
PROTECTING VITAL AND PRESSING
GOVERNMENTAL INTERESTS—A
PROPOSAL FOR A NEW ZONING
ENABLING ACT

*DOUGLAS W. KMIEC**

More and more evidence suggests that government at all levels has created much of the affordable housing crisis. Of course, no single economic factor can surpass the adverse impact of excessive government spending at the federal level on housing and interest rates. Nothing in this article, by virtue of its focus on state and local land use control, should be construed as suggesting that correction of regulatory abuse will right the far greater damage done by inflationary policies. Nevertheless, by restricting the supply of land and increasing the cost of site construction, state and local zoning and subdivision controls have driven new home prices to unnecessarily high levels. In short, one can now convincingly demonstrate that less government would result in more house at less cost. Many local communities, however, continue

* Deputy Assistant Attorney General of the United States, Office of Legal Counsel, U.S. Department of Justice; Professor of Law and Director of the Thomas J. White Center on Law & Government at the University of Notre Dame (on leave). A former Special Assistant to the Secretary of Housing and Urban Development, Professor Kmiec's single volume treatise on land use, the *ZONING AND PLANNING DESKBOOK*, recently was published by Clark Boardman. An earlier version of this paper was presented at a conference on Affordable Housing at the University of California, San Diego, in March, 1985. Portions of this article are reprinted here with permission from *9 ZONING AND PLANNING LAW REPORT 1* (Jan. 1986) published by Clark Boardman Company, 435 Hudson Street, New York, N.Y. 10014. The views expressed herein are those of the author, and not necessarily those of the Department of Justice.

to regulate in a manner that either imposes subjective and costly aesthetic preferences, or arbitrarily adopts the misguided opinions of a central planner over the informed wisdom reflected in the cumulative demand of thousands of housing consumers.

In recognition of this problem, the President's Commission on Housing has recommended that states replace present zoning enabling acts, which broadly authorize any land use control that can somehow be said to promote the general welfare, with a more specific and demanding standard. Specifically, the Commission recommended:

To protect property rights and to increase the production of housing and lower its cost, all State and local legislatures should enact legislation providing that no zoning regulations denying or limiting the development of housing should be deemed valid unless their existence or adoption is necessary to achieve a vital and pressing governmental interest. In litigation, the governmental body seeking to maintain or impose the regulation should bear the burden for proving it complies with the foregoing standard.¹

Dean Cribbet and Professor Johnson recently reprinted the Commission's policy recommendations in their casebook on property and followed it with the unanswered question: "Are these recommendations sound?"²

The clear answer to this question is that these recommendations *are* sound. Four considerations affirm their soundness: (1) constitutional theory; (2) a correct understanding of the Supreme Court's decision in *Village of Euclid v. Ambler Realty*;³ (3) an examination of recent judicial frustration with the zoning process in *Southern Burlington County NAACP v. Township of Mount Laurel*⁴ and *Fasano v. Board of Commissioners*;⁵ and (4) the mounting empirical evidence of the cost of regulatory abuse.⁶

First, with respect to constitutional theory, one must examine the source of a local governing body's authority over land use matters. All too frequently, courts do not look behind the zoning enabling act⁷ to

1. THE REPORT OF THE PRESIDENT'S COMMISSION ON HOUSING 200 (1982) [hereinafter cited as PRESIDENT'S COMM'N].

2. J. CRIBBIT & D. JOHNSON, CASES AND MATERIALS ON PROPERTY 1132 (1984).

3. 272 U.S. 365 (1926).

4. 92 N.J. 158, 456 A.2d 390 (1983).

5. 264 Or. 574, 507 P.2d 23 (1983).

6. See *infra* notes 28-30 and accompanying text.

7. Forty-seven states authorize local communities to enact land use regulations pursuant to provisions that resemble the Standard State Zoning Enabling Act of 1924, as

determine if the act itself exceeds the power of the state.

In constitutional terms, a state's power is derived from the inherent police or regulatory power which the tenth amendment reserved to the states. The fact that most recent tenth amendment cases have concerned the extent of state authority, or lack of it, with respect to the federal government,⁸ should not obscure a careful exploration of the extent of the state's power over individual landowners. Some may wish to avoid this issue in order to prevent limiting state governments from two opposite directions at once. No one, however, would credibly argue for giving the state unlimited reign over the individual as rectification for the judicially-created federalism imbalance. To do so would be nothing more than a new feudalism, with the states as vassals of the federal government and individual property owners performing peonage for the states.

There is little question but that the tenth amendment provides states with authority over the individual property owner. As a matter of constitutional philosophy, however, that authority is not unlimited because the authority itself is derived from individual citizens or "the people." It becomes necessary, therefore, to ask what authority the people have. In other words, only if individuals have yielded to the states some authority or right, which was properly theirs to yield, is the state's exercise of power, or its delegation of power to local zoning bodies, legitimate.

Ought one individual have a right to dictate to another the use of the other's property? In cases when the other's property use would physically harm another individual's person or property, the answer is clearly yes. When, however, one's use of property would merely displease another individual, the answer is just as clearly no.

A simple example will help illustrate this point. Assume that a city zoning ordinance denies a landowner the right to construct six detached houses on a vacant, one-acre parcel. The ordinance requires—under the guise of the "general welfare"—one-acre minimum lots.

revised in 1926, and promulgated by the Department of Commerce. The Standard State Zoning Enabling Act allows virtually any land use control so long as it promotes the "health, safety, morals, or the general welfare of the community." The amorphous general welfare requirement, when coupled with the presumptive validity of legislative acts, insulates most land use regulation from meaningful scrutiny.

8. The demise of state sovereignty is apparent in *Garcia v. San Antonio Metropolitan Transit Auth.*, 105 S. Ct. 1005 (1985). For a general discussion of the imbalance in federal-state relations, see Kmiec & Diamond, *New Federalism is Not Enough: The Privatization of Non-Public Goods*, 7 HARV. J.L. & PUB. POL'Y 321 (1984).

Under current law in most, if not all, states the requirement will be presumed valid and upheld absent the showing of an exclusionary impact or the total destruction of the landowner's investment-backed expectations. The requirement should, however, be considered patently illegitimate because limiting the density of land use to one house rather than six is almost certainly unrelated to any meaningful concern with physical harm. In this regard, one individual could not legitimately require another to observe such limitation; therefore, it is sheer sophistry to suggest that the state, which derives its power from the individual, could do any more.

The property clauses in the fifth and fourteenth amendments of the Constitution serve to emphasize this point. Together these amendments explicitly prohibit both Congress and the states from depriving a person of "life, liberty, or property, without due process of law." The fifth amendment further prohibits the taking of private property without "just compensation." In addition, the fourteenth amendment empowers Congress to enforce the prohibition against state deprivations of these rights "by appropriate legislation."

Yet, these constitutional protections have proven harshly illusory for most landowners. The Supreme Court has protected landowners only from actual physical invasions⁹ or virtual confiscation.¹⁰ Moreover, it is no longer clear, as it seemed to be after Justice Brennan's dissent in *San Diego Gas and Electric Co. v. City of San Diego*,¹¹ that even a quasi-majority of the Court would award monetary compensation to a landowner whose property has been effectively taken by regulation. In this regard, in its recent decision in *Williamson County Regional Planning Commission v. Hamilton Bank*,¹² the Court substantially foreclosed access to the federal courts on regulatory taking claims by imposing an unrealistic finality requirement. As a consequence of

9. See, e.g., *Loretto Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (cable ordinance authorized physical installation without owner's permission); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) (public access to nonnavigable pond); *United States v. Causby*, 328 U.S. 256 (1946) (airplane overflights).

10. It is something of an overstatement to suggest that the Supreme Court even has protected landowners from virtual confiscation, because their most recent pronouncement on determining when a taking occurs, *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), relies upon a highly unsatisfactory case-by-case approach to determine whether there has been an impermissible interference with investment backed expectations.

11. 450 U.S. 621, 637 (1981) (Brennan, J., dissenting).

12. 105 S. Ct. 3108 (1985).

Hamilton Bank, a landowner must pursue all theoretically available administrative variances and state remedies before seeking compensation from a federal tribunal. Apparently this includes pursuing variances from the same planning commission that just told the landowner to "get lost," as was the case in *Hamilton Bank*. In addition, a landowner's Section 1983 action is kept out of the federal forum, because the Court convinced itself that there is a meaningful distinction between administrative exhaustion, which is not required for Section 1983 actions,¹³ and administrative finality.¹⁴

Quite obviously, the Court's decision in *Hamilton Bank* is a major setback for landowners. Not only does it remove the mantle of legitimacy accorded to Justice Brennan's dissent in *San Diego* favoring the availability of compensatory remedies for regulatory takings, but it also reveals the Court's great reluctance to admit that regulatory takings even exist. Although the majority does not decide the issue, it leans heavily in favor of the view that excessive regulation is not a taking at all, but at best, a deprivation of due process. Justice Stevens' concurrence is clear on this point. To him, "temporary takings" that result from governmental decisionmaking are "fairly characterized as an inevitable cost of doing business in a highly regulated society."

Presently on appeal to the Supreme Court is the unpublished decision of the California Court of Appeal in *MacDonald, Sommer & Frates v. County of Yolo*.¹⁵ In *MacDonald*, the California court denied monetary relief to a landowner whose tentative plat for residential development was rejected by the county board. Even though the land was designated for residential use on the county plan, the nearby City of Davis had it designated as "agricultural reserve" and refused to extend access and other city services, which denials became the basis for the county's action. The landowner claimed that an agricultural use was infeasible because of the prior removal of topsoil, the presence of nematodes, and nearby residential development.

Because the landowner did not present alternative development plans when its tentative plan was rejected, the Court may view *MacDonald* as insufficiently ripe to reach the underlying constitutional issue, just as it did in *Hamilton Bank*. Because the county demurred, however, to the landowner's allegations of the futility of other relief and complete deprivation, it is possible for the Court to view the ripe-

13. *Patsy v. Florida Bd. of Regents*, 457 U.S. 496 (1982).

14. 105 S. Ct. at 3120.

15. Case No. 3 Civ. 22306.

ness considerations as satisfied. The Department of Justice has for the first time argued as *amicus curiae* that "the merits of this case are important and deserve resolution."¹⁶ Most significantly, the Justice Department concludes in its brief that: "[b]ecause regulation of land may constitute a 'taking,' within the contemplation of the Fifth Amendment, and because a temporary appropriation of land likewise can constitute a 'taking,' it would seem to follow inexorably that a regulatory restriction on the use of land that is only of temporary duration may also, in appropriate circumstances, constitute a 'taking' that implicates the Just Compensation Clause."¹⁷

Through it all, one should remember that, even if the Court sanctions the monetary remedy in *MacDonald*, it will mean only that compensation is available for the most extreme cases of regulatory abuse, not that regulatory abuse is at an end. Nevertheless, do not be misled. The fact that current constitutional interpretation does not support the recommendations of the President's Housing Commission does not mean that sound constitutional theory and principle are not in full agreement.

Turning to *Village of Euclid v. Ambler Realty*,¹⁸ the President's Commission recommended that the Attorney General re-examine the zoning standard enunciated in that seminal decision to determine if the Commission's standard might not be presented to the Supreme Court as an alternative.¹⁹ Although that is entirely appropriate, it is suggested that a correct interpretation of *Euclid* already supports the Commission's recommendation.

First, it is well-recognized that even though *Euclid* upheld the general constitutionality of zoning, it expressly left open the question of challenging specific applications of a zoning ordinance.²⁰ Indeed, shortly thereafter the *Euclid* Court invalidated a specific application of an ordinance in *Nectow v. City of Cambridge*.²¹ Nevertheless, many overlook the standard that the *Euclid* Court suggested for evaluating specific applications of zoning measures. The standard employed in *Euclid* was *sic utere tuo lut alienum non laedes*—use your own prop-

16. Brief for the United States as Amicus Curiae at 16.

17. *Id.* at 20.

18. 272 U.S. 365 (1926).

19. PRESIDENT'S COMM'N, *supra* note 1, at 201.

20. 272 U.S. at 387, 390.

21. 277 U.S. 183 (1928).

erty in such a manner as not to injure that of another.²² Arguably, even a liberal adherence to this nuisance based standard would reach a result similar to that suggested by the President's Commission.

Commentary contemporaneous with the *Euclid* decision suggests that while the *Euclid* Court may not have believed that common law nuisance and the police power were exact equivalents, the Court surely viewed the police power as principally concerned with the prevention of harm. Thus, Professor Freund writing twenty years before *Euclid* could state that "under the police power [the state takes property] because it is harmful"²³ and James Metzenbaum, the foremost advocate of zoning who represented the Village of Euclid, wrote four years after the case: "Unless a [zoning ordinance] is enacted for the purpose of protecting the public safety, health or welfare, it cannot be expected to meet with the approval of the courts. And this is as it should be."²⁴

The facts of *Euclid* support this narrow interpretation. This too has been obscured, however, because the Court accepted in that case an ordinance that segregated single family homes from apartments, a segregation that is unjustifiable in view of modern construction practices. The Court, however, was not reviewing modern construction practices, but rather, tenements that, in the Court's own words, "[came] very near to being nuisances."²⁵

When viewed in this light, it becomes clear that current Supreme Court interpretation may not only be at odds with basic constitutional theory or principle, but also with the Court's own precedent. To comprehend how far the present Court has strayed one need only remember the Court's recent rejection in *Penn Central Transportation Co. v. City of New York*²⁶ of the landowner's attempt to distinguish an aesthetically based landmark preservation ordinance from earlier decisions concerned with the noxious use of land. Without support, the Court commented, "these cases are better understood as resting not on any supposed 'noxious' quality of the prohibited uses but rather on the ground that the restrictions were reasonably related to the implementation of a policy—not unlike historic preservation—expected to produce

22. 272 U.S. at 387.

23. E. FREUND, *THE POLICE POWER* § 511 (1904).

24. J. METZENBAUM, *THE LAW OF ZONING* 7 (1930).

25. 272 U.S. at 395. See Babcock and Bosselman, *Suburban Zoning and the Apartment Boom*, 111 U. PA. L. REV. 1040-49 (1963).

26. 438 U.S. 104 (1978).

widespread public benefit. . . ."²⁷

Of course, unlimited police power and uncontrolled land use authority does not necessarily produce widespread public benefits. As the decision of the New Jersey Supreme Court in *Southern Burlington County NAACP v. Township of Mount Laurel (Mount Laurel I)*²⁸ reveals, such authority can easily result in widespread regulatory abuse. Mt. Laurel had placed over one-third of its developable land into an industrial holding zone and set aside the rest of its land for expensive single family homes on large lots. In *Mt. Laurel I* in 1975, the state supreme court instructed the community to redraft its ordinance to purge it of its exclusionary features. The community responded, just as one might expect a community drunk with its own regulatory power, by rezoning 20 acres out of a possible 14,300 acres for multi-family use. Moreover, most of those 20 acres were, according to the evidence, "low lying and swampy, and . . . covered with rank, dense underbrush."²⁹ The New Jersey court tolerated this affront until 1983 when, in *Southern Burlington County NAACP v. Township of Mount Laurel (Mount Laurel II)*,³⁰ it took over the land use process in that state in what is nothing short of a judicial preemption of legislative prerogatives.

Mt. Laurel II confirms the soundness of the Commission's recommendations, as do similar exclusionary zoning decisions in Pennsylvania,³¹ New York,³² and even to a very limited extent, California.³³ Most of these decisions provide that once an ordinance is shown to be prima facie exclusionary, the burden of justification shifts to the munic-

27. *Id.* at 133-34 & n.30.

28. 67 N.J. 151, 336 A.2d 713, *appeal dismissed and cert. denied*, 423 U.S. 808 (1975).

29. *Southern Burlington County NAACP v. Township of Mount Laurel*, 161 N.J. Super. 317, 391 A.2d 935 (Super. Ct. Law. Div. 1978).

30. 92 N.J. 158, 456 A.2d 390 (1983).

31. *See, e.g., National Land and Inv. Co. v. Kohn*, 419 Pa. 504, 215 A.2d 597 (1965).

32. *Berenson v. Town of New Castle*, 38 N.Y.2d 102, 341 N.E.2d 236, 378 N.Y.S.2d 672 (1975).

33. California explicitly rejected the activist approach of New Jersey in *Associated Home Builders v. City of Livermore*, 18 Cal. 3d 582, 557 P.2d 473, 135 Cal. Rptr. 41 (1976). California, however, does require local governments to "consider the effect . . . on the housing needs of the region in which the local jurisdiction is situated and balance these needs against the public service needs of its residents and available fiscal and environmental resources." CAL. GOVT. CODE §§ 65863.6, 66412.3 (Deering Supp. 1985).

ipality. The policy proposed by the President's Commission would do this as a matter of course.

There is another line of state court opinions that are seldom thought of as similar to the *Mount Laurel* variety, but which also reflect judicial frustration with zoning abuse. In these cases, courts reclassify zone amendments as quasi-judicial in order to subject them to greater judicial scrutiny. The most noted case in this area is that of the Oregon Supreme Court in *Fasano v. Board of Commissioners*.³⁴ While the *Fasano*-type cases are not necessarily prodevelopment, they do reflect the same judicial skepticism of unbridled police power as the exclusionary cases. *Fasano* and its progeny, of course, utilize the comprehensive plan as the method of regaining control of the regulatory apparatus. The *Mount Laurel II* decision does the same, placing the heaviest burden of proof on any exclusionary community designated as a "growth area" on the State Development Guide Plan.

One should not mistake the preceding analysis as an endorsement of either *Mount Laurel II* or *Fasano*, for it is not. Although these courts deserve considerable credit for identifying regulatory abuse, both approaches are greatly flawed. With respect to *Mount Laurel II*, no judicial entity known to man has the capability to apply its standard. To pretend that there is a readily ascertainable definition of housing region, to pretend that there is a readily ascertainable definition of present housing need, to pretend that there is a readily ascertainable definition of prospective housing need, and then, to pretend that anyone will agree on what their "fair share" of these needs are—is, well, just to pretend.³⁵ The limitations of the judicial role recently led the

34. In *Fasano*, the Board of County Commissioners of Washington County authorized a zone change for a 32-acre parcel of land. The change allowed a development company to build a mobile home park on land that had formerly been zoned as single family residential. Several homeowners filed a petition to have the Commissioners' decision reversed in court. Both the trial court and the court of appeals reversed the Commissioners' order because the Commissioners had not shown any change in the character of the neighborhood that would justify the rezoning. 7 Or. App. 176, 489 P.2d 693 (1971). In affirming the court of appeals' decision, the Oregon Supreme Court rejected the Commissioners' argument that the change was a legislative act and, therefore, presumptively valid. 264 Or. at 580-81, 507 P.2d at 26. The court held, instead, that the change was quasi-judicial in nature and, as such, was subject to a higher standard of review. *Id.* 264 Or. 574, 507 P.2d 23 (1973).

35. The extraordinary task of complying with *Mt. Laurel II* already has spawned a book of its own. See R. BURCHELL, W. BEATON, AND D. LISTOKEN, *MT. LAUREL II: CHALLENGE AND DELIVERY OF LOW COST HOUSING* (1983). Problems in complying with *Mt. Laurel II*, and its unintended effects are discussed in Rose, *The Mt. Laurel II Decision: Is it Based on Wishful Thinking?* 12 REAL EST. L.J. 115 (1983).

New Jersey legislature to pass legislation creating a Council on Affordable Housing. The Council is to be appointed by the Governor with the advice and consent of the Senate.³⁶

Under the New Jersey legislation, a municipality has the option of submitting for Council review a housing element designed to achieve its present and prospective housing needs. If the Council certifies the housing element, then those bringing exclusionary zoning cases against the municipality first must seek review and mediation from the Council itself. In addition, the Council's substantive certification creates a presumption of validity in the housing element and implementing ordinances, which can be overcome only by clear and convincing evidence. Finally, certification yields relative preference for monies set aside in a fair housing trust fund account.

The legislation provides all municipalities a respite from the "builder's remedy"—that is, court imposed zoning measures such as mandatory set-asides or density bonuses—at least up to the date by which a municipality must submit a housing element. There is also generally available a twelve month moratorium on previously granted, but not implemented, judicial decrees that require the provision of low and moderate income housing. The moratorium is available to the extent that the vested rights of the developer are not affected and the judgment requires "provision of any housing in the municipality which is not affordable."

Obviously, the legislation is extremely complex, and is likely to tax the capability of even the administrative Council created by it, if for no other reason than the difficulty of amassing, and keeping current, information pertaining to present and prospective housing needs. Nevertheless, the Supreme Court of New Jersey recently has decided that it will tolerate, at least temporarily, this reassertion of legislative power by the legislature.³⁷

Fasano is unworkable for much the same reason. The advance planning of developing communities is beyond human capacity and in some

36. Act of July 2, 1985, ch. 222, 1985 N.J. Sess. Law Serv. 46 (Pamphlet No. 7).

37. In *The Hills Development Co. v. Township of Bernards*, Case No. A-122-85, decided February 20, 1986, the Supreme Court of New Jersey upheld the constitutionality of the state Fair Housing Act and allowed the transfer of *Mt. Laurel* cases to the Council created by the Act. At a number of junctures, however, the court cautioned that it might reassert jurisdiction where the state constitutional obligation was not being met. For example, in commenting upon the Act's moratorium on the builder's remedy, the court noted that if the moratorium resulted in the *Mt. Laurel* obligation not being met, then the Act may be declared unconstitutional. Slip Opinion at 57-58.

ways directly antithetical to the dynamic nature of the planning process itself.³⁸ More fundamentally, as already suggested, the judicial activity in these cases is contrary to basic notions of separation of powers implicit in our federal and state governmental systems. In short, although *Mount Laurel*, *Fasano* and the President's Commission all correctly identify the problem of regulatory abuse, only the Commission has identified an acceptable and workable solution.

One final consideration in support of the Commission's recommendations is the now overwhelming empirical evidence that when zoning is out of control, it is a cost borne largely by the housing consumer. The most recent Urban Policy Report states that the cost of excessive regulation is as much as 25% of the final unit price of a home.³⁹ This general observation is borne out by specific studies. Econometric estimation of the cost of growth controls in California reveals that these land use measures accounted for more than 27% of the increase in real housing prices during the period from 1972-1979.⁴⁰ An on-going site demonstration study by the U.S. Department of Housing & Urban Development indicates that by eliminating needless site preparation requirements and density restrictions, the cost of housing units can be consistently delivered for 20 to 30% less.⁴¹ In Boulder, Colorado, housing costs between 1976 and 1979, before and after growth control, rose 25% while the cost of a comparable house in two nearby communities increased only 11%.⁴²

Assuming that the Commission's recommendations are accepted as sound, the next, and perhaps most important, step is to decide upon a means of implementation. The Commission suggests three approaches.

38. See generally Krasnowiecki, *Abolish Zoning*, 31 SYRACUSE L. REV. 719 (1980); Rose, *Planning and Dealing: Piecemeal Land Control as Problem of Local Legitimacy*, 71 CAL. L. REV. 839 (1983).

39. U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, THE PRESIDENT'S NATIONAL URBAN POLICY REPORT 64 (1984).

40. Mercer and Morgan, *An Estimate of Residential Growth Controls' Impact on Housing Prices*, reprinted in *RESOLVING THE HOUSING CRISIS* 189 (M.B. Johnson ed. 1982).

41. U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, Office of Policy Development and Research, case study of Lincoln, Nebraska, affordable housing demonstration (October 1982) indicating that among other things land development costs were reduced by 25%. Under its "Joint Venture for Affordable Housing," the Department of Housing and Urban Development has produced a number of publications including a user bibliography on the subject.

42. NATIONAL ASSOCIATION OF HOME BUILDERS, *THE DANISH PLAN RETROSPECT: A LOOK AT GROWTH MANAGEMENT ISSUES IN BOULDER, COLORADO* (1981).

Optimally, states will respond to the the challenge by incorporating the vital and pressing governmental interest standard into state zoning enabling acts.⁴³ Second, if states fail to act, the Commission urges localities to employ the standard in local ordinances.⁴⁴ Finally, as noted earlier, the Commission also recommends that the Attorney General consider utilizing the standard in appropriate litigation in order to have it judicially sanctioned as constitutional doctrine.⁴⁵

Clearly, the first alternative, state enactment, is preferable. Not only is it more expeditious than the piecemeal local approach, but it is also more cognizant of the proper roles of the legislature and the judiciary. Although Supreme Court recognition of the proper limits of the police power would be welcome, strong traditions of federalism suggest that individual states should give content to the exact meaning of the vital and pressing governmental interest standard. A number of the Commissioners stated exactly this view.⁴⁶

Of course, favoring state enactment does not mean that those concerned with the affordable housing crisis should not help the states in drafting legislation. To provide some assistance in this area, a model statute representing this draftsman's attempt to have the vital and pressing governmental interest standard enacted into law follows. In brief, the statute seeks:

1. To expressly limit land use authority to "the enactment of regulations which promote a vital and pressing governmental interest." The express statement is meant as a substitute for the vague, and often undefinable, "general welfare" standard that presently exists in most state enabling acts.
2. To define vital and pressing governmental interests as dealing primarily with collective public goods and infrastructure, and not primarily the design or location of private improvements. Thus, the statute would allow local governments to continue regulating and providing for the availability of sanitary sewer, water, street, utility and other public infrastructure, but they could not impose site design requirements with only an aesthetic justification.

The standard proposed in the model statute also allows for "the segregation or exclusion of noxious, nuisance-like or subnormal uses . . .

43. PRESIDENT'S COMM'N, *supra* note 1, at 200.

44. *Id.*

45. *Id.* at 201.

46. *Id.* at 202.

which create a substantial and unreasonable risk of harm to the person or property of others.” As Professor Siegan’s classic study of the nonzoned City of Houston reveals, most of this segregation will occur quite naturally pursuant to market choice.⁴⁷ The marginal cases which do not exhibit segregation will be covered by this provision. Although there may be disagreement as to what is noxious or nuisance-like, there is considerable common law in the nuisance area to provide guidance. Those dissatisfied with the vagaries of common law nuisance may wish to expressly define a standard of normalcy in terms of existing development within the community.⁴⁸ In fact, the model statute does just that.

A few matters expressly are set out as not being in furtherance of a vital and pressing governmental interest. These include highly restrictive and generalized growth controls, the placement of costs attributable to the community at large upon a specific landowner, aesthetic regulation, and insupportable differentiations between site-built and manufactured housing.⁴⁹

3. To allow landowners and neighbors a reasonably expeditious way to challenge regulations enacted under the model statute.

There is perhaps nothing more unsatisfactory than the current judicial remedies available to landowners harmed by regulatory abuse. The litigation is costly and unlikely to result in any definitive relief. Nevertheless, the late Don Hagman suggested that in taking cases municipalities need to have their attention focused.⁵⁰ Professor Hagman relied upon administrative exhaustion for this purpose. The model statute employs a more informal notice of alleged invalidity to which the local governing body is given a limited statutory period to respond. If the response is unsatisfactory, the landowner may appeal promptly to a hearing examiner and then to the courts.

In accordance with the Commission’s recommendations,⁵¹ the statute affords neighbors within 300 feet of the regulated property the same opportunity to challenge a regulation as the landowner.

47. Siegan, *Non-Zoning in Houston*, 13 J. L. & ECON. 71, 142-43 (1970).

48. Professor Robert Ellickson has elaborated on the importance of distinguishing between above-normal, normal and subnormal uses in pursuit of an efficient land use control system. See Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 728-31 (1973).

49. On reasons why not to discriminate against manufactured housing, see Kmiec, *Manufactured Home Siting*, 6 ZONING & PLAN. L. REP. 105-11, 113-17 (1983).

50. Hagman, *Temporary or Interim Damages Awards in Land Use Control Cases*, 4 ZONING & PLAN. L. REP. 129, 134 (1981).

51. PRESIDENT’S COMM’N, *supra* note 1, at 201.

4. To place the burden of proof or justification on the regulatory body. Again, this approach is in accordance with both the Commission's recommendations and the approach taken in exclusionary zoning cases under present law. Generalizing the requirement not only is more protective of the concept of private property, but also properly places the burden of proof upon the party most likely to have the best information at the least cost.

5. To provide the landowner with monetary compensation for any period of time in which his property is the subject of regulation which does not promote a vital and pressing governmental interest. This is a simple matter of fairness, recognized by Justice Brennan in *San Diego*, and long overdue.

The model statute, of course, is just one proposal. It is anticipated that if states choose to adopt this statute, or something like it, consideration will be given to including within it other specific provisions related to local practice, such as those functions presently carried out by the planning staff or commission in the review of proposed subdivision plats. The actions of any administrative body, however, like its legislative counterpart, always should be expressly limited to promoting a vital and pressing governmental interest. To quote James Metzenbaum, the father of zoning, "This is as it should be."

Proposed Model State Land Use Enabling Statute

SECTION I

Land Use Authority Generally—Vital and Pressing Governmental Interests

In order that cities, counties and other political subdivisions of this state (hereafter collectively referred to as "political subdivisions") shall be well-designed in a manner which secures the general welfare of both existing and prospective residents thereof, such political subdivisions are hereby empowered to enact only such regulations as can be shown by the political subdivisions by a preponderance of evidence to promote one or more of the following vital and pressing governmental interests:

1. The assurance of the availability of adequate sanitary sewer, water, street, utility and other public infrastructure resources;
2. The mitigation or prevention of damage from natural hazards, including fire or flood; or
3. The segregation or exclusion of noxious, nuisance-like, or subnormal uses (by standards of existing development within the political subdivision), or such other uses which

create a substantial and unreasonable risk of harm to the person or property of others.

SECTION II

Land Use Authority—Specific Regulatory Power

To carry out the above vital and pressing governmental interests, political subdivisions may:

1. Plan and build streets, parks, public buildings, schools, storm and sanitary sewers, water mains, and such other facilities of public infrastructure as may be required;
2. Impose development fees, dedication requirements, servitudes, user fees and special assessments as may be necessary to cover the specific and unique fiscal costs of any proposed improvement or development;
3. Regulate and limit the height, area, bulk and use of improvements to be erected hereafter; and
4. Regulate the intensity of use of land and lot areas.

Provided, however, that no such regulation may be adopted which does not serve a vital and pressing governmental interest as defined in Section I, including without limitation, regulations which result in a generalized discouragement of the growth and development of the political subdivision; the placement of costs attributable to the political subdivision at large upon a specific landowner; the promotion of merely aesthetic or other subjective preferences unrelated to health and safety; or the differentiation of site-built and manufactured homes unrelated to health and safety.

SECTION III

Land Use Authority—Challenge by Landowner or Neighbor

The validity of any land use regulation enacted pursuant to this Title may be challenged by the regulated landowner or adjoining neighbor within 300 feet of the regulated property by filing a written notice of challenge with the governing body of the political subdivision. Such notice shall state why the landowner or neighbor believes the regulation either fails to promote a vital and pressing governmental interest as defined in Section I or is contrary to those interests.

Within 30 days of receipt of the notice from a landowner or neighbor, the political subdivision shall respond by either justifying the sufficiency of the regulation under one or more of the specific vital and pressing governmental interests defined in Section I of this Title or by modifying or repealing the regulation.

If after 30 days the political subdivision has not responded or the regulated landowner or neighbor further disputes the validity of the original or modified regulation, the regulation may be appealed to a hearing examiner acceptable to the landowner or

neighbor or both and the political subdivision. The hearing examiner shall conduct a hearing with representatives of the landowner or neighbor or both and the political subdivision and enter a written finding supported by substantial evidence as to whether the challenged regulation promotes a vital and pressing governmental interest.

The decision of the hearing examiner may be appealed to a court of appropriate jurisdiction. In all proceedings, the political subdivision shall bear the burden of proving by a preponderance of the evidence the existence of a vital and pressing governmental interest as defined in Section I and the manner in which such regulation promotes that interest.

In the event that the disputed regulation is partially or totally invalidated by a court of last resort, the landowner shall be compensated by the political subdivision for the full loss of market value suffered by the landowner during the period the invalidated regulation shall have been in effect plus costs.

SECTION IV

Land Use Authority—Effect on Existing Regulation

Any zoning classification or designation of vacant or improved land among agricultural, industrial, commercial, residential, and other uses and purposes, as well as any land use regulation dependent upon such classification or designation, including without limitation, regulations pertaining to height, area, design, bulk and use of land or improvements, yards, or open space, enacted prior to the effective date of this Title shall be advisory only unless re-enacted by the political subdivision after the effective date thereof.

SECTION V

Land Use Authority—Effective Date

This title shall be effective 6 months following the date of its Enactment.