In the

Supreme Court of the United States

THE CITY OF EASTLAKE, et al.,

Petitioners,

v.

FOREST CITY ENTERPRISES, INC.,

Respondent.

No. 74-1563

Washington, D. C.
March 1, 1976

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FOREST CITY ENTERPRISES, INC., Respondent.	:	

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Monday, March 1, 1976

The above-entitled matter came on for argument at 1:40 p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN P. STEVENS, Associate Justice

APPEARANCES:

J. MELVIN ANDREWS, ESQ., 35475 Vine Street, Eastlake, Ohio 44094, for the petitioners.

WILLIAM D. GINN, ESQ., Thompson, Hine and Flory, 1100 National City Bank Building, Cleveland, Ohio 44114, for the respondent.

I N D E X

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear argument next in No. 74-1563, City of Eastlake against Forest City Enterprises.

Mr. Andrews.

ORAL ARGUMENT OF J. MELVIN ANDREWS ON BEHALF OF PETITIONERS

MR. ANDREWS: Mr. Chief Justice, and may it please the Court: The City of Eastlake is located approximately 15 miles east of Cleveland, in the State of Ohio, and has about 20,000 people, and it is a city which operates under a charter type of government which, under the Ohio Constitution, grants to the city all rights of local self-government, and it grants to the people sovereign rights insofar as they do not conflict with the Ohio Constitution or general laws.

The City of Eastlake has adopted a general zoning plan some 25 years ago in which the entire city is zoned into various districts for industrial, business, and residential use. The general zoning plan of the City of Eastlake is not under attack in this case.

In May of 1971, Forest City, the respondent herein, asked or requested rezoning of an 8-acre parcel of land from a limited industrial use to a multiple-family use for the purpose of building multiple housing. The record does not disclose the type of multiple housing, whether it be very

expensive apartments or the lower economic variety.

At any rate, the Planning Commission of the City of Eastlake approved this rezoning request, and in the meantime the voters by initiative petition had made an amendment to the Eastlake City Charter requiring that before any rezoning of land becomes finally effective it must be submitted to a 55 percent majority vote of the people.

Now, the City Council then approved the rezoning request of Forest City, and under the Eastlake Charter amendment it was submitted for a vote of the people and failed to receive the 55 percent affirmative vote necessary for its passage.

Forest City then applied to the local Court of Common Pleas requesting injunctive relief and declaratory judgment asking that the court declare the Eastlake Charter amendment to be unconstitutional. The Court of Common Pleas affirmed the constitutionality of the Eastlake Charter amendment, and subsequently in the Court of Appeals, the Eastlake Charter amendment was affirmed, and then in the Ohio Supreme Court the decision was reversed. And the Ohio Supreme Court found a reasonable use of property by rezoning may not be made dependent upon the potentially arbitrary and unreasonable whims of the voting public without violating due process under the 14th Amendment to the Federal Constitution.

It's important to note that the Ohio Supreme Court

did not find the Eastlake Charter amendment to violate the Ohio Constitution or the general laws of the State of Ohio even though this was contended by the respondent throughout.

The issue in this case is whether the mandatory referendum voting procedure of the Eastlake Charter relative to rezoning constituted unlawful delegation of legislative power to the electorate in violation of the Federal Constitution. I believe basically that the Ohio Supreme Court got the cart before the horse because the delegation of power is not from the Council to the people, but it's exactly the opposite under the Charter and under the Ohio Constitution. The power is given by the people to the Council. They can give as much of the power to the Council as they desire or they can retain it unto themselves.

Really, what is involved here, we believe, is a struggle on a lawful issue between whether the final power of rezoning shall reside in the City Council or whether it shall reside in the people.

The Supreme Court has placed in jeopardy the final power of the people in respect to rezoning.

QUESTION: Your entire argument is based upon the hypothesis that zoning is a legislative function.

MR. ANDREWS: That is correct.

Now, the history of Ohio, without exception, made the determination that rezoning property is a legislative act

and as such subject to referendum.

QUESTION: A variance would probably be an administrative or quasi-judicial act, is that it?

MR. ANDREWS: That's right. We are not talking of a variance here nor a hardship nor administering of the act.

QUESTION: A general zoning provision.

MR. ANDREWS: That's right. The basic thinking is that as long as the people have the initial right to enact zoning ordinances, then they also have the right of change, because if that were not so, then the final power of zoning would vest in the Council and not in the people.

My basic position is this is a pure local issue as to where that power should be vested.

QUESTION: If one thought of zoning, generally zoning, as a judicial or quasi-judicial function, you couldn't make the argument you are making, could you?

MR. ANDREWS: There are cases throughout the United States where they have called rezoning a quasi-judicial act or an administrative act and attempted to get around the referendum, because the referendum even in Ohio is restricted to legislative acts.

QUESTION: Right.

MR. ANDREWS: But the Ohio Supreme Court, even in this case, found this to be a legislative act and cited the Ohio law which backs that up.

QUESTION: Another Ohio law that has traditionally been considered a legislative function.

MR. ANDREWS: That is correct, your Honor.

QUESTION: Is there any claim here that the existing use of the property, existing industrial zoning was an unreasonable classification?

MR. ANDREWS: Absolutely not. This is the basic problem here that there is no claim whatsoever that the existing zoning classification of the property, which is industrial zone classification, is in any manner unreasonable. There is no claim that there is any economic damage to the respondent here by virtue of the failure of the city to rezone. In other words, this property may be equally valuable as industrial property, maybe more so, than it would as multiple family zoned housing.

There is nothing in the record to show that it would be good city planning to rezone the property as requested. In fact, the proposed parcel is located directly between industrial and business zoned property.

The very reason that this came into being is that the respondent here is a very large developer of property throughout the Ohio district, and the history has been such that they can go into a given community and exercise much power or control over the Council. So the City of Eastlake residents felt, rightly or wrongly, that Forest City had too

much sway over Council and that Council was making these decisions not because of what is good for the city, but because of pressures and so forth, what was good for Forest City. And the very traditional concept of referendum was to sort of counterbalance the wealthy and the entrenched, so that the people could reserve to themselves the power to in effect veto the actions of their Council.

QUESTION: What if in Ohio, what if this city subjected rezoning or variances to referendum.

MR. ANDREWS: There is a difference.

QUESTION: Let's suppose it did. What Federal constitutional provision is implicated by that?

MR. ANDREWS: The only way we got into the Federal implication is that the Ohio Supreme Court made no finding of any violation of Ohio law, but said that this procedure violated the 14th Amendment of the Federal Constitution. Our premise is that --

QUESTION: In what respect? I understand this. In my example, what provision of the Federal Constitution do you think might be implicated?

MR. ANDREWS: Well, they said the 14th Amendment --

QUESTION: How about you? What do you think?

MR. ANDREWS: I don't believe it's a question for a Federal constitutional constraint at all. I think it's a pure local issue.

QUESTION: I take it you think the local legislative bodies could leave to the electorate all questions of rezoning or variances.

MR. ANDREWS: Rezoning -- they are two different things. Variances are administrative probably.

QUESTION: Just take the variance, then. Just take the variance.

MR. ANDREWS: Probably a variance is usually given to a board of appeals, and generally speaking, I think variances are to be considered administrative probably --

QUESTION: Then what provision of the Federal Constitution would be implicated if those decisions were subject to referendum?

MR. ANDREWS: I don't believe there would be any. I think the line is drawn here. We go back to the Ambler Realty case, 1926, in which this Court in its initial case finding the general zoning to be valid under the police powers said, number one, that it had to be reasonable, and secondly had to pass certain tests it has to bear reasonable resemblance to the public health, the safety, morals and welfare.

I believe that if the final decision of the Council people and so forth violates those safeguards of Ambler, then on a case-by-case basis, then it should be determined whether or not it's an unconstitutional restriction.

But in the absence of that, I don't believe that the

Federal Constitution has anything to do with a decision of the people so long as the decision is reasonable as it applies to any given property.

QUESTION: What if the State of Ohio should make every decision of the Supreme Court of Ohio subject to popular recall, referendum. Would that violate the Federal Constitution?

MR. ANDREWS: Would you repeat that, please?

QUESTION: Let's say the Ohio State legislature provides that every decision of the Ohio Supreme Court upon initiative of 5 percent of the people could be subject to referendum and recall, i.e., popular overruling. Would that violate the Federal Constitution?

MR. ANDREWS: Really, this is far afield from --

QUESTION: Maybe not in theory. I don't think it is very far afield in theory, at least arguably.

MR. ANDREWS: I don't believe that court decisions constitutionally can be made the subject of a vote of the people

QUESTION: Well, why not?

QUESTION: In every State system?

MR. ANDREWS: Pardon?

QUESTION: State system.

QUESTION: They didn't command any division of powers in the State system.

QUESTION: No, it has been expressly held.

QUESTION: What if you had a provision under Ohio

statute that said after a criminal defendant's trial in the Court of Common Pleas, the verdict would then be submitted to a referendum of the people in that county, and if they found him guilty even if the jury and the Court of Common Pleas had found him innocent, he would be regarded as guilty.

MR. ANDREWS: No, I don't believe the people would have that power.

QUESTION: Take the 6th and 14th Amendments, the Supreme Court of Ohio hypothesis doesn't involve those, does it?

MR. ANDREWS: Like I say, that requires so much -- I just haven't considered that kind of a question here. I think that we are into a different area. I think we are dealing here with a local decision, not with a court decision, that we are dealing with legislative matters which are subject to the vote of the people.

Now, whether judicial matters are subject to the vote of the people is another question. I don't think it is involved here.

QUESTION: If the Supreme Court of Ohio had based this decision solely on Ohio law, would you be here?

MR. ANDREWS: It would have been much more difficult to be here, but the Ohio Supreme Court based this entirely upon a Federal Constitutional ground . In effect, by their silence, this held this does not violate the Ohio Constitution or general laws.

QUESTION: Do you think that Ohio would have reached a different result if the referendum called for a simple majority rather than a 55 percent?

MR. ANDREWS: I think there would have been no difference whatsoever. The traditional concept of Ohio law, and I have quoted these various decisions in my brief, many of the statutes of Ohio require 55, 60, and 65 percent --

QUESTION: But the only issue here is whether they were right in saying that merely submitting it to a referendum violated the 14th Amendment.

MR. ANDREWS: That's right. And that's the precise issue that we are talking about here, and this is exactly what the respondent contends, that it is the procedure by which this is given to the people that they are arguing about. They don't seem to say that there is anything wrong with having a referendum on zoning matters as long as 10 percent petition is circulated, but the moment you eliminate that 10 percent petition and say it will be by automatic referendum, then they say that is not correct.

But anyhow, really, this doesn't make that much change because in the zoning procedures under Eastlake Charter, and this is a traditional method, first of all, it goes to the Planning Commission, and then there is a public hearing before the Planning Commission, then it goes to City Council, there is a public hearing before the City Council. This far the

amendment makes no change whatsoever. If City Council turns the change down, it makes no difference. It's only in the event that City Council approves the proposed rezoning that for the first time does this amendment come into play, and then it says before that decision of City Council becomes final that it must be approved by a majority vote of the people.

Now, if we have a builder whose property or rezoning is destined to become a subject of referendum by the 10 percent petition, it makes no difference at all other than the fact the electorate have to circulate the 10 percent petition.

On the other side of the fence, if it does make a difference, it might add as much as six months time to the application, because you do have to submit it for a vote of the people and there is some delay involved there.

I think we should at least mention, because of Judge Stern's decision, that the record does not substantiate any claim of racial or economic discrimination in this case. I believe that respondent will probably back me up. There is no record in this case whatsoever except for the Charter and the applicable ordinances. So really we are talking entirely about the constitutionality of the Eastlake procedure provided for rezoning. It's a little unfortunate, because in the Ohio Supreme Court there was a housing unit that filed a brief which was far afield from the record in this case, and there they advocated discrimination and impeding the right to

travel and so forth, and Judge Stern in his concurring majority opinion adopted this kind of wording. But I don't believe that the record in this case substantiates that and I don't believe it is basically a discrimination case.

As a practical matter I believe that this case is pretty well governed by the finding of this Court in the Valtierra case rising out of California. Almost the same arguments were made in that case, even though that case applied to public housing. It was a constitutional amendment of the State of California requiring before any low-rent housing comes into any community it's subject to automatic referendum requirements. And the same arguments were made in here that the developers were entitled to this 10 percent procedure type petition and there Judge Black, I believe, in the ruling said that the referendum is a democratic decision-making procedure in which by insuring that all people in the community will have a voice in the decision which may lead to large expenditures of local government funds for increased public services, so it gives them a voice in the decisions that will affect the development of the community.

I think that's what we are saying here, that this is a means whereby the people have a constitutional right to reserve unto themselves the power in respect to rezoning.

Now, if rezoning was a power that was set aside by the Ohio Constitution, they said, "No, you can't vote on that,"

that would be something else. There are certain things such as fiscal matters, tax matters which are exempt. Rezoning is not one of them. And rezoning is traditionally has been subject to a vote of the people, first of all in adopting the general zoning plan, and secondly, we feel that they have the power to rezone.

QUESTION: You haven't, I think, dealt specifically with the two or three decisions in this Court upon which the Supreme Court of Ohio relied, have you?

MR. ANDREWS: Are you speaking now of -- Oh, yes. We are speaking now of the two cases -- the Supreme Court below and also the respondents here rely pretty much upon Roberge, and this is a case way back in 1928, in which the court held that the philanthropic home could not be made the subject of voting by people located in the same block, and also the Eubank case which was in 1912, and this is one in which they attempted to establish building lines by adjacent neighbors.

We believe that neither of these cases are correctly interpreted by the respondent or by the Ohio Supreme Court because these are neighborhood preference cases. They say that they can't have a vote of people in the neighborhood, preference cases, unless there are established standards. But even in those cases, in each case, the Court said the power to locate a philanthropic home, or the general power of a city to locate a philanthropic home we do not decide. And in the other case

the power to establish building lines we do not decide. So these are the cases which were relied upon by the respondent and I think they are misinterpreted, misrelied upon by the Ohio Supreme Court. And this is exactly the wording which was used by the district court case out in California, the Alameda Spanish Speaking case in which they said that the two cases were misinterpreted and were not a basis for a finding where the entire referendum power of the city is involved.

QUESTION: Mr. Andrews, may I ask you a question?

MR. ANDREWS: Yes.

QUESTION: I understood you to indicate that the referendum was required because some history indicates that the Council was subservient to large economic interests of some kind.

MR. ANDREWS: Yes.

QUESTION: Is there anything in the record to indicate that?

MR. ANDREWS: No. The reason this was circulated, the petition, and so forth, it was conceded by the respondent that the petition was correctly circulated, that the amendment was correctly made, and so the reason why this amendment was made is somewhat immaterial to this case.

QUESTION: Then as the case comes to us the record is silent on why this procedure was adopted.

MR. ANDREWS: That is correct.

QUESTION: And you suggest there is nothing in the record to show there is any public interest in having this rezoning take place. Should we not presume that the City Council acted in the best interests of the community and therefore there is some public interest to be served by this particular rezoning?

MR. ANDREWS: That certainly is not in the record, but I suppose it is a presumption . I don't think it's --

QUESTION: You represent the city and as lawyer for the city you are describing the City Council the way you did earlier, that they are subservient to outside interests.

MR. ANDREWS: No. I am saying this, that the City Council is subservient to the electors. In other words, I am saying the final decision is not in the Council, the final decision is in the electors and that the electors have a constitutional right to veto the actions of their elected representatives if they so desire.

QUESTION: Mr. Andrews, I presume if one can assume that the City Council acted in the public interest, one can assume that the people who voted in the referendum likewise acted in the public interest.

MR. ANDREWS: I certainly hope so. As they state in the Valtierra case that such procedure, the referendum procedure, show devotion to democracy and not to bias and prejudice. So I hope that we can assume that, yes.

QUESTION: The Valtierra case did not involve a due process issue, did it?

MR. ANDREWS: No, they used equal protection. But the arguments were the same.

QUESTION: What is the logical end of your last statement? Suppose the citizens adopted an amendment to the City Charter and say instead of 55 percent we have to have 95 percent, and then along comes a referendum on this kind of a zoning ordinance and only 93 percent vote in favor of it.

MR. ANDREWS: I think that would be an unreasonable requirement and I think an unconstitutional requirement.

QUESTION: Where would you draw the line, then?

MR. ANDREWS: I don't know that the courts have ever really drawn that line. I know in Ohio they have held that 55 percent is constitutional in certain issues.

QUESTION: We gave some intimations of it in the West Virginia case a couple of years ago where I think it was either 66 or 60, there was some input that could go so high that it might create constitutional problems.

MR. ANDREWS: Yes. As far as I know, no court has ever held -- and also as far as I know no court has ever held the automatic referendum procedure or practice itself to be unconstitutional.

QUESTION: I take it that the zoning that results from the referendum, this referendum procedure, is subject to

the same type of review as if it had simply been limited to the City Council. That is, once it has gone to referendum doesn't mean all judicial review is foreclosed of the reasonableness of it.

MR. ANDREWS: Absolutely. You have the same Ambler procedural safeguards to the final decision.

That's why I am saying that the way that the political decision is made,by the people or Council, is of no consequence, but if they make the wrong decision, be it Council or people, then we go into the Ambler test and if it's unreasonable, it's subject to judicial scrutiny on a case-by-case basis.

QUESTION: Would unreasonableness embrace one that Mr. Justice Blackmun suggested, 90 or 93 percent?

MR. ANDREWS: I would think so, almost without a doubt.

MR. CHIEF JUSTICE BURGER: Mr. Ginn.

ORAL ARGUMENT OF WILLIAM D. GINN ON BEHALF OF RESPONDENT

MR. GINN: Mr. Chief Justice, and may it please the Court: If there is one thing that we shall not do in this case is to treat this issue which has been presented by these litigants lightly or other than a severe question of due process under the 14th Amendment.

My client is a corporation form, but it was ten

immigrants from Lithuania originally and we cherish the right to vote and the constitutional protections just as much as the citizens of the City of Eastlake. And, your Honors, we don't have a voting right case here, and we don't really have a referendum case, and we really do not have a division of powers case in the sense of legislative-administrative.

QUESTION: What is the difference between Valtierra and the referendum aspect?

MR. GINN: In the referendum aspect, your Honor, it does not differ. There was a mandatory referendum in effect in Valtierra and there is also here a mandatory referendum. The crucial difference in Valtierra, and there are several differences, the first difference is that Valtierra was not a due process case. As the Court recognized, the Valtierra case was a situation where there was no attempt to exercise the police power. The issue was equal protection, it was raised by a group of persons interested in low-rent housing, not in individual property owners' rights with respect to the use of his property, and it was not a zoning case.

QUESTION: Is your argument that if there had been no City Council ordinance, no referendum in this case that you should win because industrial zoning is unreasonable for this property?

MR. GINN: No, it is not, your Honor.

QUESTION: The result is that you are left with

industrial zoning.

MR. GINN: The result is that we are left with industrial zoning but with a deprivation of due process.

QUESTION: How is that?

MR. GINN: Because, your Honor, the essential issue in the case is exactly that, the due process issue. And I will explain to the Court why.

QUESTION: Well, it has to do with the fact that you are being unreasonably restrained in the use of your property, doesn't it?

MR. GINN: It has to do, your Honor, with the process by which our rights have been decided.

QUESTION: Not with the unreasonable restriction on the use of your property?

MR. GINN: On the use of the property. We are challenging the process by which the City of Eastlake seeks to grant or deny the right to change which is recognized in Euclid, which is recognized in due process cases generally, even in McGautha and the dissenting opinion of --

QUESTION: More precisely the way it has chosen to pass on applications such as yours to change the zoning that existed on the property at the time you bought it.

MR. GINN: Precisely, your Honor.

That comes directly down to really the vices -- and I think these will interweave into the questions that the Court

has been asking. The vice, if you will, the shortcoming of the Euclid mandatory referendum system -- we have a traditional referendum system, and I believe the Court understands that -- I mean a traditional zoning system and rezoning system up to the point where the Council has validated the request for the change, has found that the request for a change is within the public safety, morals, and general welfare of the community. And at that point it is that the Eastlake mandatory zoning procedure takes over. And we submit that the defectiveness, if you will, of a legislative determination -- Yes, Mr. Justice Rehnquist.

QUESTION: Why don't you object on the ground that once the Planning Commission has decided to recommend the change it's unconstitutional to submit it to even a body derivative from the sovereignty of the people such as the City Council?

MR. GINN: Because the Planning Commission only makes recommendations, your Honor.

QUESTION: Isn't the way the Eastlake ordinance is set up now that the City Council only makes recommendations and it is ultimately the people who decide?

MR. GINN: It's --

QUESTION: Suppose it just said it never goes to the City Council. Once the Planning Commission acts, it goes to the people.

MR. GINN: Had that been true, your Honor, and if the people were exercising the right to control the use of my property, then that exercise of that right would have to arise to the constitutional standard of the 14th Amendment.

My property and the right to utilize it is being restricted by a system which in the first instance is not a process which permits the reasonable decision by reason of the process. In other words, in order to have a constitutional system for restricting my property rights under Euclid, under McGautha, the decision on rezoning, your Honors, must be arrived at in an even-handed manner on a rational basis and not by a process which permits random choice or arbitrary decisions. That's the standard.

QUESTION: Let me back up to something you said before, Mr. Ginn. You, at least I understood you to say, that they could not change the rules of the game after you acquired the property here.

Now, suppose at the time you acquired the property, a simple majority of the City Council would resolve these issues, but the City Charter was amended after you had acquired the property to provide that it would take a vote of three-fourths of the Council to change the zoning. You say that's unconstitutional?

MR. GINN: No, I would not, your Honor, because I have no vested right in the zoning. The zoning -- this is the

very thing that precipitated Justice Stern's concurring opinion in the Supreme Court below. The attempt to think in terms of a constitutional zoning system as though it's a restricted covenant running with the land, the right to change it which is a matter of favor, it can be granted or denied depending upon the status of the particular litigant standing before the people.

QUESTION: What's the difference between having the city procedure amended by putting it to a referendum and increasing the size of the vote in the Council. What is the fundamental difference there?

MR. GINN: We may increase the size of the vote in Council, your Honor. We may under a constitutional or a classic zoning system provide for various procedures for change, but the end result, the final decision here, is a decision which in effect is a mandatory referendum decision, it is one which is not reviewable on any of the bases which support a due process system. It is one which can't be referred to any of the standards of health, safety, or general welfare. Under the classic zoning system, your Honor,we have a provision for -- as it prescribes it in Euclid v. Ambler Realty -- a provision for measuring whether the end product has had reference to the standards of due process.

QUESTION: What if the City Council in this case had simply denied your application for rezoning without any reasons

or giving any -- simply a minute order denying it. Would you say that that is procedurally defective under the 14th Amendment?

MR. GINN: No, I would not say it is procedurally defective, your Honor, because there the decision by the real decision-maker, the City Council, arrived at through a due process system has determined that I shall not get the change. Now, it may be --

QUESTION: You say that the City Council is the real decision-maker. Now, in a hypothesis where the City Council is the final authority, that's true. But the people of Eastlake have made the people the real decision-makers.

MR. GINN: And in making the people the real decision-maker, that is where they have created the conflict under the 14th Amendment, because -- yes, Mr. Justice Blackmun.

QUESTION: Suppose this case, instead of coming up from Ohio, came up from a rural county in Massachusetts where everything is done by town meeting. Would you be making the same argument there?

MR. GINN: I think the question, the issue, Mr. Justice Blackmun, in that circumstance would be whether the town meeting as a part of the process for rezoning had a sufficient procedural protection to it so that we could ascertain whether the standards of due process were being applied by the decision-maker so that we could examine into the basis of that

decision through some legitimate judicial process.

QUESTION: Well, you know what a town meeting is.

MR. GINN: I do, your Honor.

QUESTION: It's a town meeting, and the decision is made that night. Are there standards ever?

MR. GINN: I think in a sense what you are referring to, your Honor, is what does take place in a lot of zoning even in Eastlake, and that is that there are public hearings.

Now, the town meeting may, I do not know whether the town meeting actually decides in the sense of a town council deciding. But as long as the constitutional processes are present, then we can have a valid zoning system.

QUESTION: I guess you would argue that if the Planning Commission makes a recommendation and the City Council then goes into executive session in the middle of the night and comes out with a decision which it announces the next morning without any reason at all. That is procedurally deficient or not?

MR. GINN: Well, --

QUESTION: The City Council does it. The only thing is it just doesn't tell you it's going to do it, has no public hearings, and there is not one single procedural right extended to any member of the public.

MR. GINN: Right. Or to the litigant.

QUESTION: Yes.

MR. GINN: Well, under those circumstances --

QUESTION: Not to the litigant; to the property owner.

MR. GINN: To the property owner, yes.

QUESTION: And the City Council just announces, "We think industrial zoning is just fine for this property," period. Now, would you make the same argument there as you are making here?

MR. GINN: No, I would say that there may be deficiencies in the due process procedure under which that decision has been arrived at, and those deficiencies may be a matter of concern to the local community at large or they may be a matter of concern to the property owner.

QUESTION: What are the procedural deficiencies in the hypothesis just given to you?

MR. GINN: That there is no public hearing and the --

QUESTION: You had a public hearing in that hypothesis before the Planning Commission.

MR. GINN: But we had no consideration, your Honor, before the public.

QUESTION: Then your answer is the City Council can't do what Mr. Justice White hypothesized.

MR. GINN: That is correct, your Honor.

QUESTION: Would you extend that rule to legislation in general. Most Western States have a provision that if the

legislature passes a law a certain number of people by petition can submit it to referendum. And if at the next election the people disapprove the law, it's repealed. Is that constitutionally infirm?

MR. GINN: Mr. Justice Rehnquist, I think it is quite well established that in that type of referendum that you have spoken of, that there may not be a constitutional infirmity. The kind of referendum, so-called, that we are speaking of is a show of hands by the people on whether my individual property shall be restricted by a zoning ordinance.

QUESTION: Shall have a restriction lifted.

MR. GINN: Well, your Honor, I don't believe that it's appropriate to say, "have the restriction lifted." The Eastlake ordinance, as indeed all of these ordinances, as the Euclid v. Ambler Realty case itself said, there must be a function of change --

QUESTION: I know that, but the question is in this case not whether your property was going to be rezoned against your will, but whether the existing zoning on your property was going to be changed in accordance with your request.

MR. GINN: Correct.

QUESTION: So it's peculiar to zoning then, this doctrine. It doesn't carry over into other legislative functions.

MR. GINN: Yes, your Honor, it is, and zoning is itself rather unique and as the Court has observed, members of the Court previously -- Mr. Justice Marshall, I think, most recently in Valtierra -- that zoning is a matter which does impinge directly on individual property rights. And zoning has historically been treated as an adjudicatory type, whether we put the labels on it or not, it's the request of the individual that he have the benefit of the change that the zoning ordinances provide as available to the community.

QUESTION: I think our real trouble is you keep saying litigant. And under the zoning procedure you are not a litigant.

MR. GINN: No, your Honor, we are an individual property owner.

QUESTION: You are not a litigant.

MR. GINN: We are just an individual property owner. And the issue is --

QUESTION: Due process is not measured by a litigant, due process, is it?

MR. GINN: No, it is not.

QUESTION: It's something else.

MR. GINN: Pardon, your Honor?

QUESTION: It's something else.

MR. GINN: It is something else.

QUESTION: And it can't be controlled by a referendum.

MR. GINN: It can be controlled by a referendum of the traditional variety, or at least it is arguable that it can be. On this particular instance we don't have that kind of a referendum. We have a show of hands which masquerades as a referendum that has been labeled as a referendum.

QUESTION: Can't you go out and put your side in before the people?

MR. GINN: You can put your side in before the people, your Honor, but let's examine that because I think that is -- due process is a matter of the burdens of court that society places on the individual. And in the case of a mandatory referendum, the burden is placed on the homeowner not only of carrying the initial burden, and that is of going to the Planning Commission, the public hearing, and the Council, and having his request for a change validated as being within the public welfare. Now, the individual property owner is given an additional burden, and that additional burden is to act in effect as the private Attorney General for the public officials seeking to validate their judgment now with respect to my use of property, that is, whether or not my use fits the general welfare.

QUESTION: You wouldn't put yourself in the position of a private Attorney General, would you?

MR. GINN: Well, I'm conscripted into that position, your Honor, because --

QUESTION: You just want to build some houses; that's all you want to do.

MR. GINN: We wanted to build some conventional housing on a piece of industrial property that was rezoned for that purpose after public hearing by the Council on recommendation of the Planning and Zoning Commission. And then by throwing it open to a show of hands to the personal preference, if you will, your Honor, of the people who happen to come down to the polls on that day by throwing it open to the show of hands, we were denied that which the duly constituted authorities under the classic rezoning situation had granted --

QUESTION: Would you argue if it was on the ballot?

MR. GINN: Pardon, your Honor?

QUESTION: If the rezoning question was on the ballot, would you make the same argument?

MR. GINN: It was put on the ballot under this mandatory referendum.

QUESTION: That's what I thought.

MR. GINN: It was put on the ballot --

QUESTION: So the show of hands can take away a whole lot of rights, but it can't take yours away.

MR. GINN: They cannot take my rights away --

QUESTION: They take a whole lot of other rights away.

MR. GINN: They do your Honor, occasionally --

QUESTION: They could change the whole zoning law, couldn't they?

MR. GINN: They cannot change it in such a way as to violate the 14th Amendment.

QUESTION: They could change the whole zoning law though, couldn't they?

MR. GINN: Yes, if they did do it --

QUESTION: But they can't change yours.

MR. GINN: No. If they change mine in accordance with the 14th Amendment, your Honor, I have no complaint.

QUESTION: What if,in accord with the ordinary referendum provisions under the town charter of Eastlake, what if the people in a referendum ordained that there would be no change in any of the zoning laws or ordinances of Eastlake for five years.

MR. GINN: Mr. Justice Stewart --

QUESTION: By a show of hands.

QUESTION: Just a law of general applicability.

MR. GINN: Yes. Make a law of general applicability.

QUESTION: And its enacted by referendum, by popular vote.

MR. GINN: Under those circumstances the issue would be whether the time for which the policy was in effect was a reasonable one. If the people or if their legislative authorities, or by charter amendment, had said that there shall

be no changes, period, in the zoning laws, that under Euclid v. Ambler Realty would be unconstitutional.

QUESTION: But that is a matter of the substantive law, not a matter of the procedure under which it was enacted.

MR. GINN: That is a matter of the burden of restrictions on my property because the very --

QUESTION: Right, as a matter of substance, not as a matter of procedures by which it was ordained or enacted.

MR. GINN: That's correct, your Honor. It's so unreasonable as to be unlawful.

QUESTION: That's a different question. You've answered, I thought, quite clearly and answered previous questions here from the bench that you are not attacking, as such, the unreasonableness of this refusal to rezone.

MR. GINN: As directed to the zoned property.

QUESTION: Is that correct?

MR. GINN: You are absolutely right, your Honor, we are attacking the method and means whereby zoning is opposed and denied under the Eastlake Charter.

QUESTION: What is the answer to my question then? A popularly enacted ordinance provides that there shall be no rezoning in Eastlake for five years, no change in the present zoning.

MR. GINN: That would likely be reasonable and likely be constitutional, because of the reasonableness of it. if the

five years was a reasonable period of time.

QUESTION: But that doesn't have to do with the procedure, the method by which it was enacted.

MR. GINN: No, it doesn't.

QUESTION: It has to do with the substantive result. How about the method and procedure by which this hypothetical ordinance was enacted. Would that be --

MR. GINN: I think the method and procedure there is inconsequential.

QUESTION: You do.

QUESTION: Mr. Ginn, do you attach any significance to the time when this referendum requirement was put in?

MR. GINN: It was clearly,under the briefs-- while they just indicated a denial of that, under the brief of the petitioner, it was clearly directed to our individual property.

QUESTION: Does the record show that?

MR. GINN: And the brief --

QUESTION: Does the record show it? And if so, do you rely on that time sequence as part of your argument?

MR. GINN: No, we do not rely upon it, your Honor. The deprivation of due process by this system is so fundamental that we would not rely upon it as the key being the fact that it was directed to us.

QUESTION: Do you rely on the 55 percent requirement?

MR. GINN: No, your Honor. The 55 percent --

QUESTION: You would be making the same argument if it were just a simple majority?

MR. GINN: Yes, your Honor.

QUESTION: Or if the City Council conditioned their approval of there being as many as 20 percent in the community who agreed with them.

MR. GINN: The question of conditional zoning is another --

QUESTION: But let's just assume the ordinance says no City Council's rezoning shall take effect until as many as 20 percent of the people in a referendum approve. You would be making the same argument, wouldn't you?

MR. GINN: I would be making the same argument, your Honor, because the fact is that we cannot examine into the basis for the decision that is made by the electorate on my property.

QUESTION: Of course, your property was already restricted. It's restricted to industrial. And it was when you bought it. And your real complaint is that this procedure keeps the restriction in effect and will not remove it.

MR. GINN: That is the effect.

QUESTION: That's what your real complaint is, isn't it?

MR. GINN: My real complaint --

QUESTION: That you cannot be denied the release of

the restriction by this procedure.

MR. GINN: By this procedure, I cannot be denied.

QUESTION: What's wrong with the procedure, do you think?

MR. GINN: Your Honor, the procedure is deficient in at least three major ways.

QUESTION: I take it you would be making the same argument if everything you wanted to say about it got in every single voter's hands.

MR. GINN: Yes, your Honor, because in the first place they have put that burden on me of expending my funds to --

QUESTION: I know, but let's assume that the state said anything you want to say we will make sure it gets in the hands of every voter. I take it your problem is that you think voters vote in a way that may be completely irrational.

MR. GINN: No. I have no distrust of the voters as a fundamental matter, your Honor.

QUESTION: So you think it's really a procedural thing?

MR. GINN: No, I say that the decision of the voters cannot be, as they have conceded, cannot be examined into. There is no way in which I can test the basis upon which -- it may be personal preference, it may be bias and prejudice.

QUESTION: So what you are saying, what your real objection to is the fact that it's a voting process and that

you just really won't accept the fact that the decision is made by the individual voter by voting.

MR. GINN: On my individual property, I cannot accept the fact that under the 14th Amendment, by a mere show of hands, that is, without any reference -- and this is important, Mr. Justice Rehnquist -- without any reference to standards because that was the key of Euclid v. Ambler Realty --

QUESTION: You could have been accorded all the process that anybody could have imagined, and you still would be here objecting.

MR. GINN: Process in that sense, I would be, your Honor, because the decision of the people on the use of my property, once having been validated as within the public welfare, now the people are asked by a show of hands to determine do I get what I've gotten from the legislative authorities and through the normal processes, or do I not? And there is no way in which I could --

QUESTION: When you say the normal processes, the normal process in the City of Eastlake is to have it go to a referendum.

MR. GINN: I should say the constitutional process, your Honor, because -- and I want to answer that directly -- because the contention that the petitioner makes is that the end result, that is, the people's vote, is the only thing that matters, and how we get to that end result is inconsequential

and cannot be attacked.

I say that under our Constitution it is process, it is how we structure the system that does the whole job and the fact that in a particular instance --

QUESTION: You were going to tell us three defects and you never did. What are the three you are relying on?

MR. GINN: Your Honor, in a --

QUESTION: One is the lack of standards, I understand.

MR. GINN: Yes. One is the lack of any ability to refer to the standards in terms of, or to measure the standards in terms of the mandatory referendum. The mandatory referendum is not susceptible to be measured by a standard.

QUESTION: What are the other two? I understand that one.

MR. GINN: The second one, your Honor, is really the first one, and that is that we cannot have a constitutional system under the 14th Amendment where there is purely at random or arbitrary result, unless the system itself is susceptible of a reasonable, rational, even-handed approach. And mandatory referendum is simply random. It depends upon the content of the information in the minds of the voters as they approach the polls on that very day. It depends upon who happens to show up. It depends upon --

QUESTION: That's true in the town meeting in Massachusetts that Mr. Justice Blackmun postulated, too, isn't it?

MR. GINN: True, your Honor.

QUESTION: It's true in plenty of city councils.

QUESTION: Mr. Ginn, please tell me the third.

QUESTION: Your argument simply means that the town meeting procedure is unconstitutional when it comes to rezoning.

MR. GINN: I am not sure that it necessarily means that, Mr. Justice Blackmun. I think that what we mean is that when we have a system which is designed to grant or deny my use or restrict my use of private property, that it has to be shrouded with at least the protections of being a system that can be referred to standards, that it can be reasonable and not random, arbitrary, capricious. Eubank, Roberge, and Euclid itself.

And, thirdly, Mr. Justice Stevens, the system itself must be one where you can examine judicially into the basis for the final decision that has been made. And there is no way, as they concede, that you can examine judicially into the basis of the determination that has been made at the ballot box on this --

QUESTION: Our cases have made a distinction, haven't they, between restrictions imposed by unilateral moves on your property and the removal of the restrictions on your property?

MR. GINN: I don't believe --

QUESTION: Oh, haven't they? Cusack said that --

MR. GINN: May I speak to that?

QUESTION: Yes, of course. I would think you would. You haven't said a word about it. You've got Cusack and Roberge and all those cases, I think, to explain away.

MR. GINN: Well, Mr. Justice Brennan, I don't have to explain away Eubank or Roberge. They are in the line of my authority. Cusack --

QUESTION: They imposed restrictions. They allowed owners to impose restrictions not already on your property.

MR. GINN: In the case of Roberge, your Honor, there was a duly validated opportunity to build a home for the aged, and that final decision, just as in the City of Eastlake, was suspended or made ineffective until there was a vote. It's directly on point.

Cusack, your Honor, involved an offensive use, that is --

QUESTION: Signboards.

MR. GINN: -- signboards, billboards which were classified under their ordinances as an offensive use, a public nuisance. And that public nuisance could be lifted by the discrete group of persons who were directly affected by it. And that was held to be constitutional. And that does not have bearing on our particular situation. The Eastlake scheme, your Honors, for ballot box zoning really presents this issue: Do the people have the right by a show of hands, by their mere

expression of personal preferences, to override an individual property owner's fully validated right to use his property in a way which is in keeping with the public welfare? If this becomes the law of the land, then we will have taken a giant step towards the destruction of due process of law in the area of land use. This concept that has been so vital to the development of land use law of a rational planning system, a decision that is reasonably arrived at, objectively reached, this is the essence of Euclid, it's the essence of McGautha's discussion of due process. That kind of a system will no longer have any significance. Fifty years of experience, your Honors, in arriving at that delicate balance between the community interest and the individual property owner's interest will be jettisoned in favor of the vagaries of the ballot box, and respectfully urge --

QUESTION: Mr. Ginn, I take it you don't attach any significance either to the fact that the property owner bears the cost of the election.

MR. GINN: I consider that to be an additional burden that is a hallmark in effect of the distinction between traditional referendum and this mandatory referendum scheme. There is a distinction which can be made. This Court could constitutionally arrive at the conclusion that the traditional referendum has a sufficient group of protections attached to it that it ought to be upheld, whereas the mandatory referendum

with no guideposts, with no standards, and with just a random result ought not to be upheld constitutionally.

QUESTION: Mr. Ginn --

MR. GINN: Yes, Mr. Justice Powell.

QUESTION: Let's assume that the Mayor had vetoed your ordinance and the Council had failed to override the veto. Would you be content with that as complying with all the arguments you have advanced?

MR. GINN: That would be another issue and I would have to test, then, the reasonableness of the action of the legislative body in terms of --

QUESTION: Could you have any better means of testing the action of the Mayor who decided to veto than you have had in testing the reasonableness of the action of the people?

MR. GINN: At least the action of the Mayor is one that could be inquired into. I think if the system provides for legislative vetoes and we assume that this is a legislative act, then the issue would be a slightly different one. It would be the reasonableness of the act of vetoing my property interest.

QUESTION: Your Charter does authorize the Mayor to veto ordinances.

MR. GINN: Pardon me, your Honor?

QUESTION: Your Charter authorizes the Mayor to veto ordinances.

MR. GINN: Yes, your Honor. And that we would welcome the system that gives us an opportunity to examine into the rightness or the wrongness or the reasonableness of what is done in that respect.

QUESTION: What was the conventional way prior to the enactment of this ordinance providing for the special referendum? What was the conventional -- how would you get review of either Council action or Council action vetoed by the Mayor that Council had failed to override?

MR. GINN: The way you get the review of Council action, your Honor, is by going to the courts.

QUESTION: Common Pleas Court?

MR. GINN: You go to Common Pleas Court.

QUESTION: Claiming what?

MR. GINN: Claiming that there had been an improper application of the standards of public health, safety, and general welfare under Euclid, putting in all the zoning type testimony into evidence that you would put in.

QUESTION: Can you still do that?

MR. GINN: Not now, your Honor, because the ultimate decision-maker -- I mean, we have the presumption attached to the validity now of what the Council has done, but the ultimate decision-maker is no longer challengeable. We never get the opportunity --

QUESTION: Why not? Why couldn't you go into the

Common Pleas Court with the same claim?

MR. GINN: Because, your Honor, you cannot delve into the minds of the voters, according to the petitioner --

QUESTION: But you could show by your own case, not by examination of your adversaries, but by your own case that this violates all the standards of equity and reasonableness that are in Ambler, can't you?

MR. GINN: Yes, your Honor.

QUESTION: In the Common Pleas Court of Ohio.

MR. GINN: I think the issue there would be slightly different, your Honor.

QUESTION: Why?

MR. GINN: The issue would be whether or not the use of your property as it has been circumscribed is an invalid use because unreasonable and contrary to the 14th Amendment. It would be the traditional Euclid v. Ambler Realty and --

QUESTION: Right. And that's what it would be if this were Council action, that's what it would be if this were Council action vetoed by the Mayor, and that's what it would be in this case, isn't it?

MR. GINN: No, your Honor.

QUESTION: It's the same issue.

MR. GINN: It would not be the same issue in the case of the Council action because there we would be seeking to have overridden the judgment of the Council denying our

rights, and we would be seeking to have the Court, you know, grant us the rezoning.

Now, in that circumstance, we would not be helped by the presumptions that normally attach to the legislative process, and we would have a real uphill battle. But in this circumstance in which we are now placed, we have had a valid exercise of legislative power over the rezoning, we have been accorded the rezoning. Now it has been put to the ballot box and personal preference has said no.

QUESTION: It was denied under the law, and you can still get a review of that under Ambler, can't you?

MR. GINN: No, we can't get the same review, your Honor, because we can't force the people --

QUESTION: You might have a little different problem of proof because in the Council action, I suppose you could call Council to the witness stand to testify, and you couldn't call the individual voters of Ambler. But beyond problems of proof, you would have the same kind of a case, wouldn't you?

MR. GINN: I don't think the case is the same, your Honor, because the issue is no longer whether the presumption of validity attaches to the legislative process by which we have gotten the change. That presumption has been wiped out by the show of hands at the end of the line.

QUESTION: Well, I suppose there is a presumption of validity of what the voters did.

MR. GINN: There is, your Honor, a presumption?

QUESTION: I would suppose so.

MR. GINN: Well, that, your Honor, then, is a presumption of validity which we cannot surmount and which we ought not to have placed upon us as a burden under the 14th Amendment.

QUESTION: No, I don't understand if this is an inequitable refusal to rezone in violation of the standards set out in Ambler, why you couldn't seek review in the Common Pleas Court the same as you would have been able to do had this simply been Council action.

MR. GINN: Well, we would certainly attempt that. I think the burdens and the whole process would be different, because we are not able to examine, as Euclid v. Ambler Realty, as McGautha, as other decisions of this Court have said, in order to have a due process system at the end of the line, judicial review must be available in a reasonable manner which enables the person who has been deprived of his rights to examine into the basis of the decision. And we are deprived of that under this system.

Thank you, your Honors.

MR. CHIEF JUSTICE BURGER: Do you have anything further, Mr. Andrews? You have only one minute left.

REBUTTAL ARGUMENT OF J. MELVIN ANDREWS

ON BEHALF OF PETITIONERS

MR. ANDREWS: Very briefly, in answer to the question of Mr. Justice Stewart, the decision would be reviewable the same from the Council or the people. That type of case you look at the property and determine what the restrictions are on the property and whether the decision is made by Council or the people it makes no difference. Are those restrictions reasonable or are they not? That's the issue there.

Secondly, I think Mr. Ginn's position is he doesn't want the people to vote on rezoning.

And, thirdly, in respect to the Eastlake Charter, rezoning has always been a subject of referendum under the Eastlake Charter, the only difference being that under the old system, so to speak, it required a 10 percent petition of the people in order to bring the referendum to vote, and the substantive right to the same. Now, the only difference is the procedure is different. Instead of the requirement that the people circulate a 10 percent petition, that is eliminated. That's the only difference.

QUESTION: Mr. Andrews, let me just get the 55 percent requirement clear in my mind. Do I correctly understand that if an individual, say, an owner of a two-flat wanted to rezone to single-family, just a very minor 30-foot lot wanted to change, that property owner would still, in order to get that

done have to bear the cost of a citywide referendum to get it approved?

MR. ANDREWS: Let's get straight on this class. The lower court held the fact that the cost of the referendum should be chargeable to the applicant was unconstitutional. We have accepted that and we have not pursued it on review, so that is not --

QUESTION: Nevertheless, is it true that no matter how small the parcel and no matter how minor the change in zoning, the property owner has the burden of getting 55 percent of the electorate to agree to that particular change?

MR. ANDREWS: That is correct. It was just very recently a piece of property up the street from this particular property was put up to a vote of the people. It was a 9-acre parcel from industrial to business. They received a 78 percent majority vote.

But this is true. We draw the line at rezoning, yes.

QUESTION: Unless you are talking about a variance.

MR. ANDREWS: A variance is something else. We are talking of rezoning, though.

QUESTION: And my brother's example might be no more than a variance.

MR. ANDREWS: That's right. If it got into a variance, that is administrative, that is not subject to a vote.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 2:42 p.m., the oral arguments in the above-entitled matter were concluded.)