions as legislative in nature and therefore subject to initiative process); *Associated Home Builders*, 557 P.2d at 480-81 (finding that due process requirements do not apply to zoning initiatives); *San Diego Bldg. Contractors Ass'n*, 529 P.2d at 573 (holding that notice and hearing requirements do not apply to zoning initiatives in charter cities); *supra* notes 100-46 and accompanying text

will likely uphold an initiative amending a general plan under the current Government Code.[206]

B. Policy Considerations

Though the California Supreme Court has concluded that voters may enact zoning by initiative,[207] scholars continue to debate the merits of land use initiatives.[208] These scholars often disagree as to whether the initiative process provides the best alternative to enacting zoning laws and general plan amendments through local legislative bodies.[209] Those arguing in favor of the system emphasize the advantages of allowing the people involved to decide issues that might otherwise be subject to political manipulation.[210] However, three significant arguments weigh against allowing direct legislation. First, those affected by the initiative, but outside the voting area, have no opportunity to be heard.[211]

(discussing *Arnel*, *Associated Home Builders*, and *San Diego Bldg. Contractors Ass'n*).

206 CAL. GOV'T CODE §§ 65300-65362 (West 1983 & Supp. 1993). If the state legislature were to enact legislation deeming general plans matters of statewide concern, courts would be more likely to find general plan initiatives invalid. *See infra* notes 259-62 and accompanying text (describing legislative proposal to characterize general plan amendments as matters of statewide concern).

207 *See Arnel*, 620 P.2d at 569 (characterizing all zoning actions as legislative in nature and therefore subject to initiative process); *Associated Home Builders*, 557 P.2d at 480-81 (finding that due process requirements do not apply to zoning initiatives); *supra* notes 109-46 and accompanying text (discussing *Arnel* and *Associated Home Builders*).

208 *See infra* notes 215-38 and accompanying text (presenting arguments for and against land use initiatives).

209 *Compare* Nitikman, *supra* note 10, at 516 (arguing that initiative process allows voters to take direct action when they feel government is not adequately responding to their needs) *and* Craig N. Oren, Comment, *The Initiative and Referendum's Use in Zoning*, 64 CAL. L. REV. 74, 105 (1976) (arguing that states should allow voters to zone by initiative because process provides protections similar to notice and hearing provisions in state zoning laws) *with* Andersen, *supra* note 67, at 547-48 (arguing that local citizens use ballot box zoning to promote parochial interests) *and* Fountaine, *supra* note 5, at 741-42 (illustrating how initiative supporters wage campaigns using manipulative political advertising and celebrity endorsements).

210 *See infra* notes 217-19 and accompanying text (citing proposition that legislatively adopted general plan may reflect desires of those with political power at time municipality adopts plan).

211 *See infra* notes 227-30 and accompanying text (describing how initiative may adversely affect interests of those outside voting area).

Second, the electorate is often inadequately informed on the complex issues surrounding general plan amendments.[212] Third, initiative measures are often subject to manipulation by special interest groups able to sway the opinions of voters through powerful advertising campaigns.[213] Because the arguments against land use initiatives outweigh those in favor of them, general plan amendments should not be subject to the initiative process.[214]

Some commentators argue that allowing voters to amend a general plan would produce a document that better reflects the will of the people.[215] For example, voting gives local citizens a means of addressing growth problems they believe local officials are not addressing.[216] One problem with zoning according to a general plan is that those with political power at the time of the plan's formulation lock in regulations that are most favorable to them.[217] The general plan may therefore reflect the views of the special interest groups who controlled the local government when local politicians passed the plan.[218] Thus, direct legislation may also allow voters to prevent special interest groups from dictating growth.[219]

In addition to preventing special interests from influencing the legislative process, initiatives may offer additional protections

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212 *See infra* notes 232-34 and accompanying text (describing complexity of general plan and inability of general voting public to grasp issues and weigh competing concerns).

213 *See infra* notes 236-38 and accompanying text (describing ability of those with financial resources and political power to influence outcome of initiative vote).

214 *See infra* notes 239-40 and accompanying text (arguing that policy dictates that general plan amendments be outside initiative process).

215 *See* Nitikman, *supra* note 10, at 516 (citing fact that initiative process allows voters to take direct action when they feel government is not adequately responding to their needs); *see also* Glenn, *supra* note 5, at 265-66 (observing that "[l]ocal politicians have demonstrated parochialism, favoritism, stupidity, and greed in regulating land development").

216 Andersen, *supra* note 67, at 520.

217 *Id.* at 530.

218 *See* Nitikman, *supra* note 10, at 516 (arguing that special interest groups may heavily influence local government decisions); *see also* Glenn, *supra* note 5, at 265-66 (observing that "[l]ocal politicians have demonstrated parochialism, favoritism, stupidity, and greed in regulating land development").

219 *See* Nitikman, *supra* note 10, at 516 (arguing that special interest groups may heavily influence local government decisions).

when land use measures affect voters directly.[220] Although the initiative process does not afford the traditional due process protections,[221] the initiative process does offer other safeguards.[222] For instance, in California, an initiative sponsor must publish a notice of intent to petition before gathering signatures.[223] Also, before the election voters must receive the text of the initiative along with brief written arguments.[224] Furthermore, the adversary nature of political campaigns allows voters to hear all viewpoints.[225]

Despite the potential advantages of allowing general plan amendments through the initiative process, problems do exist.[226] Land use initiatives allow a narrow segment of the population to vote on measures that impact the larger community.[227] This problem becomes especially acute when amending a general plan that may affect areas outside the voting municipality.[228] The California Supreme Court has held that notice and hearing requirements do not apply to zoning initiatives.[229] If the court applies this same rationale to initiatives amending general plans, those

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220 *See infra* notes 222-25 and accompanying text (describing additional protections initiative process gives voters directly affected by initiative).

221 *See* Associated Home Builders v. City of Livermore, 557 P.2d 473, 480-81 (Cal. 1976) (finding that due process requirements do not apply to zoning initiatives); San Diego Bldg. Contractors Ass'n v. City Council, 529 P.2d 570, 573 (Cal. 1974) (holding that notice and hearing requirements do not apply to zoning initiatives in charter cities), *appeal dismissed*, 427 U.S. 901 (1976); *supra* notes 100-21 and accompanying text (discussing *Associated Home Builders* and *San Diego Bldg. Contractors Ass'n*).

222 *See* Oren, *supra* note 209, at 105 (arguing that states should allow voters to zone by initiative because process provides protections similar to notice and hearing provisions in state zoning laws).

223 *Id.*

224 *Id.*

225 *Id.* Such a view does not consider the exorbitant cost of such campaigns, which can cost up to four million dollars. Fountaine, *supra* note 5, at 751-52.

226 *See infra* notes 227-38 and accompanying text (discussing problems land use initiatives pose).

227 Andersen, *supra* note 67, at 547.

228 *See id.* at 547-48 (arguing that local citizens use ballot box zoning to promote parochial interests).

229 Associated Home Builders v. City of Livermore, 557 P.2d 473, 478 (Cal. 1976); *see supra* notes 109-21 and accompanying text (discussing *Associated Home Builders*).

outside the municipality would have no reasonable means to voice their concerns.[230]

Additionally, some amendments may not promote the general welfare.[231] Zoning and planning require careful scientific study and a balancing of the interests of the entire community.[232] The initiative process does not allow for such considerations.[233] Also, the electorate is often poorly informed or insensitive to competing policy considerations.[234] Local legislative bodies are better equipped to carefully consider past, present, and future community needs.[235]

Further, a majority vote may not truly represent the will of the people because the initiative process is subject to manipulation.[236] Those with ample financial resources can affect the outcome of the election.[237] Also, land developers or others could

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230 *Cf.* Scott v. City of Indian Wells, 492 P.2d 1137, 1142 (Cal. 1972) (granting citizens outside city, but adversely affected by conditional use permit, same notice and hearing provided to citizens within municipality). In most instances, however, California courts have not upheld the right to notice and a hearing with zoning initiatives. Andersen, *supra* note 67, at 548-49.

231 *See* Nitikman, *supra* note 10, at 518.

232 *Id.* at 518-19.

233 *Id.* at 519.

234 *See* Glenn, *supra* note 5, at 286 n.91 (citing survey results illustrating level of voter ignorance on zoning issues and demonstrating that public hearings better inform citizens on zoning issues).

235 *Id.* at 270; *see also* Committee of Seven Thousand (COST) v. Superior Court, 754 P.2d 708, 719 (Cal. 1988). In *COST*, the court stated that highway projects should be left to the county supervisors and city council members, who have more familiarity with municipal planning. *Id.* For that reason, the court felt they were better able to comprehend the complex issues involved in such matters. *Id.*

236 *See, e.g.*, Fountaine, *supra* note 5, at 741-42 (illustrating how initiative supporters wage campaigns using manipulative political advertising and celebrity endorsements).

237 Nitikman, *supra* note 10, at 519. A majority of voters demonstrated its power to promote its own interests to the detriment of the politically powerless minority in Southern Burlington County N.A.A.C.P. v. Township of Mt. Laurel, 336 A.2d 713 (N.J. 1975), *cert. denied*, 423 U.S. 808 (1975) (also known as *Mount Laurel I*). In that case, the electorate used municipal zoning to favor revenue-producing uses over those that would provide additional housing. *Id.* at 721-22. In a lengthy opinion, the Supreme Court of New Jersey held that communities such as Mount Laurel must provide their fair share of low- and moderate-income housing. *Id.* at 724. The court said the majority could not use its zoning power to improve the tax base by encouraging industry and commerce to the exclusion of adequate housing

use the initiative process to circumvent the notice and hearing requirements that normally apply to traditional general plan amendments.[238] Thus, though arguments exist in favor of allowing general plan amendments through the initiative process,[239] far more factors weigh against allowing such amendments.[240]

C. Possible Solutions

If the California Supreme Court finds the initiative process applicable to general plan amendments, commentators have proposed several solutions to limit the impact of this process.[241] These proposals include procedural[242] and substan-

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for low- and middle-income people. *Id.* at 732. If courts allow the majority to exert its will using general plan initiatives, that process will similarly exclude those without political power from the city's land use scheme. *See* Fountaine, *supra* note 5, at 751 (arguing that initiatives and referenda allow majority to impose its will on minority).

238 Andersen, *supra* note 67, at 549; *see* Sara R. Levitan, Comment, *The Legislative-Adjudicative Distinction in California Land Use Regulation: A Suggested Response to* Arnel Development Co. v. City of Costa Mesa, 34 HASTINGS L.J. 425, 459 (1982) (arguing that direct zoning legislation denies minority interests their due process rights).

239 *See supra* notes 215-25 and accompanying text (presenting arguments in favor of allowing voters to amend general plan by initiative).

240 *See supra* notes 227-38 and accompanying text (detailing problems with general plan initiatives).

241 *See infra* notes 246-53 and accompanying text (outlining substantive proposals to limit initiative power as applied to general plans). While these proposals apply to zoning ordinances, they apply equally well to general plan amendments. *See supra* notes 24-25 and accompanying text (explaining close relationship between zoning and general plan).

242 Writers have proposed various procedural limitations on the initiative process, hoping to rectify due process problems. One possible solution is to require notice and a hearing for general plan initiatives. *See* Levitan, *supra* note 238, at 458-59. Under this plan, local legislators would hold public hearings to disseminate information and educate the electorate. *Id.* at 457-59 (proposing that local legislative bodies hold public hearings prior to zoning initiative elections). However, this proposal seems unlikely to succeed given the holding in *Associated Home Builders*. *See* Associated Home Builders v. City of Livermore, 557 P.2d 473, 475 (Cal. 1976). In that case, the California Supreme Court unequivocally rejected imposing statutory notice and hearing requirements on the initiative process. *Id.*

Notwithstanding the holding in *Associated Home Builders*, Levitan's solution is still flawed in two respects. First, it incorrectly assumes that the public will take advantage of the opportunity to become more informed. *Cf.* Fountaine, *supra* note 5, at 741 (revealing that most voters rely on television

tive[243] changes in the initiative process. The California Supreme Court has rejected procedural limitations on the initiative process, so procedural changes are unlikely to survive judicial scrutiny.[244] While the substantive proposals are more likely to pass such scrutiny, they do not address the entire problem.[245]

One commentator has devised a substantive reform plan that focuses on the tendency of municipal residents to favor exclusionary zoning practices.[246] He proposes a system of "transferable

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and newspaper advertisement for information on ballot issues). Second, because voters are ill-informed, the initiative process remains susceptible to manipulation by powerful political lobbies. *See supra* notes 236-38 (describing power of well-financed political groups to influence election outcome). Thus, notice and hearing requirements would not rectify the inherent problems with the initiative process.

Another possibility is to require those proposing the amendment initiative to make certain findings showing a need for the amendment. Levitan, *supra* note 238, at 459. The standards for such findings were set out by the California Supreme Court in Topanga Ass'n for a Scenic Community v. County of Los Angeles, 522 P.2d 12, 13-14 (Cal. 1974). In *Topanga*, petitioners, a group of local taxpayers and property owners, opposed the city's granting a zoning variance to allow development of a mobile home park. *Id.* at 14. Both the trial court and the appellate court denied the petition for mandamus, but the California Supreme Court granted the petition. *Id.* at 22. The court held that local administrative agencies must support their decision to grant variances with specific findings. *Id.* at 13. Also, agencies must support these findings with substantial evidence. *Id.* at 13-14. Any court reviewing the action must then determine whether the findings support the agency's action. *Id.* at 14.

Nitikman also proposed imposing requirements similar to those outlined in *Topanga* for zoning initiatives. Nitikman, *supra* note 10, at 538. He further recommended that cities only enact such initiatives when two-thirds of the voters are in favor of them. *Id.* He proposed a revision of the Government and Elections Codes to establish coherent procedures for implementing these proposals. *Id.* at 539. In general, however, the procedural requirements of state zoning laws do not apply to direct legislation. *See supra* notes 109-46 and accompanying text (discussing *Associated Home Builders* and *Arnel*). Therefore, any direct procedural limitations on the use of the initiative process in amending general plans will probably not survive scrutiny in the California courts.

[243] *See infra* notes 246-53 and accompanying text (describing substantive changes).

[244] *See supra* notes 100-46 and accompanying text (discussing *Arnel*, *Associated Home Builders*, and *San Diego Bldg. Contractors Ass'n*).

[245] *See supra* notes 153-79 and accompanying text (describing statewide concern doctrine and other substantive limitations on initiative process that courts have sustained).

[246] *See* Andersen, *supra* note 67, at 551.

development rights."[247] Under such a system, voters would either allow low-income housing in their area, or pay for another community to provide their "fair share" of such housing.[248] This solution, however, is a partial solution because it addresses only the problem of exclusionary housing.[249] It does not address the effects of voter ignorance and special interest influence in land use initiatives.[250]

Another solution is an amendment to the California Constitution limiting the power of the initiative as applied to general plans.[251] Constitutional amendments have succeeded in the

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247 *Id.* Andersen bases this system on the scheme proposed in South Burlington County N.A.A.C.P. v. Township of Mount Laurel, 456 A.2d 390 (N.J. 1983) (also known as *Mount Laurel II*). *See* Andersen, *supra* note 67, at 540. In *Mount Laurel II*, plaintiffs brought suit in several cities challenging each municipality's compliance with the mandate of *Mount Laurel I*. *Mount Laurel II*, 456 A.2d at 410; *see supra* note 237 (summarizing *Mount Laurel I*). The New Jersey Supreme Court consolidated the cases and found that these municipalities had not provided their fair share of low- and moderate-income housing. *Mount Laurel II*, 456 A.2d at 410-12. In its opinion, the court directed municipalities to use the State Development Guide Plan to determine if they were designated "growth" areas. *Id.* at 424. Growth areas had to supply their fair share of housing under the court's holding. *Id.* Where developers were still not meeting low-income housing needs, the court proposed providing density bonuses as an incentive for builders to erect low-income housing. *Id.* at 448. Under a system of transferable development rights, cities whose zoning laws restrict property development allow property owners to transfer their development right to another property. Andersen, *supra* note 67, at 556-57. Landowners can either transfer this right to a property the developer owns elsewhere or sell the right to another property owner. *See id.* at 552-53.

248 *See* Andersen, *supra* note 67, at 551-61.

249 *See id.* at 555-60 (focusing on problems posed by exclusionary housing practices in zoning).

250 *See supra* notes 232-35 and accompanying text (illustrating how poorly informed electorate cannot adequately weigh competing policy considerations involved in drafting general plan).

251 *See* Nitikman, *supra* note 10, at 523.

past.[252] However, California voters are unlikely to willingly give away the initiative power granted under the constitution.[253]

None of the proposed solutions resolves the problems associated with initiatives that amend general plans. Based on its past decisions, the California Supreme Court would be unwilling to allow any legislatively mandated procedural changes to the initiative process.[254] The substantive changes proposed might survive judicial challenge, but they are inadequate or unworkable solutions to the problem.[255]

IV. PROPOSAL

The best solution, given the statutory framework and judicial opinions in the area of zoning initiatives, is for the state legislature to define general plans as regional.[256] The legislature could emphasize the important role general plans play in regional plan-

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252 Under the California Constitution, voters may amend the constitution by passing statewide initiative measures. CAL. CONST. art. XVIII, § 3. California citizens have often used their initiative power to amend the constitution. Recent Cases, *State Constitutional Law — Constitutional Revisions — California Supreme Court Upholds Term Limitation Initiative* — Legislature of California v. Eu, 105 HARV. L. REV. 953, 953 (1992) (analyzing California Supreme Court decision upholding initiative amending state constitution to limit number of terms state legislator can serve). In one of the most dramatic uses of the initiative power, the California electorate passed Proposition 13, a constitutional amendment which drastically cut property taxes in the state. *Id.* The United States Supreme Court subsequently ruled that Proposition 13 is constitutional. Nordlinger v. Hahn, 112 S. Ct. 2326, 2336 (1992).

253 *Cf.* Recent Cases, *supra* note 252, at 953 (stating that California voters have often used initiative power granted by state constitution).

254 *See supra* notes 100-46 and accompanying text (discussing cases in which court rejects procedural due process challenge to zoning initiatives).

255 *See supra* notes 248-50 (criticizing system based upon transferable development rights because it only addresses problem of exclusionary zoning); note 253 and accompanying text (rejecting idea that California citizens would vote to limit their initiative power).

256 *See* Committee of Seven Thousand (COST) v. Superior Court, 754 P.2d 708, 716-17 (Cal. 1988) (finding that statutory purpose to fund intercity highway construction demonstrated regional impact of statute, placing it within statewide concern doctrine, and therefore outside initiative process). This opinion also stated that the delay inherent in the initiative and referendum process would contravene the legislature's intent to deal with urgent transportation matters. *Id.* at 719. Thus, the court concluded that the legislature had a legitimate reason for excluding the electorate from acting on this issue. *Id.*

ning.[257] Because courts consider regional issues of statewide concern, general plan amendments would be outside the scope of the initiative process.[258]

The legislature could amend the Government Code to delegate general plan drafting and amendment powers to the local legislative body. It would need to show a clear intent to delegate power only to the city council or board of supervisors.[259] The legislature could draft the statute as follows:

> (a) The Legislature finds drafting and amending general plans of vital statewide importance.[260]
>
> (b) The board of supervisors of any county or the city council of any city may adopt or amend a general plan in the manner specified in sections 65351 to 65362 of this article.[261]

This statute would demonstrate the legislature's clear intent to delegate general plan drafting and amendment powers only to local legislative bodies.[262] General plan amendments would be outside the initiative process, thereby eliminating the due process and other concerns general plan initiatives present. Voters would retain their right to pass zoning initiatives. However, general

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257 *See* Hile, *supra* note 72, at 911-12 (noting growing importance of regional planning evidenced by county and regional planning commissions); *cf.* Andersen, *supra* note 67, at 547 (arguing that voters using ballot box zoning will pursue their own parochial interests to detriment of those outside municipality). *See generally* Orlando E. Delogu, *The Dilemma of Local Land Use Control: Power Without Responsibility*, 33 ME. L. REV. 15 (1981) (arguing that states should abandon local land use control in favor of regional or statewide approach).

258 *See supra* notes 153-56 and accompanying text (discussing nature of statewide concern doctrine).

259 *See* Fletcher v. Porter, 21 Cal. Rptr. 452, 456 (Ct. App. 1962) (stating that specific grant of authority to local legislative body evinces intent to exclude direct legislation); *see also* Mervynne v. Acker, 11 Cal. Rptr. 340, 344 (Ct. App. 1961) (deeming specific delegation to legislative body exclusive grant of power unless contrary conclusion is reasonable).

260 *Cf.* CAL. GOV'T CODE § 65580 (West 1983) (using similar language).

261 *See id.* §§ 65350-65362 (West 1983 & Supp. 1993) (outlining general plan adoption procedures); *cf. id.* § 66484.3 (West Supp. 1993) (delegating fee assessment for costs of bridges to county board of supervisors and city councils).

262 *Cf. Fletcher*, 21 Cal. Rptr. at 455-56 (finding that statutory language delegating power to "legislative body" showed legislative intent to delegate exclusively to that body); *Mervynne*, 11 Cal. Rptr. at 344 (deeming specific delegation to legislative body exclusive grant of power unless contrary conclusion is reasonable).

plan amendments would be beyond the scope of the initiative process.

CONCLUSION

Legislating by initiative is a well-established tradition in California.[263] Also well-established is the municipalities' use of zoning laws to govern local land use.[264] Voters have used the ballot box to enact zoning legislation,[265] and the California Supreme Court has upheld such zoning initiatives.[266] In 1971, the legislature mandated consistency between zoning laws and general plans.[267] The intricacies of the general plan drafting and amending processes make them difficult to reconcile with the initiative process.[268] However, given the California courts' tendency to uphold zoning initiatives, they would probably likewise uphold initiatives amending general plans.[269]

To keep general plan amendments outside the scope of the initiative process, the legislature must amend the Government Code to deem general plans as regional and therefore of statewide concern.[270] By adopting the legislation this Comment proposes, the legislature could keep general plan amendments within the purview of local legislative bodies.[271] As a result, landowners affected by general plan amendments would retain the due pro-

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263 *See* Fountaine, *supra* note 5, at 735-36 (tracing history of direct democracy in United States back to 1800s).

264 *See supra* note 28 and accompanying text (tracing history of zoning in United States).

265 *See supra* notes 91-146 and accompanying text (discussing California Supreme Court cases on zoning initiatives).

266 *See supra* notes 141-46 and accompanying text (discussing California Supreme Court's rejection of procedural due process challenges to zoning amendments).

267 CAL. GOV'T CODE § 65860 (West 1983).

268 *See supra* note 233 and accompanying text (stating that initiatives amending general plan do not allow for scientific study and balance of community interests).

269 *See supra* notes 100-46 and accompanying text (discussing California Supreme Court's rejection of procedural due process challenges to zoning amendments).

270 *See supra* notes 259-62 and accompanying text (detailing legislative proposal to place general plan amendments outside initiative process).

271 *See supra* note 262 and accompanying text (stating that proposed statute would show legislative intent to give local legislative bodies exclusive power to draft and amend general plan).

cess rights that the initiative process does not provide.[272] Only legislative action will preserve the general plan as the constitution for all future development.[273]

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[272] *See supra* notes 109-46 and accompanying text (discussing cases holding that due process required by zoning statute does not apply to zoning initiatives).

[273] *See supra* notes 259-62 and accompanying text (detailing legislative proposal to place general plan amendments outside initiative process).

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