Southwest Diversified, Inc. v. City of Brisbane: New Opportunities for Municipalities to Avoid Referendum in Land Use Decisions

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In Southwest Diversified, Inc. v. City of Brisbane, the California Court of Appeal held that a city ordinance which changed the zoning of originally designated wildlife habitat to another location within the proposed development was an administrative act and therefore not subject to referendum. Although local citizens groups had collected the requisite signatures to put the ordinance on the ballot for repeal by referendum, the appellate court upheld the lower court’s decision ordering the city to desist from holding the election on the issue. The appellate court, narrowly focusing on the perceived intent and wording of a habitat conservation plan, determined that because the plan had a provision for future modifications, the ordinance which changed the zoning within the project merely “pursue[d] a plan already adopted by the legislative body” and, therefore, was administrative and exempt from repeal by referendum. This Note explores the impact of the decision’s expansion of exemptions from the referendum process upon citizens groups as well as the problems and potential for municipal abuses.

I. INTRODUCTION

The power of citizens to effect land use decisions through their reserved powers of referendum and initiative has been a recent and heated topic of debate. Some commentators believe important land

use decisions should be left to the expertise of professional planners. Others believe land use decisions are more balanced and beneficial to the community if citizens participate through the referendum and initiative process. Striking the proper balance between the involvement of citizens and the expertise of the professional planner has predominately fallen upon the judiciary.

The California Constitution reserves citizens the power of referendum and initiative. The referendum power grants citizens the opportunity to repeal unpopular governmental land use decisions. Conversely, the initiative power grants citizens the power to directly enact land use legislation. However, these powers are not absolute. Certain subtle yet important restrictions apply. One of the most important restrictions upon the use of the referendum is that only "legislative" land use decisions are subject to repeal. "Administrative" land use decisions, on the other hand, are exempt from repeal by the citizenry. The primary purpose for exempting administrative decisions from the referendum process is to ensure that governmental functions do not become bogged down with time consuming and costly referendums concerning basic governmental functions.

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3. Robert H. Freilich & Derek B. Guemmer, Removing Artificial Barriers to Public Participation in Land Use Policy: Effective Zoning and Planning by Initiative and Referenda, 21 Urb. Law. 511 (1989). Freilich and Guemmer acknowledge referenda as a "basic instrument of democratic government." Id. at 513 (quoting City of Eastlake v. Forest City Enterprises, 426 U.S. 668, 679 (1976)). They also assert that there are no persuasive policy reasons to prevent public participation in land use policy and those jurisdictions that do not allow public participation "essentially make a policy decision to further a political ideology which elevates efficiency and expertise in government over citizen participation." Id. at 514.


5. See infra note 17 and accompanying text discussing the California constitutional provisions for referendum and initiative.

6. Legislative decisions or acts have been defined as those which declare a public purpose and make provisions for the ways and means of accomplishing that purpose. McKevitt v. City of Sacramento, 55 Cal. App. 117, 124, 203 P. 132, 136 (1921).

7. Administrative decisions or acts have been defined as those activities which are necessary to carry out legislative policies already declared by the legislative body. Id.

8. See infra note 27 and accompanying text.

Labeling a city land use decision as "legislative" or "administrative" has a tremendous impact on the available avenues of action for concerned local citizens. The judiciary has been given the important task of setting the boundaries of what will be considered "legislative" and subject to referendum and what will be "administrative" and exempt.

In *Southwest Diversified, Inc. v. City of Brisbane*, the California Court of Appeal unanimously held a city ordinance that changed the zoning of a wildlife habitat to another location within a proposed development was merely an administrative act not subject to referendum. The court reasoned the zoning swap was simply a modification provided for by a pre-existing habitat conservation agreement and therefore was an administrative act. Although the wording of the appellate court decision down-played the changes embodied in the mere "modification" and represented the ordinance as a continuation of a pre-existing legislative plan, the decision will allow a new opportunity for shrewd municipalities to avoid unwanted referendums in land use decisions. If cities accept conservation or development agreements with "flexible" terms for later "modifications," they will be able to backdate their legislative decision to the initial agreement. Later, when the terms of the proposed development are firmed up and finalized, dramatic changes in the layouts of projects can be accomplished as "administrative" decisions exempt from public referendum. As the range of what can be considered an "administrative" decision expands, citizens' groups will be severely hampered in their ability to actively participate in their communities' land use decisions through referendum. By allowing municipalities to approve "flexible" agreements which allow for dramatic future changes, the citizens of a community are kept uninformed and unable to anticipate or exercise other political tools until proposed projects are close to completion. This Note explores the background, legal decision, and political problems created by the appellate court's decision in *Southwest Diversified, Inc. v. City of Brisbane*.

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11. Id. at 1558, 280 Cal. Rptr. at 875. See infra notes 55-82 and accompanying text.
II. LEGAL BACKGROUND

The power and use of referendum and initiative by citizens has had a long and disparate history. Direct democracy, through referendum and initiative, was originally used as a method for states to adopt their own constitutions. Later, these powers were used by citizens to overcome legislative shortfalls and directly focus laws upon those areas which interested citizens most. The specific uses of referendum and initiative have mirrored the particular concerns of the citizenry over the years and continues to reflect new public attitudes and agendas as they develop.

In California, the state constitution expressly reserves the power of referendum and initiative to the people. The California Constitution defines the power of referendum as “the power of the electors to approve or reject statutes or parts of statutes.” Generally, the courts have liberally construed the peoples’ ability to exercise their reserved powers of referendum. The California Supreme Court has

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2. Callies et al., supra note 13, at 57-58.

3. Id. at 59, 60 (noting that citizen concerns such as women’s suffrage, prohibition, civil rights, and environmental protection were addressed through initiative and referendum).

4. Id. at 58-63. In the late nineteenth century the Progressive movement led to state constitutional amendments providing citizens statutory guarantees of referendum and initiative. Over time citizens used this power to enforce societal concerns. During the turn of the century many initiatives and referenda addressed the problems of child labor, women’s suffrage, and prohibition. In the 1930s social welfare issues took center stage. During the 1950s and 1960s civil rights and civil liberties were addressed through initiative and referendum. Later in the 1970s and 1980s environmental issues stepped to the forefront. Notwithstanding the subject matter, the overall numbers of initiatives in California has also increased. Id. See also On the Initiative Glut... Major Reforms Needed Quick, L.A. DAILY J., Oct. 30, 1990, at 6 (citing excessive number of initiatives as harming direct democracy).

5. CAL. CONST. art. IV, § 1 ("The legislative power of this State is vested in the California Legislature which consists of the Senate and Assembly, but the people reserve to themselves the powers of initiative and referendum.").

6. CAL. CONST. art. II, § 9 (defining the scope of the peoples’ referendum powers and only exempting "urgency statutes, statutes calling elections, and statutes providing for tax levies or appropriations for usual current expenses of the state" from referendum recall).

7. Merriman v. Board of Supervisors, 138 Cal. App. 3d 889, 891, 188 Cal. Rptr. 343, 344 (1983) (allowing referendum, stating that "[t]he People's reserved power of referendum... is to be liberally construed to uphold the power whenever it is reasonable to do so" (citing Associated Home Builders of Greater Eastbay, Inc. v. City of Livermore, 18 Cal. 3d 582, 591, 557 P.2d 473, 477, 135 Cal. Rptr. 41, 45 (1976) (other citation omitted)); Reagan v. City of Sausalito, 210 Cal. App. 2d 618, 628, 26 Cal. Rptr. 775, 781 (1962) (holding that policy of city to acquire specified waterfront properties
held that if doubts exist regarding legislative interpretation, they should be resolved in favor of allowing the people to exercise their reserved powers.\(^{20}\)

However, before the people may vote on an ordinance for recall, certain procedural requirements must be met. To recall an ordinance a local city council has passed, ordinance recall proponents must gather petitions signed by ten percent of the city's registered voters.\(^1\) The petition must be completed and presented to the city council within thirty days of the effective date of the ordinance.\(^{22}\) After receipt of the petition the city council must suspend and reconsider the ordinance.\(^{23}\) If the city council or legislative body does not completely repeal the ordinance, it must be submitted to the voters for a decision.\(^{24}\) The ordinance cannot become effective until a majority of voters have approved it.\(^{25}\)

The constitutional limitations upon referendum powers are very narrow.\(^{26}\) In contrast, the judiciary has imposed more expansive restrictions on this reserved power. One of the most significant judicial

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20. "If doubts can reasonably be resolved in favor of the use of this reserve power, courts will preserve it." Associated Home Builders of Greater Eastbay, Inc. v. City of Livermore, 18 Cal. 3d 582, 591, 557 P.2d 473, 477, 135 Cal. Rptr. 41, 45 (1976) (quoting Mervynne v. Acker, 189 Cal. App. 2d 558, 563-64, 11 Cal. Rptr. 340, 344 (1961)). The court held that the growth control initiative which would limit growth until facilities could be built to handle increased population was not unconstitutional, stating that the relationship between the initiative and the public welfare need only be "fairly debatable". Id. at 606, 557 P.2d at 486, 135 Cal. Rptr. at 54. See generally Mervynne v. Acker, 189 Cal. App. 2d 558, 563, 11 Cal. Rptr. 340, 344 (1961) (direct democracy through initiative is "one of the most precious rights of our democratic process").


22. Cal. Elec. Code § 4051 (West Supp. 1992). For city or municipal referendum 10% of all registered voters must sign; if a city has less than 1000 registered voters then 25% or 100 voters (whichever is less) must sign the petition. Id.


25. Cal. Elec. Code §§ 3754, 4055. The city council is also prohibited from reintroducing an ordinance previously repealed by referendum for a period of one year after the date of repeal by voters or city council. Cal. Elec. Code § 4055.

26. See supra note 18 and accompanying text (listing three exemptions under constitutional referendum powers). Also, under the Elections Code, referenda cannot be used to reject ordinances calling for changes (improvement, opening, or closing) of city streets

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restrictions upon the power of referendum is that the recall power may only be exercised against "legislative" as opposed to "administrative" decisions. 27

In the arena of land use decisions, California courts have generally adopted a system of "generic classifications" which determine whether decisions are legislative or administrative based on their subject matter. 28 Under this approach, the courts have generally held zoning, rezoning, and general plan adoptions and amendments to be "legislative." 29 Alternatively, the approval of conditional use permits, variances, and tentative subdivision maps are considered to be "administrative." 30 In supporting the categorical approach, the courts have noted generic categories offer the advantages of economy, certainty, and avoidance of unnecessary litigation. 31 Although the appellate court in Southwest Diversified, Inc. v. City of Brisbane acknowledged the advantages of the categorical approach and attempted to keep it intact, the decision is a significant departure from the established methodology and deserves analysis.

III. SOUTHWEST DIVERSIFIED, INC. v. CITY OF BRISBANE

A. Facts of the Case

This case presents the story of a complex struggle between small town residents attempting to maintain the character of their community, developers proposing a large residential development, and two species of butterflies 32 inhabiting not only the proposed development (including right-of-ways and grades) which are to be funded by special assessments on real estate. CAL. ELEC. CODE § 4061.

27. Simpson v. Hite, 36 Cal. 2d 125, 129, 222 P.2d 225, 228 (1950) (stating that the California Constitution applies "only to acts which are legislative in character, and not to executive or administrative acts"). See also W.W. Dean & Assocs. v. City of South San Francisco, 190 Cal. App. 3d 1368, 236 Cal. Rptr. 11 (1987) (upholding legislative/administrative dichotomy).


30. W.W. Dean, 190 Cal. App. 3d at 1374-75, 236 Cal. Rptr. at 15.

31. Arnel Development, 28 Cal. 3d at 516, 620 P.2d at 572, 169 Cal. Rptr. at 907. In Arnel Development, the court held the act of rezoning parcels owned by only three individuals was a legislative act subject to initiative and that parcel size or number of property owners were not the proper criteria to determine whether rezoning was legislative or administrative.

32. See, e.g., PETER STEINHART, CALIFORNIA'S WILD HERITAGE: THREATENED AND ENDANGERED ANIMALS IN THE GOLDEN STATE 60 (1990) (photographs and descriptions of endangered species in California, including the Mission Blue butterfly (Icaricia
area, but also the Federal Endangered Species List.

In 1976, the United States Fish and Wildlife Service (USF&WS) listed the Mission Blue butterfly as an endangered species. As a result of the listing, any proposed residential development on San Bruno Mountain which would kill the butterflies would be halted.³³ San Bruno Mountain is located near the tip of the San Francisco Peninsula. Although the mountain is surrounded by urban development, it remains a viable habitat area for many rare species of plants and animals.³⁴ The area of the mountain considered for development was a 237 acre low-lying extension called the Northeast Ridge. The ridge is ninety percent grassland and was an important butterfly habitat. This area was eventually annexed by the City of Brisbane.³⁵

By the early 1970s, developers had purchased the entire mountain. With the discovery of the endangered species on the mountain, two thousand acres were eventually sold or donated to the county and state. The balance of the land was held for development.³⁶ In order to create an acceptable plan for the mountain, the San Bruno Mountain Steering Committee was formed. The Committee consisted of all interested parties, including the City of Brisbane, the developers, and the USF&WS.

In 1982, the Committee executed a Habitat Conservation Plan agreement (HCP) to protect endangered species and possibly allow limited development on the mountain.³⁷ This agreement allowed for icarioides missionensis) and San Bruno Elfin butterfly (Incisalia mossii hayensis). Author also notes positive impact of San Bruno HCP agreement on protecting butterflies' habitat. See infra note 38 and accompanying text.

34. Southwest Diversified, 229 Cal. App. 3d at 1550, 280 Cal. Rptr. at 870. The mountain is one of the last remnants of an isolated and unique ecosystem. A 1982 biological census found seven rare animal species and twenty-seven rare plant species inhabiting the mountain.
35. Id. at 1552, 280 Cal. Rptr. at 871. The ridge area was estimated to contain 22 to 33% of the mountain's population of Mission Blue butterflies and 12 to 50% of the Callippe Silverspot butterfly population. Although the Callippe Silverspot was never officially added to the endangered species list, all parties involved considered its habitat requirements in their decision-making.
36. Id. at 1550, 280 Cal. Rptr. at 870. The original joint owners of the mountain were Visitacion Associates and Crocker Land Co. After litigation with the County of San Mateo, Visitacion sold in excess of 2,300 acres of its mountain property for over $11,000,000.00. Visitacion owns the Northeast Ridge property. Southwest Diversified, Inc. (a subsidiary of COSCAN, a multinational, publicly-traded corporation based in Toronto, Canada) holds an option to purchase the ridge from Visitacion. Opening Brief of Appellants at 6-8, Southwest Diversified (No. A049364); Appellant's Petition for Rehearing at 7, Southwest Diversified (No. A049364).
37. Appellant's Petition for Rehearing at 8-9, Southwest Diversified (No. A049364).
future development of some portions of the butterfly habitat and for
disruption and revegetation of an additional, small percentage of the
land. However, the HCP preserved eighty-one percent of the moun-
tain as open space/undisturbed habitat. The HCP also provided for
habitat management programs of open spaces to be funded by the
developers and annual homeowner assessments.

In September 1982, Cadillac-Fairview Homes (the predecessor in
interest of Southwest Diversified, Inc.) prepared a specific plan for
the ridge. The specific plan included a proposal for 1250 condomini-
ums on 67.7 acres of the ridge. Cadillac-Fairview never received any
development approvals from the city and the project was ultimately
abandoned.

In February 1983, the City of Brisbane adopted the Northeast
Ridge Specific Plan, approved the developers’ tentative subdivision
map and enacted Ordinance No. 289. Ordinance No. 289 estab-
lished areas to be a “planned development” district and an “open
space” district for the conserved area. The proposed new condo-
minium project would increase the population of Brisbane by fifty
percent.

A049364). “[T]he objective of the plan is to conserve the species of concern with or
without development on SBM (San Bruno Mountain).” Id. The HCP also required de-
velopers to submit their plans to the appropriate local agency to follow “normal approval
procedures.” Id. Amici curiae stressed the biological HCP was not a development agree-
ment. Id.

38. Southwest Diversified, 229 Cal. App. 3d at 1551-52, 280 Cal. Rptr. at 871.

The proposed development area would destroy 14% of the Mission Blue habitat and 8% of
the Callippe Silverspot habitat. The HCP also had several mitigation measures such as
drainage control, revegetation of native species, buffer zones, and phased construction to
lessen the overall potential impact.

39. Id. The funding for habitat management programs was a major selling point
by amici curiae in support of the developers. The amici noted $60,000 per year was
needed to carry out the HCP, and of that figure $50,000 would be paid by the developer
or homeowners. The amici argued “without the assurance of the continued availability of
these [developers’ payments] . . . there would be a substantial risk the [conservation]
program would fail.” Amicus Curiae Brief of County of San Mateo in Support of Appel-
lees Southwest Diversified, Inc., Visitacion Assoc. at 8-9, Southwest Diversified (No.
A049364).

40. Appellant’s Petition for Rehearing at 10, Southwest Diversified (No.
A049364).

41. Southwest Diversified, 229 Cal. App. 3d at 1552, 280 Cal. Rptr. at 869. It is
unclear which developer’s tentative subdivision map was approved—whether it was
Southwest Diversified or Visitacion Associates. However, it does seem clear that the ten-

tative subdivision map was not from Cadillac-Fairview. Appellant’s Petition for Rehear-
ing states that Cadillac-Fairview had not completed a final master subdivision map or a
tentative subdivision map. Appellant’s Petition for Rehearing at 10, Southwest Diversi-

fied (No. A049364) (citing City’s Judicially Noticed Federal Court Answer § 27 at 7-8).

42. Southwest Diversified, 229 Cal. App. 3d at 1552, 280 Cal. Rptr. at 871.

43. The dramatic population increase was of great concern to the Brisbane resi-
dents. Appellant’s Reply to ‘Joint Brief’ at 21, Southwest Diversified (No. A049364)
(The proposed development would increase the current Brisbane population by fifty per-
cent. “A fifty percent change in population cannot be considered minor. The people
should be allowed to vote on this.”).

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In 1985, as opposition to the development mounted, the city adopted a new "housing element" of its 1980 general plan. The amendment would limit the number of housing units in the city and attempt to preserve the "small town character" of Brisbane.

In response to the general plan amendment, the developers sued the city and city council, claiming the amendment unconstitutionally interfered with their vested right to develop the property. The suit was ultimately settled and the City of Brisbane was named as the prevailing party.

During the period when the suit was still pending, the city and developers entered into non-public negotiations. The negotiations lasted three years and produced a settlement agreement based upon a revised plan. The revised plan maintained the amount of property to be developed at 92 acres, but reduced the number of units from 1250 condominium units to 579 mixed units including single family homes.

The revised plan also substantially changed the boundaries

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44. A "housing element" is one of the mandatory elements of a general plan. This element is a comprehensive assessment of the community's current and future housing needs. It includes policy statements for providing adequate housing and programs to implement the policy. CAL. GOV'T. CODE §§ 65302(c), 65580-65589.8 (West 1987); see also DANIEL J. CURTIN, JR., CALIFORNIA LAND-USE AND PLANNING LAW 9-11 (1990).

45. Appellant's Petition for Rehearing at 11, Southwest Diversified (No. A049364). A "general plan" is a long-term comprehensive plan for the physical development of a city. The general plan sets forth the development policies for a city and must contain a variety of mandatory elements which specifically outline the plan. The mandatory elements are (a) land use element, (b) circulation element, (c) housing element, (d) conservation element, (e) open space element, (f) noise element, and (g) safety element. Other elements are optional. CURTIN, supra note 44, at 8-17.

46. Appellant's Petition for Rehearing at 11, Southwest Diversified (No. A049364).

47. A "vested right" refers to a developer's right to build a project if he has obtained a building permit and has performed substantial work in good faith on the project prior to the changes in a city's land use regulations affecting their project. Avco Community Developers, Inc. v. South Coast Regional Comm., 17 Cal. 3d 785, 791, 132 Cal. Rptr. 386, 389-90, 553 P.2d 546, 550 (1976).

48. Southwest Diversified, 229 Cal. App. 3d at 1553, 280 Cal. Rptr. at 871. The developers' suit alleged the city had reneged on an agreement for development (citing the HCP agreement) and illegitimately exercised municipal authority. The developers requested some city council members be personally liable and pay $100,000 in punitive damages. The city answered explaining the HCP was a biological agreement and the city preserved its "police power to regulate land use." Appellant's Petition for Rehearing at 11-12, Southwest Diversified (No. A049364).

49. Appellant's Petition for Rehearing at 15, Southwest Diversified (No. AO49364); Southwest Diversified, 229 Cal. App. 3d at 1553, 280 Cal. Rptr. at 871. There seems to be a direct conflict in the number of acreage involved in the negotiated plan. The amici curiae contend, "The negotiated plan called for the residential development area to be increased to 92 total acres from the original 67.7 acres." Appellant's Petition for Rehearing at 15, Southwest Diversified (No. AO49364) (citing 5 Record,
between the open space and the planned development. This change consolidated the development downslope, closer to Brisbane.\textsuperscript{50}

As part of the settlement plan with the developers, the city agreed to act upon the developers' application of a vesting tentative subdivision map, related permits, and rezoning of the ridge to conform to the revised development plan.\textsuperscript{51} The project was "fast-tracked" through the public review process and on November 6, 1989, the city council conditionally approved the new subdivision map. One week later, the city council enacted Ordinance No. 351 which adjusted the zoning boundaries of the area to conform to the new subdivision map.\textsuperscript{52}

The citizens' group response was swift. Within one month of the rezoning, they gathered the requisite number of signatures for a referendum on Ordinance No. 351. The city clerk verified the petition and set an April 17, 1990 election date.\textsuperscript{53}

On December 29, 1989, Southwest Diversified filed for a writ of mandate to block the election. The writ was opposed by a non-profit organization, Bay Area Mountain Watch, and five local citizens. The Superior Court granted the peremptory writ and ordered the city to vacate their referendum election. Throughout the litigation, the City of Brisbane had taken a neutral position.\textsuperscript{54} The citizens' group appealed and the case was reheard in the California Court of Appeal, First District.

\textsuperscript{50} Southwest Diversified, 229 Cal. App. 3d at 1553, 280 Cal. Rptr. at 872. The revised plan also required the developers to fund certain impacted municipal facilities which would add $18,323 in cost to each residential unit. Road layouts also changed. Additionally, since the revised plan changed the area for development, an amendment to the permit under the Endangered Species Act was required. New biological studies were undertaken, and the new plan was considered to be an improvement, biologically speaking.

\textsuperscript{51} Id. at 1554, 280 Cal. Rptr. at 872. The city was adamant about clarifying that the developers were only assured that the city would guarantee a decision on the application, not approval of the application. The city merely agreed to a decision by a specific deadline. Petition for Rehearing, or, Alternatively, for Modification of Opinion at 2-3, Southwest Diversified (No. A049364).

\textsuperscript{52} Petition for Rehearing at 15-16, Southwest Diversified (No. A049364); Southwest Diversified, 229 Cal. App. 3d at 1554, 280 Cal. Rptr. at 872.

\textsuperscript{53} Petition for Rehearing at 16, Southwest Diversified (No. A049364).

\textsuperscript{54} Petition for Rehearing at 16-17, Southwest Diversified (No. A049364). The city of Brisbane had been sensitive about the litigation involving San Bruno Mountain and filed a separate modification request to ensure the published opinion reflected the fact that the settlement with Southwest Diversified guaranteed the city would process the developer's applications but not automatically approve them. Petition for Rehearing, or, Alternatively, for Modification of Opinion at 2, Southwest Diversified (No. A049364).
B. The Court's Opinion

Acting Presiding Justice Newsome delivered the unanimous opinion. The court held that the ordinance, which rezoned the open space and planned development, pursued a plan already adopted by a legislative body and therefore was an administrative act not subject to referendum.55

The court began its discussion by noting the issue in the case was fairly narrow: whether the adjustment of "open space" and "planned development" boundaries "to mitigate the environmental impact of the development" was subject to referendum.56 The court expressly noted that the citizens’ group had not challenged the developers’ vesting tentative subdivision map or questioned the relocation of roads or the changes in the residential unit mix.57 In doing so, the court avoided the issue of whether the city changed the permitted character of the development by a legislative decision.

After defining the parameters of the issue, the court traced the basis of the referendum powers from the California Constitution through case law, highlighting those cases which distinguished legislative from administrative decisions.58 The court noted that according to McKevitt v. City of Sacramento,59 legislative acts include those acts which declare a public purpose and make provisions for the “ways and means” of achieving that purpose. Administrative acts were defined by the McKevitt court as those which are “necessary to be done to carry out legislative policies and purposes already declared by the legislative body.”60 Citing a more recent treatise, the Southwest Diversified court defined legislative acts as those which proscribe a “new policy or plan,” where administrative acts “merely pursue a plan already adopted by the legislative body.”61

56. Id. at 1555, 280 Cal. Rptr. at 873 (1991).
57. Id. (The residential unit mix was changed to include not only condominiums but also single family residences.).
58. Id. at 1556, 280 Cal. Rptr. at 873 (citing McKevitt v. City of Sacramento, 55 Cal. App. 117, 203 P. 132 (1921); Fishman v. City of Palo Alto, 86 Cal. App. 3d 506, 150 Cal. Rptr. 326 (1978)).
59. 55 Cal App. 117, 203 P. at 132 (1921).
60. Id. at 124, 203 P. at 136.
61. Southwest Diversified, 229 Cal. App. 3d at 1555, 280 Cal. Rptr. at 873 (citing 5 Eugene McQuillen, THE LAW OF MUNICIPAL CORPORATIONS § 16.55, at 266 (3d ed. 1989)).
The court stated that the distinction between legislative and administrative acts would turn on both legal and factual issues regarding the legislative body's intent. That intent would be inferred from the ordinances themselves, as well as related documents such as the HCP agreement.62

To determine the intent of the city council, the court focused on Article III of the HCP agreement which included a modification clause allowing for boundary and map changes under the terms of the agreement.63 The court also acknowledged another section of the HCP agreement which provided procedures for amending the boundaries of the conserved habitat area.64 One of the amendment procedures provided for the adjustment of boundaries through land exchanges. Exchanges of habitat land for proposed development land was permissible if the land traded was of equal biological value.65 The court determined Ordinance No. 351 would fall under the land exchange provision of the HCP agreement.66

Examining Ordinance No. 289 (the original districting ordinance) in light of the HCP agreement, the court determined the trial court might reasonably have found the city had intended the boundaries to be provisional, subject to future modification.67 Therefore, the court reasoned, the modification pursued a plan already adopted by a legislative body and was an administrative act not subject to referendum.68

The court bolstered their decision by drawing parallels to their recent decision in W.W. Dean & Associates v. City of South San

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62. *Southwest Diversified*, 229 Cal. App. 3d at 1556, 280 Cal. Rptr. at 873. In their decision, the *Southwest Diversified* court relied very heavily on interpreting the HCP agreement to support their finding of an administrative action. See infra notes 63-68 and accompanying text.

63. Id. at 1556-57, 280 Cal. Rptr. at 873-74 (The provisions of Article III stated, “It is recognized that the maps included within chapter VII of the HCP indicating the boundaries of Conserved Habitat assume implementation of the HCP in light of existing conditions and restrictions . . . but that such maps, boundaries and conditions may be modified or revised in accordance with this Agreement.” (emphasis added)).

64. Id. at 1556, 280 Cal. Rptr. at 874.

65. Id. The requirements for the biological land trade included that the exchange occur within the same administrative parcel upon the written findings of the local jurisdiction that the land in fact was biologically equivalent.


67. Id. See infra notes 84-88 and accompanying text discussing court’s interpretation as representative of new, more reserved trend in allowing referendum in local land use decisions.

68. *Southwest Diversified*, 229 Cal. App. 3d at 1556, 280 Cal. Rptr. at 874 (citing *McQuillen*, *supra* note 61, § 16.55, at 266).
The *W.W. Dean* case also involved a proposed development on the flanks of San Bruno Mountain and changes to the development plans pursuant to the HCP agreement. The proposed changes in *W.W. Dean* were to allow for a higher amount of acreage than was called for in the HCP agreement to be disrupted during construction, then revegetated to its natural state. In *W.W. Dean*, the court held the temporary changes were administrative in nature and not subject to referendum. In the present decision, the court acknowledged the factual distinctions between the *Southwest Diversified* case and the *W.W. Dean* case, but stated it still supported the theory that amendments to development plans pursuant to the HCP agreement "may be regarded as merely carrying out a previously adopted legislative policy."

The court next addressed the appellant's argument regarding the required use of "generic classifications" for land use decision determination. The court acknowledged the classification scheme had an unbroken lineage of judicial support, as well as the merit of economy of application. However, the court did not feel compelled to follow the precedent in this case. The court conceded that on the whole "generic classifications" analysis was appropriate in land use decisions, but noted this was a unique case. The court reasoned that, unlike the California Supreme Court decision in *Arnel Development Co. v. City of Costa Mesa*, which upheld the generic classification

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71. *Id.* (The purpose for amending the HCP in *W.W. Dean* was to mitigate against landslide problems.).

72. *Id.* (The *Southwest Diversified* court noted the strong dissent of Justice White in the decision of *W.W. Dean* that the *Dean* changes were administrative as opposed to legislative.).

73. *Id.* at 1557, 280 Cal. Rptr. at 874 (In noting the difference in the two cases the court stated, "The decision differs from the present case in certain significant respects—it sanctioned the disturbance of a substantial portion of conserved habitat and involved the amendment of the HCP rather than a zoning ordinance.").

74. *Id.* (Among the cases cited for their precedential value were Yost v. Thomas, 36 Cal. 3d 561, 685 P.2d 1152, 205 Cal. Rptr. 801 (1984) and Associated Homebuilders of Greater Eastbay, Inc. v. City of Livermore, 18 Cal. 3d 582, 557 P.2d 473, 135 Cal. Rptr. 41 (1976).).

75. *Id.* at 1558, 280 Cal. Rptr. at 875 ("We agree that such a simple generic analysis is ordinarily appropriate in this field.").

76. 28 Cal. 3d 511, 620 P.2d 565, 169 Cal. Rptr. 904 (1980).
model, this case dealt with a fact situation in which the legislative body anticipated future boundary changes and provided procedures for those changes.77 The court continued to distinguish the Arnel decision, stating the Arnel court’s concerns regarding the creation of vague distinctions which would deprive cities of a clear and reliable test to distinguish legislative and administrative acts were not present in this case.78 The court believed their holding could be confined to the unique circumstances of the case and would therefore not disrupt the generic classification approach of Arnel.79

The court next dismissed the appellant’s final argument that the election should have been held prior to the court hearing the appeal. The court explained that although courts should generally decline to hear constitutional challenges to referenda until after the election, the court was entitled to remove issues from ballots prior to elections if the people did not have the power to vote on them originally.80 Citing the California Supreme Court decision of Legislature v. Deukmejian,81 the court stated it was well settled that courts may remove referenda from ballots if the subject did not concern a legislative matter.82

IV. Analysis

Although Southwest Diversified may initially appear to be very fact-specific and of little impact, the decision is important for three reasons. First, the decision may reflect a recent trend toward curtailing and limiting public participation in land use decisions through referendum and initiative. Second, the decision creates a significant exception to the Arnel generic categorical approach in land use analysis. Finally, the decision allows municipalities to enter “flexible” agreements permitting future modifications, even to zoning, to be exempt from the censoring votes of the public. Without the ability to anticipate or recall these flexible ordinances, citizens are unable to

77. Southwest Diversified, 229 Cal. App. 3d at 1558, 280 Cal. Rptr. at 875.
78. Id.

Moreover, the considerations that prompted the Arnel court to adopt a categorical rule are not present in the instant case. The [Arnel] court was concerned that a rule treating minor zoning actions as administrative would call for vague distinctions and deprive municipal governments of a “test which distinguishes legislative from adjudicative acts with clarity and reasonable certainty.”

Id.

79. Id. (“[W]e perceive no difficulty in confining our holding to the unique circumstances of the case. . . . [and] we cast no doubt on the classification of zoning actions generally as legislative in nature.”).
80. Id. at 1558-59, 280 Cal. Rptr. at 875 (“There can no longer be any doubt that the courts may remove a referendum from the ballot on the ground that it does not concern a legislative measure.”).
82. Southwest Diversified, 229 Cal. App. 3d at 1558, 280 Cal. Rptr. at 875.

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exercise one of their most "precious rights"—that of direct democracy through referendum.

A. Reflection of a Trend

Commentators have been acutely aware of the tensions and conflicts involved in allowing citizens to participate directly in establishing and repealing land use legislation. Although the courts have in the past stated that any doubts about legislative intent should be settled in favor of allowing the citizens to exercise their reserved powers of referendum and initiative, the Southwest Diversified decision seems to reflect a growing trend away from this presumption.

The Southwest Diversified court stated the trial court might have found the city intended future modifications in the development zoning and therefore interpreted the city's action as an administrative decision. However, the court could have noted the ambiguity in the city's intent and followed previous decisions enforcing the presumption allowing referendum. The court's choice not to follow the presumption may reflect the changing attitude of the judiciary toward the use of referendum in the land use arena.

83. Mervynne v. Acker, 189 Cal. App. 2d at 563, 11 Cal. Rptr. at 344 (1961) (direct democracy is "one of the most precious rights of our democratic process").


86. Southwest Diversified, Inc. v. City of Brisbane, 229 Cal. App. 3d 1548, 1556, 156, 280 Cal. Rptr. 869, 874 (1991) ("[T]he trial court might reasonably find that the municipality intended the boundaries to be provisional, subject to future adjustment in accordance with the HCP Agreement. Under this interpretation, the revision of boundaries by Ordinance No. 351 would fall within the accepted definition of an administrative act ... ") (emphasis added).

87. The appellants in their petition for rehearing were also aware of the presumption of allowing referendum and questioned whether it was error not to follow it. Appellant's Petition for Rehearing at 22-23, Southwest Diversified (No. A049364).

88. See e.g. Daniel J. Curtin, Jr., California Land-Use & Planning Law 198-99 (1992). Author notes small but significant backlash against use of initiative in land use planning. Also noted are recent decisions questioning amount of public expertise and knowledge available in the subject area to be voted on (citing Taxpayers to Limit Campaign Spending v. Fair Political Practices Commission, 51 Cal. 3d 744, 799 P.2d
The sole dissenter in the California Court of Appeal, First District's decision in *W.W. Dean & Associates v. City of South San Francisco* strongly acknowledged the presumption toward referendum and noted the constitutional referendum power "is to be liberally construed to uphold the power whenever it is reasonable to do so."89 The two remaining justices were not swayed and again did not allow the people to exercise their referendum powers.90 This new administrative classification simply broadens the range of land use cases in which the public is not allowed to participate.

B. Exception to Generic Classification Approach

In *Arnel Development Co. v. City of Costa Mesa*, the California Supreme Court articulated the standard approach in deciding classifications of legislative and administrative acts in the land use arena.91 The *Arnel* court stated that the generic classification method, as opposed to the case-by-case method, was the standard.92

The *Arnel* court noted that the use of generic classifications would have many benefits. Those benefits included: overall economy and predictability as to whether notice, hearings, or findings are necessary and what form of judicial review is appropriate.93 According to the *Arnel* Court, straying away from these generic classifications would substantially increase administrative costs, create great uncertainty regarding application of referendum or initiative, and unduly burden the courts with litigation to resolve these classification issues.94

In their prior decision of *W.W. Dean*, this court supported the generic classification approach. The court flatly stated that "zoning and rezoning ordinances . . . are legislative actions."95 In *Southwest* 1220, 274 Cal. Rptr. 787 (1990) and changes in the Election Code (CAL. ELEC. CODE § 4009.5 authorizes city council to request reports to measure impact of initiative changes on the community) to remedy some shortfalls. Although the author primarily notes problems with the use of initiatives, judicial attitudes toward referendums in land use decisions may parallel this view.

92. *Id.* at 523, 620 P.2d at 572, 169 Cal. Rptr. at 911 ("In summary, past California land-use cases have established generic classifications, viewing zoning ordinances as legislative and other decisions, such as variances and subdivision map approvals, as adjudicative.").
93. *Id.*
94. *Id.* at 523, 620 P.2d at 572-73, 169 Cal. Rptr. at 911-12.
Diversified, the court has broken away from its traditional standard proscribing the rezoning of property to be a legislative act. It attempts to mitigate the impact of the departure by stating:

Here, we perceive no difficulty in confining our holding to the unique circumstances of the case. By construing the revision of a zoning boundary pursuant to a previously adopted procedure as an administrative action, we cast no doubt on the classification of zoning actions generally as legislative in nature.66

The problem with the creation of this administrative “sub category” of rezoning is that it leaves the general public without a benchmark to determine which modification agreements are significant enough to create the administrative exception. The Southwest Diversified court found the modification clause it relied upon in a federally related HCP agreement. The HCP agreement was not a development agreement like those typically relied upon by citizens.97 The general public looked to the words of Ordinance No. 351, which called for the rezoning of property; it was well settled the rezoning of property was legislative. Therefore, referendum would be allowed.

To allow the creation of a new “sub category” or exception to the rezoning-of-property-as-legislative-action rule adds a layer of confusion and detracts from the advantages of the generic classification approach. Courts will become burdened with litigation regarding the sufficiency, location, and notice of modification clauses. Citizens and municipalities will be subject to greater uncertainty and confusion. Finally, a new potentially confusing “sub category” exception will hamper the goal of the Arnel court, which was to create a test distinguishing legislative and administrative acts “with clarity and reasonable certainty.”98

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98. Arnel Development Co., 28 Cal. 3d at 523, 620 P.2d at 572, 169 Cal. Rptr. at 911 (“Yet without some test which distinguishes legislative from adjudicative acts with clarity and reasonable certainty, municipal governments and voters will lack adequate guidance in enacting and evaluating land-use decisions.”).
C. Problems of “Flexible” Ordinances and Modification Clauses

Allowing municipalities to use modification clauses, embodied in documents other than the ordinance itself, to support an “administrative” decision creates problems for citizens’ groups. First, the citizens cannot anticipate which actual modifications will occur in the future. By the time the modification/rezoning is determined, the decision is deemed administrative and exempt from referendum recall. Additionally, if the modification clauses can be embodied in documents other than the original ordinance, citizens monitoring legislative activity may believe the ordinances embody the final zoning, and not research further. Citizens may be misled into believing they can anticipate and respond to changes in their community, while unknown major changes could be around the corner camouflaged as “mere modifications” to an administrative design.

The Southwest Diversified case illustrates this point well. The HCP agreement, which contained the modification clauses, was a biological plan for the area.\(^9\) Ordinance No. 289 was a separate document which created the initial zoning districts for “open space” and “planned development”.\(^{10}\) Local citizens who may have investigated the proposed neighboring development would have seen the zoning layout of the project as described in Ordinance No. 289 and would have believed they could anticipate the ultimate layout of the adjoining project. Even if the citizens had been directed to the HCP agreement, an insignificant clause regarding potential modifications would not have alerted them to the possibility or probability of future massive changes. Based upon the apparent zoning of the neighboring parcel, citizens believed they understood what development to expect in their community. Not until Ordinance No. 351 was passed did the citizens know of the major zoning changes in the neighboring development. Only when the true impact of the proposed development had been made clear did the citizens become aware and sufficiently concerned to rally and propose a referendum.

Citizens can only react to zoning decisions of which they have firm knowledge. The Brisbane citizens acted quickly, gathering signatures as soon the true nature of the development was determined.\(^{101}\) The

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100. Southwest Diversified, 229 Cal. App. 3d at 1552, 280 Cal. Rptr. at 871; see supra notes 42-43 and accompanying text.
101. Appellant's Petition for Rehearing at 16, Southwest Diversified (No. A049364) ("Shortly after the rezoning, the citizens' group gathered the requisite number of signatures for a referendum petition putting Ordinance No. 351 to a vote.").
court, however, did not allow the referendum, implying the citizens somehow could have anticipated the radical changes. This case illustrates how "flexible" agreements and ordinances keep citizens uninformed and immobilized until, under this court's decision, it is too late.

The *Southwest Diversified* decision also provides incentives for municipalities to introduce or add modification clauses to any land use agreement. In this manner, municipalities can invoke clauses implementing major changes as "modifications," knowing citizens will be barred from repealing the changes by referendum. Allowing these clauses to function in this manner not only cuts out citizen participation from the land use loop,102 but also adds another level of potential non-disclosure or deception by municipalities.

V. CONCLUSION

Although controversies exist regarding how much the public should directly participate in land use decisions, courts in the past have generally resolved legislative intent issues in favor of allowing referendum and initiative.103

In *Southwest Diversified, Inc. v. City of Brisbane*, the California Court of Appeal seems to backtrack from the judicial presumption of allowing direct public participation in the land use arena. The court attempts to focus on the "unique character" of the case to deflect any potential criticism regarding its departure from the established tradition of favoring public involvement in local government.

Substantively, the decision also creates a new exception or "sub category" to the established doctrine of using "generic classifications" in determining legislative intent for purposes of allowing referendum. In addition to creating this categorical exception, the decision creates incentives for municipalities to include modification clauses in their land use agreements. Allowing "flexible" ordinances keeps the public uninformed and immobilized from action until projects are closer to being finalized and citizens may be barred from referendum.

Citizens can offer important input and balance to local land use

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103. *See supra* notes 1-3, 19-20 and accompanying text.
decisions. As residents of the community, they have strong incentives to participate and make prudent decisions that will intimately effect their quality of life. The citizens of Brisbane were denied the opportunity to participate in their community's development by exercising their right of referendum. Other citizens should not have to suffer the same fate. The California Supreme Court should reaffirm the importance of public participation through referendum and initiative in the local land use arena.

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104. Freilich & Guemmer, supra note 102, at 556 (noting that the United States Supreme Court has recognized the importance of public participation in land use decisions and has stated, "[N]o more important local government power and responsibility to the people exists than the determination of land-use governance and planning for the future of the community." (citing Young v. American Mini Theaters, Inc., 427 U.S. 50, 72 (1976); City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986)).