ZONING AND PLANNING LAW REPORT

Vol. 25, No. 3 **March 2002**

THE GREENLIGHT INITIATIVE AND BALLOT BOX ZONING: CALIFORNIA TEA PARTY AND HARBINGER OF THINGS TO COME?

by Paul J. Weinberg

Paul Weinberg is a real estate attorney practicing in Irvine, CA. Since 1979, his Orange County practice has specialized in real estate, title, leasing, and real property development matters. Paul is the only non-architect member of the Laguna Beach Architectural Guild and acts as their legal counsel. He is a member of the Society of Architectural Historians and the American Institute of Architects. Paul has also served on the faculty at University of California's Hastings College of Law in San Francisco, CA, where he has taught civil trial practice. He also authors articles for the University of California's Continuing Education of the Bar Real Property Law Reporter and West Group's National Real Property Law Journal. in 1998, Paul announced the formation and opening of a private mediation service devoted to the resolution of real property disputes. *He gratefully acknowledges the assistance of Nola McGuire Leahy, Esq. (ret.), in preparing this article.*

The November 2001 election saw what may be the first significant seed planted in a prominent and growing trend among voters to take land use authority away from local municipal bodies. While the measure at issue was local in scale, the success of the measure, placed in context with the sudden appearance of others like it across the country, point to a disturbing and growing trend. That trend is that, for whatever reason, local voters and citizens have lost confidence in the ability of municipal bodies to render reasoned and fair land use planning decisions. The voters, like the Boston Tea Party, have decided that they're taking matters into their own hands; any major land use decision that affects them will be one that they want a voice in. How did the level of discontent among the citizens rise to the point where an obvious and confrontational rebuke was handed to the municipalities at the polls?

Perhaps the best place to start is to look at the underpinnings of an initiative that passed and to listen to the concerns of everyone who was for and against it.

That initiative was termed "Greenlight" and was penned by a group of local citizens in Newport Beach, California, a wealthy enclave in suburban Orange County, approximately an hour and a half south by car from Los Angeles. *The Los Angeles Times*, in its November 12, 2000 edition, summarized the new temperament of the voters and the activist role that they had decided to assume:

> While all eyes last week were focused on who would win the White House, voters from Escondido to Sonoma County also zeroed in on whether they would get new Wal-Mart's propped in their back yards, or lines drawn around their communities to contain sprawl.

Zoning and Planning Law Report
is published by West Group, 50 Broad Street East, Rochester, NY 14694. ISSN 0161-8113

As the nation's economy continues to spawn new development, voters are increasingly wresting control of planning decisions from government employees. A record number of growth-related initiatives were on ballots nationwide Tuesday—so many that a think tank studying the issue hasn't begun to count them all. Across the West, voters decided scores of slow growth issues. In California alone, there were 60 such initiatives—the most in a decade.

"There's a struggle going on over who's going to be in charge. It's part of a remarkable national conversation we're having on growth and planning," said Phyllis Myers, consultant for the Washington, D.C.-based Brookings Institution.

Experts say Tuesday's results, although mixed, point to several emerging trends. Voters seems willing to tax themselves to offset effects of growth by buying open space, but remain leery of sweeping control on development. And the more narrow or localized an initiative was, the better it did. A majority of California's local slow growth measures passed, but broad-brushed initiatives in Arizona and Colorado were trounced, as were similar measures in San Luis Obispo and Sonoma Counties.

Backers of the Sonoma County anti-sprawl initiative put this warning on their website: "Now is the time to act if we don't want to end up like Orange County." The effort was opposed by 57% of voters.

They might have done better to follow, paradoxically, an example of Orange County, where a more focused anti-growth initiative that sprang from concerns about clogged streets near a proposed Newport Beach resort sailed to victory. "The bad guy was winning for a long time," said Tom Hyans, proponent of the so-called Greenlight Initiative, "now it's time for the good guys to win."

By "good guys" he didn't necessarily mean environmentalists. Many slow growth measures were supported by farmers worried about the loss of agricultural land, or neighborhood groups concerned about quality of life. In Newport Beach, Measure S was supported by a majority of the ritzy beach towns' wealthy Republican voters.[1]

The Greenlight Initiative is, in some ways, the outgrowth of California's long judicial history of tolerance for referenda and initiatives in general and for the purpose of amending, modifying, or striking land use decisions made by local municipalities in particular. The 1980 California Supreme Court case of *Arnel Development Co. v. City of Costa Mesa*[2] was the progenitor. In *Arnel*, as the Court summarized the facts:

> Plaintiff Arnel proposed to construct a 50-acre development consisting of 127 single-family residences and 539 apartment units. Objecting to this proposal, a neighborhood association circulated an initiative rezoning the Arnel property and two adjoining properties (68 acres in all) to single family residential use. When the voters approved the initiative, Arnel instituted the instant action. . . . We transferred the cause here on our own motion to examine further the holding of the Court of Appeal that the rezoning of specific, relatively small parcels of privately owned property is essentially adjudicatory in nature, and thus cannot be enacted by initiative.[3]

The California Supreme Court came down squarely on the side of allowing citizens to decide for themselves whether a zoning decision was proper:

> . . . California precedent has settled the principle that zoning ordinances, whatever the size of parcel affected, are legislative acts. . . . A decision that some zoning ordinances, depending on the size and number of parcels affected and perhaps on other facts, are adjudicative acts would unsettle well established rules which govern the enactment of land use restrictions, creating confusion which would require years of litigation to resolve. Since such a decision is unnecessary to protect either the rights of the landowners or the public interest in orderly community planning and development, we adhere to established precedent and conclude, accordingly, that the ordinance rezoning plaintiff's property was a legislative act.[4]

The Supreme Court made the logical leap to tie the essence of the zoning decision as a legislative act to the fact that it could be modified by an initiative or referendum: "Numerous California cases have settled that the enactment of a measure which zones or rezones property is a legislative act. California courts have so held in cases permitting zoning by initiative [citations omitted], [and] in cases upholding zoning referendums[.]" 28 Cal. 3d at 516. The court concluded that "the current California rule that rezoning is a legislative act is well settled by precedent and comports with both federal and state constitutional requirements. The cost of departing from settled precedent in this setting is apparent; the benefits questionable and perhaps non-existent. We therefore adhere to the rule that a zoning ordinance is a legislative act and, as such, *may be enacted by initiative*."[5]

Interestingly, *Arnel*'s holding, and apparently rationale, is followed in a number of other activist states that are on the forefront of land use issues, for example, Oregon,[6] Ohio,[7] Arizona,[8] Michigan,[9] Nevada,[10] South Carolina,[11] and Utah.[12]

Most of the cases opposed to allowing citizens to change zoning decisions by initiative use the same rationale. The Michigan case of *Korash v. City of Livonia*[13] set out a laundry list of procedural problems that the validation of a zoning ordinance caused, observing that under the initiative procedure there was no provision for a tentative report on a proposed zoning ordinance by a Planning Commission, for the holding of a public hearing and the making of a final report on the ordinance by that body, for publication of notice and the holding of a public hearing on the ordinance before the City Council, or for the opportunity on the part of affected property owners to file written objections and thus to force a three-fourths vote of the Council in order to enact the ordinance.[14]

The Michigan case underscores the fears of many municipalities and planners concerning the relative ignorance of voters in making complex land use decisions, and their reluctance to read through voluminous traffic studies, environmental impact reports, planning commission staff reports, and other land use factual findings to make a decision.

Something is happening, though, something deep enough to offend enough citizens that this new trend is emerging of citizens taking, in a very frontier sense, the law into their own hands. An interview with Phil Arst, one of the authors of the Greenlight Initiative itself, is very illuminating. In his home on January 16, 2002, Mr. Arst was able to clarify what led him and others in Newport Beach to seek a referendum giving the voters the power to make major land use decisions:

> We've had a traffic phasing ordinance here for the last 25 years. We've had to pay to mitigate the traffic problems that your development caused. If you exceeded the level of service "D," only one stop at a traffic light, then you had to pay. When the *Dolan* case came out [Dolan v. City of Tigard, 512 U.S. 374, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994)], the city attorney decided that the traffic phasing ordinance was unconstitutional because it put a burden on developers to pay for the improvement. Since that time, July of 1999, the Planning Commission began to allow larger projects that put a burden on us. We felt that they didn't listen at the Planning Commission or the City Council level. Our comments and suggestions were quickly ignored. We saw that, by July of 1999, if it became infeasible economically to mitigate the traffic concerns, then the City waived them.
>
> We had a very grass roots organization. We had a budget of $25,000 and wound up spending a total of $97,000, with over 200 volunteers. It was our reaction to not being dealt with fairly. We were opposed by 16 major municipal organizations as well as paid political consultants. They included the Chamber of Commerce, Fire and Police and the Building Industry Association.
>
> The voters are now aware of these matters because of Greenlight; their consciousness was raised. I don't believe that we've had representative government; it's been controlled by special interests."[15]

This level of discontent, the sense that the voters weren't being listened to by municipalities, was echoed by the opponents to Greenlight, too. Rick Manter, a political consultant employed by the Irvine, CA office of the public relations firm Porter-Novelli, and retained by the Building Industry Association to oppose the Greenlight Initiative, had some pointed and very incisive comments about the catalyst for groups like these to begin offering initiatives like this one:

> The pace of growth and the lack of communication with the electorate is causing the problem. There's been a good job of planning, but a poor job of communicating with the electorate. They don't think that anyone is watching the store. California has a history of referendums. Roads are in place, schools are in place; the vast majority of the community leaders apparently don't want to get involved in the problem. Most of the people working on Greenlight were older, well-to-do, satisfied people who don't want things to change; many of them are Republicans who are opposed to tax hikes.[16]

These sentiments are echoed at the national level as well. Clayton Traylor, the Vice President of Political Affairs for the National Association of Home Builders in Washington, D.C., sees problems with what he calls

> ballot box planning—an end run around the system; most of the problems with these types of initiatives are the

ZONING AND PLANNING LAW REPORT

Editorial Director
Tim A. Thomas, Esq.

Contributing Editors
Patricia E. Salkin, Esq.
Kenneth H. Young, Esq.

Electronic Composition
Joanna Danforth

Published eleven times a year by
West Group
Editorial Offices: 50 Broad Street East, Rochester, NY 14694
Tel.: 716-546-5530 Fax: 716-258-3774
Customer Service: 610 Opperman Drive, Eagan, MN 55123
Tel.: 800-328-4880 Fax: 612-340-9378

Subscription: $283 for eleven issues

ISSN 0161-8113

outcome. They may express the wishes of the electorate but they cannot anticipate all of the outcomes. It encourages the developers to "bring things in under the radar." For example, no moderate income housing will be proposed; it is designed to get passed by the electorate, not by what the County needs. Another example of development out past the core, not just development that pushes into the desert ("smart growth"). No one has ever written the perfect law; as an industry, National Association of Homebuilders takes the position that it is inappropriate to make land use decisions through the ballot process. The proposals are written by extremists in the country; really impassioned people—it bears the law of untoward consequences. They present the problem as an all or nothing proposal.

Mr. Traylor goes on to give some further practical problems with ballot box planning by initiative or referendum:

> The American people always hear compromise; they are compromisers by nature; they give and take and use checks and balances. Is this the appropriate manner to dictate a land use planning question? The ballot statement in Colorado was only 2800 words; the only way it can be amended is with a new constitutional amendment; that creates a really high threshold . . . This is the result of exploding public frustration; rapid growth in a short time. There's a "window of vulnerability"; the drafters see a moment of opportunity.[17]

Lynne Fishel, the Chief Executive Officer of the Orange County Building Industry Association, echoes Clayton Traylor's sentiments:

> In a good economy, slow growth issues come up. People are less secure when their jobs are in jeopardy; they are more willing to do anything to boost the economy. People don't want to see their quaint town change; older people in particular. Anything that hits their pocketbook or changes their behavior is difficult to get past.[18]

To understand the background of the Greenlight Initiative, and others like it, it's necessary to understand in simple terms what the measure provides. As *The Los Angeles Times* summarized it in an article written a month before the election:

> Newport Beach's Greenlight Initiative, Measure S, is being watched across the state. If approved, proposed developments that exceed the City's general plan by a hundred residential units, 40,000 square feet, a 100 peak hour car trip would trigger a city-wide vote. Smaller projects in highly developed areas of the City—defined by a complex equation—could also trigger a vote—even before the vote, the initiative has had an impact. The Irvine Company withdrew a proposal in January that would have added 200,000 square feet of shopping space, two office buildings, apartments and other development to Fashion Island. Soon after, two other companies withdrew expansion plans nearby. All cite the initiative. . .[19]

Against this backdrop of law and politics, how has the frustration that is catalyzed in these types of initiatives spread to other states?

The two primary examples are, in a sense, the largest: Amendment 24 in Colorado and Amendment 202 in Arizona. Both were statewide initiatives and both had more sweeping, and perhaps deeper implications for the future of city planning and the making of land use decisions.

Amendment 24 in Colorado was widely watched around the nation. The Brookings Institution Center on Urban and Metropolitan Policy issued a report in February of 2001 tracking the growth management initiatives around the nation. Here's what they had to say about Amendment 24: "Amendment 24 in Colorado would have required local governments to describe the impacts of development allowed by their proposed growth plan. Impacted elements to be considered included housing, traffic, air quality and water supply. The measure would have also required localities to describe how their growth plans conflicted or coordinated with approved or pending plans of adjacent local governments."[20]

Colorado was in a bit of a pickle with trying to amend its land use laws; to get around the fact that it was incompatible with their constitution to allow initiative or referenda to modify land use laws, they had to amend the constitution. That's what they did with a new Article 28. It had a very high-flown purpose:

> Rapid, unplanned, unregulated growth through development and subdivision of land is a matter of statewide significance and concern, because it is causing serious harm to public health, safety and welfare by consuming large tracts of open space and farm and ranch lands, scenic vistas and archaeological and historic sites; imposing unfair tax burdens on existing residents; overburdening police protection, emergency services, schools, roads, water supplies and other public facilities and services; including increased levels of traffic congestion; causing unhealthy levels of air and water pollution; harming wildlife, biodiversity and eco-systems; and impairing the ability of cities and counties, counties and towns to maintain community character and protect neighborhoods.[21]

This preamble showed that this amendment was a grab bag for everyone; no one could possibly object to clean air, clean water, "restoration" of open space, and relief of tax burdens and a hearkening back to the Colorado of the past with its emphasis on ranchers and farmers.

What's interesting is, though, that that really wasn't the Colorado of 2000 at all. In an interesting interview

on February 1, 2002, Tom Ragonetti, an attorney in Denver, Colorado, one of the leaders of the movement to defeat Amendment 24, spoke about how Colorado's demographics have changed:

> The "Frontier Mentality" protection of property rights has now changed. Colorado's population is now largely suburban; they've come from other places. Suburbanites now outnumber ranchers and farmers. The quality of life has only improved since World War II, bearing in mind that our state now only has four million people in it. There was a frustration with the state legislature. For five to seven years, no one was capable of getting anything done about growth management; the special interests were very effective. Initially, the polls indicated that there was a huge popular vote; it took six million dollars to defeat it. Moderate growth management is better than something radical. Initiatives are the planning equivalent of a lynch mob. People don't understand the nuances; they are simply angry citizens. *This type of legislation is reductive in nature; it reduces a complex series of problems and issues to a sound bite.*[22]

Ragonetti's dissatisfaction with the initiative process extended into an editorial that he wrote for the Denver Post on December 10, 2000, after the defeat of Amendment 24. Some of his concerns are applicable across the board:

> States or communities that feel most in need of growth management are obviously places that are growing rapidly. That means they are also changing rapidly, and the conditions and goals to which growth management must respond are likely to be changing rapidly as well. It follows that any growth management system has to be flexible to begin with, and also has to be capable of being amended as necessary to respond to new demands. Among the biggest problems with Amendment 24 was whether it was a constitutional amendment, requiring a vote of the citizens to change and that its major growth control tool was a growth plan that could only be adopted and amended by a vote of the citizens. Obviously, growth management is better done by state legislation, which can be amended as necessary, and the tools employed by that legislation must also be flexible enough to meet changing conditions.[23]

Ragonetti's editorial went on to put squarely in front of the reader the overriding dilemma with this type of broad-brush initiative:

> The uncomfortable little secret of growth management is that you can't eliminate people. You can't fence the borders of the state to keep people out, and you can't stop the people already here from having children. When you have a growing population, growth management becomes a process of physically arranging people on the land you have available. You can pile them up—that's density—spread them out—that's sprawl—or do something in-between. To counteract sprawl, which we're told the citizens don't like, and reduce pressure on the urban periphery, it is logical to increase densities in existing areas. Yet, we're told, citizens don't much like density either. But you're going to have to put in increasing population some place.[24]

And so the argument rages; there's been a "disconnect " between the municipalities and the legislatures and the electorate. "We've got to take things into our own hands!" is the battle cry heard around the West. And in fact it *is* heard around the West; Phyllis Myers' Brookings Institution study makes that clear: "The five state-wide measures in the growth management/regulation category are all citizen initiatives, and with one exception, they appeared on ballots in the West. In fact, there were no growth management/regulation measures at all in the South or in the Northeast. There were 94 such measures at the state and local level—42 in the Midwest and 52 in the West."[25]

What's happening out here that is so different from the Midwest and from the East?

For one thing, our law is different. California's case law and its constitution include the right to bring referenda and initiatives, extending to land use and zoning decisions. So do Oregon's. So, in fact, do Colorado's. Is this an outgrowth of the "frontier mentality"? Have we become, in a sense, superannuated; are we a group of suburbanites harking back to lost times? The Brookings Institution Report makes clear, though, that without question California is leading the way: "Nearly half (44) of the local measures were on ballots in California jurisdictions. The Solimar Research Group has documented a revival of ballot box zoning in California at a pace not seen for more than a decade."[26]

The Solimar Study that Phyllis Myers referred to contains some very interesting findings for California, particularly over the last 15 years:

> During the 15 year study period, there have been substantially more slow growth measures on the ballot than pro-growth measures. Counting the results of all of the measures, the electorate has voted to limit growth 57% of the time. Although the total number of local land use ballot measures has decreased since the high period of 1986 or 1990, ballot measure activity is on the rise again—especially in the 2000 year.
>
> Ballot measure activity appeared to correspond with period of economic recession and prosperity in California. Ballot measure activity was greatest during the boom years of 1986 or 1990, subsided during the recession periods of 1991 through 1995, and picked up as the economy strengthened from 1996 through 2000. Voters appear more willing to limit urban growth during

times of economic prosperity.

> Interestingly, though, ballot results have not followed the same trend. Slow growth ballot victories have declined over time. From 1986 through 1990, the slow growth position won 60% of the time. The figure dropped to 56% from 1991 through 1995, and it dropped further to 54% from 1996 through November 2000. This drop has occurred mostly because pro-growth measures have passed more often, not because slow growth measures have failed more often.[27]

Interestingly, also, we're in a recession now. But when the measures that are all discussed here were voted upon, November 2000, the economy was in better shape. Yet, both the Colorado and, as we'll see, the Arizona initiative failed. The proponents of the measures claimed that that's because of money; the entrenched special interest have so much money, according to the proponents, that the resources were disproportionate and that's why the initiative failed.

We can now turn to the Arizona initiative, Proposition 202, and look at it to see whether the prosperity and economic power between the proponents and the opponents caused it to fail.

To generate the kind of dollars that were needed to defeat this initiative, land owners had to believe that they were in serious jeopardy if it passed. On May 17, 2000, the opponents commissioned a law firm in Phoenix, Arizona, Storey & Pieroni, to do an analysis of Amendment 202, otherwise known as the Citizens Growth Management Initiative. That analysis used strong rhetoric:

> No other growth measure adopted anywhere in the country comes close to the CGMI. Although it has been characterized as a growth management initiative, in truth, the CGMI is a patently "no growth" proposition. Notwithstanding Sierra Club's claims about "returning power to the people", it is a fact that, under the CGMI, "the people" could be indefinitely prevented from coming up with a growth management plan because of the many new standards and requirements. That, in turn, would effectively freeze many communities in place. It is also a fact that, before or after a voter-approved growth management plan is achieved, just "one person" could undo the efforts of many other persons by filing a lawsuit.[28]

The follow-on to this impact analysis struck at the core of the initiative and the most inflammatory aspect of it; the fact that any one person could stop a project cold by instilling fear and restraint in the elected officials and the planning bureaucracy:

> Immediately following passage of the CGMI, there could be an immediate moratorium on approvals for any development not having "vested land use rights." That is because, even though the CGMI gives communities until January 1, 2003 to adopt the required growth management plan, a number of the CGMI's new standards and requirements would, or arguably could, apply immediately. In particular, communities and their public officials and employees would be prohibited from "failing to act in a manner that is required by the CGMI or acting in a manner that violates or is contrary to the CGMI" while, at the same time, having no interpretive guidance concerning how to implement the mandates from the CGMI. Depending on how these new requirements are interpreted (a process that, in and of itself, would take time, CGMI proponents are likely to argue that some or all counties and cities will be unable to timely establish growth plans that comply with CGMI if they grant any new development approvals. Since the CGMI expressly authorizes "any person" to file a lawsuit against "any [other] person" to enforce its provisions, the prospect of an immediate moratorium in at least some counties and cities seems clear.
>
> Importantly, the legal "cloud" created by the CGMI, with or without the threat of lawsuits, could be sufficient to cause a "freeze" in additional development approvals. That is because, in view of the CGMI's repeal of existing state restrictions on moratoria, counties and cities might be inclined to impose their own moratoria pending clarification of the new rules to avoid costly litigation[.][29]

The opponents of Proposition 202 saw a very immediate threat, not only to their economic livelihoods, but to the effect of operation of operation of a planning bureaucracy at all. Rebecca Pieroni's attachment to her analysis made that point clearly:

> The initiative's inflexible, one-size-fits-all approach, does not allow local needs to take precedence over outmoded notions of centralized planning. Among other things, many of the small cities will have to struggle just to pay for the "infrastructure" necessary to comply with the detailed provisions of the initiative. More importantly, the initiative imposes restrictions that will almost certainly adversely impact the ability of a city to make decisions that will facilitate achieving the goals and objectives of its citizenry.[30]

How you look at this problem depends on whose vantage point you're looking at it from. Connie Wilhelm, the President of Homebuilders' Association of Central Arizona, on January 31, 2002, echoed the concerns of a lot of the opponents on the issue of the "private right of action"—any person could sue, as she put it, "based on anything in the law." The Homebuilders' Association of Central Arizona issued a flyer reprinting the entire proposition, and redlined Section 11-1608, entitled

"Enforcement," which stated: "The Attorney General shall enforce the provisions of this Act to effectuate its purposes. Any person, including the Attorney General, may file a civil action in Superior Court alleging violation of this Act by any person in seeking injunctive and other appropriate relief."

The portion to the left of the quoted language on the flyer had this criticism: "This is a blank check for lawsuit abuse! Any person can sue any other person in Arizona alleging a violation of 202. They can sue to stop voter approved plans. They can sue to stop citizens from using their land. They don't even have to live here to sue—and they can collect legal fees from us as well."

The flyer went on to quote Governor Jane Hull, reinforcing and, to some extent, polarizing the issue: "I don't think the Sierra Club and its out-of-state backers with their punitive boundaries know what's best for Arizona.—Gov. Jane Dee Hull."[31]

The flyer also limned out other "broad-brush" criticisms:

> 202 imposes strict boundaries around communities with more than 2500 residents whether they want them or not. Apartments, row houses, unwanted public facilities and businesses will be forced into our neighborhoods—bringing more traffic to local roads. Neighborhood open space will be threatened by "infill" development; farmers, ranchers and people planning to build a home outside these strict boundaries will be unable to get public services like water and sewer. What's their land worth? The Sierra Club would make some landowners rich by including them in the boundary, while others would lose the value of their land.

Other charges included the elimination of guarantee of public access to lands bought with taxpayer money, taxpayer money for open space diverted to special interests by repealing "matching funds" requirements for open space and "any change in land use over 20 acres is prohibited."[32]

A more sober look at these complaints reiterate Tom Ragonetti's and others' criticism of ballot box zoning, that a rigid, inflexible framework is being created by it.

Not surprisingly, The Sierra Club didn't see it that way. The Sierra Club brought the legislation because it believed that the state was undergoing urban sprawl at a furious rate and that the legislature had failed or refused to listen to the concerns of a lot of citizens in coming to grips with it. In an interview on February 2, 2002, Sandy Bahr, The Sierra Club's representative for the Grand Canyon Chapter of Arizona, indicated that the legislature didn't want to address the problem:

> We talked to planners, looked around the country. We were out-spent; banks, utilities and interests associated with development spent almost six million dollars; we could only raise $890,000. We want to require growth management plans with growth boundaries; they have to go to the voters to accommodate ten years' worth of growth. How is the developer going to pay for the cost? We're trying to eliminate or reduce "wild cat subdivision"; we need to give the county government more authority to develop regulations. In the county, up to five lots don't need a subdivision whereas in the city only up to three lots don't need to be subdivided.
>
> We feel that the developers' interests have been over-accommodated. For example, we feel that the Planning Commissions and other authorities have the attitude of "What can we do to accommodate Del Webb?

Sandy Bahr goes on to indicate that the current development is of poor quality and, as she put it, the "slums of tomorrow," particularly in Phoenix. She cites the 1999 "Emerging Trends in Real Estate" annual study prepared by the accountancy firm of Price Waterhouse Coopers, and in fact, that study bears her out ("[Phoenix] . . . residents of these areas are increasingly fed up with sprawl and congestion, and their overburdened, poorly planned infrastructure can't handle the influx . . ."[33]).

She believes that Proposition 202 would have promoted communities deciding what they wanted to be. She feels that the leaders have to convince people of when and how the vision of growth should change. "Development is the most powerful interest in the state; the status quo is working for us now; some people are frightened of any change at all—the economy can come crashing down."[34]

There's no question that there were economic disparities in the amounts of money spent; the Denver *Rocky Mountain News* indicated, in its story of November 10, 2000, that the opponents of Amendment 24 raised $5.7 million to fight the Amendment 24 growth control ballot question. These are huge numbers, and, quoting Sandy Bahr, they are determinative: "The lesson is that we needed more money."[35]

The very same complaint that Sandy Bahr makes about growth and the problems with air and water pollution, water quantity and water quality, road improvements and urban sprawl are echoed in a microcosm with Greenlight. The biggest lesson learned here is that these problems are common to all of the jurisdictions. What's really up in the air is whether an initiative or a referendum can really solve them. So far, apparently, most of the voters don't think so. With Greenlight, however, that may change. So far, Greenlight has managed to flout the rule that money is determinative. The vehemence with which the fight was fought in Colorado and Arizona, together with the specter of more initiatives in those states on the horizon by disgruntled voters, shows the continuing nature of

the problem. The Brookings Institution's study found that at least one other statewide growth control initiative was brought in the November 2000 election, albeit limited to prohibiting new outdoor advertising (Missouri's Proposition "A").

There are solutions. If the municipalities repair the breach by reaching out to the electorate to inform and involve them more in the planning process, the likelihood that initiatives like this will gain steam is lessened. The "disconnect" that so many of the members of both sides of this dispute that I spoke with talked about is the very problem that's not being addressed by any of the legislation or by the status quo. Perhaps that's the best place to start: to reinforce with the existing planning bureaucracy and elected officials that they're leaving out of the decision-making process one of the most critical elements of it, that the input of the community where the land use decision is being made. If that doesn't change, more of these initiatives are certain to appear and, more likely than not, win.

Notes

[1] *The Los Angeles Times*, November 12, 2000, "California and the West; Electorate Taking Control of Growth; Development: Voters considered a record number of planning issues. In general, localized initiatives fared better than broad strictures," by Mike Anton and Seema Mehta.

[2] Arnel Development Co. v. City of Costa Mesa, 28 Cal. 3d 511, 169 Cal. Rptr. 904, 620 P.2d 565 (1980).

[3] Id., 28 Cal. 3d at 513-14.

[4] Id., 28 Cal.3d at 514.

[5] Id., 28 Cal.3d at 524-525 (emphasis added). The *Arnel* rationale and holding have been reaffirmed as recently as May 11, 2001 in the California Court of Appeal case of Merritt v. City of Pleasanton, 89 Cal. App. 4th 1032, 1041, 107 Cal. Rptr. 2d 675 (1st Dist. 2001): "We would decline to depart from the holding in *Arnel* even if we had the power to do so [citations omitted]. It is not at all certain that any and all zoning decisions should be deemed adjudicative simply because the implement policy set forth in a general plan, and any other conclusion would lead to all the problems recognized by the Supreme Court in *Arnel*."

[6] Allison v. Washington County, 24 Or. App. 571, 548 P.2d 188 (1976).

[7] Russell v. Linton, 52 Ohio Op. 228, 67 Ohio L. Abs. 132, 115 N.E.2d 429 (C.P. 1953).

[8] Sherrill v. City of Peoria, 189 Ariz. 537, 943 P.2d 1215 (1997), but found inapplicable and therefore unenforceable.

[9] Korash v. City of Livonia, 388 Mich. 737, 202 N.W.2d 803 (1972).

[10] Forman v. Eagle Thrifty Drugs & Markets, Inc., 89 Nev. 533, 516 P.2d 1234 (1973).

[11] I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000).

[12] Dewey v. Doxey-Layton Realty Co., 3 Utah 2d 1, 277 P.2d 805 (1954).

[13] Korash v. City of Livonia, 388 Mich. 737, 202 N.W.2d 803 (1972).

[14] Id., 202 N.W.2d at 807.

[15] Interview with Philip Arst in Newport Beach, California, January 16, 2002 by the author in Mr. Arst's home.

[16] Interview with Rick Mantor of February 1, 2001, by telephone with the author.

[17] Interview with Clayton Traylor, Vice President of Political Affairs for the National Association of Homebuilders on Tuesday, January 8, 2002 by telephone with the author.

[18] Interview with Lynne Fishell of February 2, 2002, Chief Executive Officer of Building Industry Association of Orange County, in her office in Irvine, California.

[19] *Los Angeles Times*, October 22, 2000, Metro, Part B, Page 1, Headline: "Three Cities Could See Voters Put Lid on Growth; on November's ballot are hot button measures in Brea, Newport Beach and San Clemente, spawned by density in traffic." Byline: Seema Mehta, Times Staff Writer.

[20] Growth to Ballot Box: Electing the Shape of Communities in November, 2000; Phyllis Myers, State Resource Strategy, Robert Puentes, the Brooking Institution Center on Urban and Metropolitan Policy.

[21] Proposed Article 28, Section 1, Page 1.

[22] Interview with Thomas Ragonetti of February 1, 2002 with the author by telephone.

[23] The Denver Post, December 10, 2000, Perspective Section, Headline: "Where Do We Grow From Here? 2001: A Growth Odyssey" by Tom Ragonetti, Page 1.

[24] Proposed Article 28, Section 1, Page 2.

[25] Growth at the Ballot Box: Electing the Shape of Communities in November 2000, Phyllis Myers, State Resource Strategies, Robert Puentes, The Brookings Institution Center on Urban and Metropolitan Policy, February 2001, page 14.

[26] Id., page 15.

[27] Trends in Local Land Use Ballot Measures, 1986 through 2000, An Analysis of City, County and Statewide Trends, William Fulton, Paul Shigley, Alice Harrison and Peter Sezzi, Ventura, California; Solimar Research Group, December 2000, pages 1, 2.

[28] May 17, 2000, Immediate Impact: Analysis; Citizens Growth Management Initiative, Rebecca Burham Pieroni, Storey & Pieroni, PLC.

[29] Id., page 1.

[30] Id., page 9.

[31] "Take a closer look at Proposition 202," Arizonans for Responsible Planning, undated flyer, pages 3 and 6.

[32] Id. at pages 7, 8.

[33] Emerging Trends in Real Estate 1999, Chapter Four, Markets to Watch, page 22, paragraph 3, Price Waterhouse Coopers.

[34] Interview with Sandy Bahr, Representative of The Sierra Club Grand Canyon Chapter, by telephone, February 2, 2002.

[35] Id.