BE IT RESOLVED, That the American Bar Association recommends:

1. In site specific zoning cases, administrative and judicial processes established by law should be followed and state and territorial legislatures should not authorize, or if necessary, should prohibit initiative or referendum in such cases.

2. In states or territories which have the right of initiative and referendum, a proposal which is inconsistent with a community's land use plan should not be allowed on the ballot or the legislature should enact legislation which provides that the initiative or referendum must directly amend the plan to resolve such inconsistency and the ballot proposition must specifically state that adoption of the ballot proposition will result in an amendment to the community's land use plan.
A. Introduction: The Essence of Zoning and the Nature of the Problem

The Zoning process is the exercise of police power by local government in order to prevent undesirable uses of private land and to promote desirable ones. The land in a city, county, town or village is divided into zoning districts, the permitted uses in which are set out in the text of the zoning ordinance. The zones are drawn on the map portion of the zoning ordinance. Changes from the land use patterns set out by the ordinance can take the form of variances, special uses, and amendments. The latter is most common.

Zoning amendments take several forms: amendment of text, creation of zones, and the changing of land use classification on a single parcel of land. The latter, known as a map amendment, has increasingly been the subject of citizen referendum or initiative, and is what this report means when it uses the term "ballot box zoning." Rezoning, or map amendments, are governed by the text of the zoning ordinance (which is applicable to everyone) and, in most jurisdictions, a comprehensive plan, to which zoning is supposed to conform.

The use of the ballot box to rezone property wrongfully permits the general public to veto a local government land use decision that, for the most part, affects only the owner of the property and, at best, the immediate neighboring landowners. Since initiative and referendum on land use classifications are used primarily to overturn local zoning decision, the public exercises a veto over land use decision based upon local comprehensive planning policy. Map amendment implements the text of the zoning ordinance and a comprehensive plan, and is usually made at the request of an individual landowner, much like a request for a permit. It is therefore policy implementation and not policy making. Initiative and referendum are for the purposes of helping elected officials make policy decision and not for the implementation of policy.

B. Specific Problems with Ballot Box Zoning

On balance, it is difficult to make a case for the use of initiative and referendum to rezone land.
1. History

Initiative and referendum have been used primarily to undertake policies which affect the population of a particular jurisdiction generally, not to overturn a specific implementation of such policy. Thus, for example, both initiatives and referenda were used to decide whether particular states or counties would continue to permit the sale of alcoholic beverages, but not whether a particular distillery or brewery should remain open or closed. By analogy, popular voting on whether to undertake zoning or planning would be a proper policy issue, but how that policy is implemented by placing a particular parcel in a particular zone would not be a proper issue. As appears below, there are legal implications for this historical distinction as well. History aside, there are several more prominent legal and institutional issues which bear upon the use of initiative and referendum for rezoning land, leading to the conclusion that, on balance, such use is seriously flawed.

2. Zoning Amendments as Quasi-Judicial Acts

Every state recognizes that only legislative acts are referendable, and that administrative or quasi-judicial acts are not. However, state courts have split more or less evenly on whether rezonings, which are usually done by a local legislative body, but reflect implementation of a legislative policy (comprehensive zoning and planning) on a particular parcel, are primarily legislative or primarily administrative/quasi-judicial. An act is legislative if it is an expression of general policy applicable to the people as a whole in a particular jurisdiction. It is administrative or quasi-judicial if it represents the implementation of a policy, affecting only part of the people in a jurisdiction and directed at them; in the land use context, if it affects a particular parcel of land rather than many parcels classified in a particular category or zone. Thus, for example, the addition of a new zoning category or district would clearly represent a legislative act. Granting a variance of special use permit to an individual property owner would not. On balance, does reclassifying a particular piece of property more closely resemble the granting of a permit or the creation of a new and generally applicable zoning category? Surely the answer cannot be made to depend upon whether the body exercising the function is a legislative body or not. On balance, rezoning most closely resembles the permitting process, and so should be classified as a quasi-judicial or administrative act. As such, it is both subject to at least state procedural due process requirements and is not referendable.
3. Federal Due Process

Federal due process requires, at a minimum, that there must be standards to guide delegated decisionmakers, and that affected landowners must be given notice and an opportunity to be heard. The use of initiative and referendum tends to circumvent these safeguards. Courts approving of direct democracy in zoning matters have tried to avoid the requirement of notice and hearing by characterizing rezoning as legislative without inquiry into the number of people affected by the rezoning. This mechanical labeling is, arguably, unconstitutional as the U.S. Supreme Court has held that whether an individual is entitled to notice and hearing depends on how many people are affected by the decision (too few are affected by rezoning). In the context of standardless delegation of power, the U.S. Supreme Court, in Eastlake v. Forest City Enterprises, Inc. has held that where the power of initiative and referendum is reserved to the people in the state constitution, the use of referendum to rezone is not a standardless delegation of power. Eastlake is a very narrow decision with no other due process ramifications.

4. Most states that have considered the question have decided that initiative and referendum conflicts with comprehensive plans, both substantively and procedurally, and on that basis cannot be used to rezone specific parcels of property. Among those that do not, California (again, a state with a long tradition of ballot box measures) has lower court cases going several directions on which effect initiative and referendum have on comprehensive plans.

5. State Due Process

A number of states have taken the position of the Hawaii Supreme Court in the Sandy Beach case: initiative (and in some instances referendum as well) does not accord with state statutory requirements for map amendments (hearing, notice, and so forth) and/or the state has delegated the power to zone only to the local legislative body. Therefore, popular voting on such amendments violates state due process requirements.

6. Reserved Power

While a number of courts have decided that the power to enact laws by initiative and referendum is reserved

1 426 U.S. 668 (1976).
to the people and so overrides any statutory problems of due process or comprehensive planning, virtually all of these cases are from states in which direct democracy is enshrined in the state constitution. In a few states, courts have held that even the reservation of initiative and referendum power in the state constitution will not overcome statutory due process or lack of planning which characterizes ballot box zoning.

C. Consistency with Comprehensive Land Use Plans.

The laws of states and territories increasingly require local governments to adopt comprehensive plans or the state or territorial government adopts a comprehensive plan which is applicable within the local jurisdiction. Those plans customarily include present and future land use elements or parts which regulate the uses of property within the local government jurisdiction.

Local governments are required to conform their zoning codes and other land use codes or ordinances to be "consistent" with the comprehensive plan applicable to that jurisdiction. Some states require such conformity to occur within a specified period of time; others do not. If the zoning and land use codes or ordinances are not in conformity within the specified time, then the nonconforming provisions are normally not enforceable. Also, any proposed rezoning or other land use change which is inconsistent with the comprehensive plan cannot be adopted or go into effect unless and until the comprehensive plan is amended so that the changes will be consistent with the plan. In many instances, it may not be possible to amend the plan to eliminate the inconsistency because such amendment may be contrary to the policies in the plan.

The zoning codes and other land use codes or ordinances of a local government are often subject to being amended or repealed by initiative or referendum, respectively. An amendment to a local government's zoning code could be proposed by initiative which is inconsistent with the local government's comprehensive plan. In fact, the impetus for the initiative may be the refusal or inability of the governing body of the local government to adopt the proposal because it is inconsistent with the plan. The initiative may proceed to a vote and be approved by the electorate. If that should occur, there will be an inherent inconsistency between the plan and the approved initiative. The local government is then in a quandary as to which provision
controls. At best land owners, local government officials and attorneys are unsure or confused as to what is the current land use law applicable to certain property.

The confusion or uncertainty should not be allowed to remain in effect and fester. The effect is to undermine the integrity of the comprehensive plan and the administrative or legislative process by which it was adopted or amended. Also, the validity of local zoning and land use regulations are questioned and, at best, confusion reigns.

One of the primary objectives of land use regulation is to establish a sound, understood and rationale policy generally applicable to all property within the local government jurisdiction. To further that policy objective, when initiative or referendum is available in a local jurisdiction, state or territorial law must provide a means for avoiding inconsistency. Either the initiative or referendum must amend the comprehensive plan (if that is possible under state or territorial law) or the troublesome amendment must not be effective until the inconsistency is resolved.

Respectfully submitted,

Carol E. Dinkins
Chair, Section of
Urban, State and Local
Government Law

February, 1992
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GENERAL INFORMATION FORM

No. ________

Submitting Entity: Section of Urban, State and Local Government Law

Submitted By: Carol E. Dinkins, chair

1. Summary of Recommendation.

In site specific zoning cases established administrative and judicial processes should be followed, and state and territorial legislatures should not authorize the use of initiative or referendum in such cases. In those states and territories permitting initiative or referendum in site specific zoning, legislation should be adopted requiring an initiative or referendum inconsistent with the community's comprehensive land use plan to either amend that plan or not take effect until such inconsistency is resolved.

2. Approval by Submitting Entity.

Approved by the Section Council at a regularly scheduled meeting of the Council on September 14, 1991.

3. Previous Submission to the House of relevant Association position.

Report 111 at the 1991 Annual Meeting in Atlanta was withdrawn.

4. Need for Action at This Meeting.

Initiative and referendum are increasingly being used throughout the country. Action at this meeting will also permit the recommendation to be considered by state legislatures before the fall general election.


None.
6. **Cost to the Association.** (Both direct and indirect costs.)

None.

7. **Disclosure of Interest.** (if applicable.)

None.

8. **Referrals.**

A copy of the Report with Recommendation was circulated to all Section and Division Chairs on November 15, 1991 and the Forum Committee on Affordable Housing and Community Development Law on December 18, 1991.

9. **Contact Person.** (prior to meeting.)

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10. **Contact Person.** (who will present the report to the House.)

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