IMPACT OF REGIONAL FACILITIES ON LOCAL VARIANCE DECISIONS: *National Merritt, Inc. v. Weist*

Local governments consider various factors when making zoning decisions,[1] seeking a balance between the general welfare of the community and a landowner's right to use his property as he chooses.[2] Some of these same factors are reviewed when a landowner seeks relief from burdensome zoning ordinances by obtaining a variance.[3] In determining the reasonableness of local zoning ordinances, courts will often consider conditions outside the physical boundaries of the municipality.[4] A tension arises, however, because municipalities would often prefer to exclude unpleasant or burdensome land uses if

1. Zoning regulations are designed to encourage land uses that promote the public health, safety, morals and general welfare of the local community. Factors considered include traffic patterns, schools, and "other public requirements." 1 R. ANDERSON, AMERICAN LAW OF ZONING, §§ 2.22, 2.24 (2d ed. 1976) [hereinafter cited as R. ANDERSON]. *See also* Fox Meadow Estates, Inc. v. Culley, 233 App. Div. 250, 252, 252 N.Y.S. 178, 180, *aff'd mem.*, 261 N.Y. 506, 185 N.E. 714 (1931) (a locality "may adopt plans suitable to its own peculiar location and needs, acting reasonably"); Note, *Regional Development and the Courts*, 16 SYRACUSE L. REV. 600, 608 (1965).

2. Zoning regulations attempt to balance public needs against private burdens. *See, e.g.*, 1 R. ANDERSON, *supra* note 1, at § 5.10. However, "[n]o zoning plan can possibly provide for the general good and at the same time so accommodate the private interest that everyone is satisfied." Shepard v. Village of Skaneateles, 300 N.Y. 115, 118, 89 N.E.2d 619, 620 (1949). *See* note 8 *infra*.

3. To be individually exempted from applicable zoning ordinances the landowner must obtain a variance. This allows him to have a non-conforming use on his land without attacking the actual validity of the zoning ordinance. *See* notes 18-20 and accompanying text *infra*.

4. *See, e.g.*, Berenson v. Town of New Castle, 38 N.Y.2d 102, 110, 341 N.E.2d 236, 242, 378 N.Y.S.2d 672, 681 (1975) ("in enacting a zoning ordinance, consideration must be given to regional needs and requirements"); Levitt v. Incorporated Village of Sands Point, 6 N.Y.2d 269, 272, 160 N.E.2d 501, 502, 189 N.Y.S.2d 212, 214 (1959) (isolated rural character of community considered).

Courts usually consider three extra-territorial factors in determining the validity of a zoning ordiance: external zoning or development, external facilities, and regional needs. Note, *Zoning: Looking Beyond Municipal Borders*, 1965 WASH. U.L.Q. 107, 107-08. *See also* note 34 and accompanying text *infra*.

they can satisfy their citizens' needs by utilizing facilities of neighboring communities.[5] The problem is that, in the modern world of economics, "[t]here is no such thing as a free lunch": a gain acquired by one entity can only be obtained at the cost of another.[6] Recently, in *National Merritt, Inc. v. Weist*,[7] a New York court denied a variance for a more intensive use partly because of the availability of similar facilities nearby. Courts usually consider the municipality's zoning impact on surrounding regions;[8] the *National Merritt* decision represents a trend to consider regional impact on local needs.

In *National Merritt*, plaintiff sought a variance to build a large shopping center on land limited by area restrictions[9] to light retail development[10] benefiting the local residents of Briarcliff Manor.[11] The New York Court of Appeals affirmed the zoning board's denial of plaintiff's variance,[12] noting the board's reliance upon the negative regional impact[13] of the proposed shopping center.[14] The court also

5. The parties affected by this type of zoning decision can be categorized as follows: the landowner, concerned with the uses to which his land may be put; the neighborhood, concerned with maintaining its character; the municipality, concerned with maintaining a balance of different neighborhoods to serve the community as a whole; and the region, a much broader area, concerned with efficient allocation of land uses.

6. B. COMMONER, THE CLOSING CIRCLE 41, 42 (1972).

7. 41 N.Y.2d 438, 361 N.E.2d 1028, 393 N.Y.S.2d 379 (1977).

8. *See* Wulfsohn v. Burden, 241 N.Y. 288, 302-03, 150 N.E. 120, 124 (1925). *See also* Hoffman V. Harris, 17 N.Y.2d 138, 146-47, 216 N.E.2d 326, 331, 269 N.Y.S.2d 119, 125 (1966); Vernon Park Realty, Inc. v. City of Mount Vernon, 307 N.Y. 493, 121 N.E.2d 517, 122 N.Y.S.2d 78 (1954).

9. The zoning ordinance as applied to plaintiff's property allowed a maximum floor area of 15,000 square feet per individual retail establishment, and a maximum length of 180 feet per individual structure. Plaintiff's proposed shopping center would cover 180,500 square feet, comprised mainly of three large retail stores, and would be 965 feet in length. 41 N.Y.2d at 440, 361 N.E.2d at 1030, 393 N.Y.S.2d at 381-82.

10. Plaintiff's 19 3/4-acre parcel was zoned "General Business B-2," the most liberal in the village ordinance. Permissible uses other than retail development included professional or business office, bank, restaurant, motion picture theatre, gasoline station, motor vehicle salesroom, and laundry. *Id.* at 440, 361 N.E.2d at 1030, 393 N.Y.S.2d at 381.

11. The village's policy was to limit retailing services "primarily for the convenience of the inhabitants of the Village and the immediate locality." *Id.*

12. 41 N.Y.2d at 443, 361 N.E.2d at 1032, 393 N.Y.S.2d at 384.

After plaintiff's petition for a variance was denied by the zoning board of appeals, the Supreme Court of Westchester County reversed the board's decision and granted the variance. The Appellate Division of the Supreme Court reversed and dismissed the petition. National Merritt, Inc. v. Weist, 50 App. Div. 2d 817, 376 N.Y.S.2d 571 (1975).

13. "Negative regional impact" in this context refers to the availability of shop-

cited the shopping center's potential adverse impact on the village's residential character and the likelihood of increased traffic congestion and flood control problems.[15]

States generally delegate land use regulation power to local governments[16] who in turn enact zoning ordinances.[17] A landowner may be granted a variance from a burdensome zoning ordinance if he can show that he will not realize a reasonable return from his property as zoned, that the conditions which prevent reasonable use of his land are unique to that land and are not generally present in the neighborhood, and that the variance will not alter the essential character of the zoned locality.[18] Through a variance, a municipality may relieve

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ping center facilities in the surrounding region, making construction of local facilities unnecessary.

14. 41 N.Y.2d at 445, 361 N.E.2d at 1033, 393 N.Y.S.2d at 385.

15. 41 N.Y.2d at 444, 361 N.E.2d at 1033, 393 N.Y.S.2d at 384. *See* note 38 *infra*.

16. 1 R. ANDERSON, *supra* note 1, at § 5.01.

Protection of the health, safety, morals and general welfare of the community through land use regulation has been recognized as a valid exercise of the police power. Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 36 (1964) [hereinafter cited as Sax].

17. Courts grant a presumption of constitutionality to municipal zoning ordinances. *See* City of Ann Arbor v. Northwest Park Constr. Corp., 280 F.2d 212, 223 (6th Cir. 1960); Standard Oil Co. v. City of Tallahassee, 183 F.2d 410, 412 (5th Cir. 1950), *cert. denied*, 340 U.S. 892 (1950); American Nat'l Bank and Trust Co. v. City of Chicago, 35 Ill. App. 3d 22, 25, 341 N.E.2d 31, 33 (1975); Dauernheim, Inc. v. Town of Hempstead, 33 N.Y.2d 468, 473, 310 N.E.2d 516, 519, 354 N.Y.S.2d 909, 914 (1974); Wulfsohn v. Burden, 241 N.Y. 288, 296, 150 N.E. 120, 122 (1925); Benham v. Board of Supervisors, 22 Pa. Commw. Ct. 245, 249, 349 A.2d 484, 487 (1975). *See* 1 R. ANDERSON, *supra* note 1, § 3.09 at 93.

18. Dauernheim, Inc. v. Town of Hempstead, 33 N.Y.2d 468, 473, 310 N.E.2d 516, 518, 354 N.Y.S.2d 909, 913 (1974) (variance denied absent proof of no reasonable return on property restricted to residential use); Williams v. Town of Oyster Bay, 32 N.Y.2d 78, 81, 295 N.E.2d 788, 790, 343 N.Y.S.2d 118, 121-22 (1973) (variance denied absent proof of lack of reasonable return); Comment, *New York Zoning Law—Variance Remedy Revived: The Impact of* Fulling *on N.Y. Zoning Law*, 29 RUTGERS L. REV. 172, 174-75 (1975).

When seeking relief from a zoning ordinance, the landowner has the initial burden of proof to show unreasonable economic injury from the classification. Salamar Builders Corp. v. Tuttle, 29 N.Y.2d 221, 226, 275 N.E.2d 585, 588, 325 N.Y.S.2d 933, 938 (1971); Fulling v. Palumbo, 21 N.Y.2d 30, 33, 233 N.E.2d 272, 274, 286 N.Y.S.2d 249, 252 (1967). It was not disputed in *National Merritt* that plaintiff would suffer severe financial hardship in developing his property as a shopping center under the existing zoning ordinances. 41 N.Y.2d at 440, 361 N.E.2d at 1030, 393 N.Y.S.2d at 382.

When a hardship is self-created or self-imposed, the hardship by itself is not enough to entitle the landowner to a variance. *See* Overhill Bldg. Co. v. Delany, 28

a landowner of undue hardships[19] and authorize a different use of the property, yet still preserve the integrity of the zoning scheme for other property.[20]

Every zoning decision must weigh the needs of the various parties

N.Y.2d 449, 455-56, 271 N.E.2d 537, 540, 322 N.Y.S.2d 696, 700 (1971). The New York Court of Appeals recently took a more liberal view toward self-imposed hardships. *Compare* National Merritt, Inc. v. Weist, 41 N.Y.2d 438, 442, 361 N.E.2d 1028, 1032, 393 N.Y.S.2d 379, 383 (1977) ("the fact that the hardship is self-created does not foreclose board approval of an area variance") *and* Conley v. Town of Brookhaven, 40 N.Y.2d 309, 314, 353 N.E.2d 594, 597, 386 N.Y.S.2d 681, 683 (1976) (area variance granted when hardship was self-imposed) *with* 113 Hillside Ave. Corp. v. Zaino, 27 N.Y.2d 258, 261, 265 N.E.2d 733, 734, 317 N.Y.S.2d 305, 307 (1970) (denial of a variance upheld where hardship self-created or self-imposed) *and* Hoffman v. Harris, 17 N.Y.2d 138, 143, 216 N.E.2d 326, 329, 269 N.Y.S.2d 119, 122 (1966) (denial of variance where building converted into rental apartments long after adoption of zoning ordinance prohibiting such rental). The *National Merritt* court ruled that plaintiff knew of the zoning ordinance when he purchased the land, and consequently could not claim relief from his self-imposed hardship. 41 N.Y.2d at 444-45, 361 N.E.2d at 1032-33, 393 N.Y.S.2d at 384.

Once the landowner proves unreasonable economic injury, the burden of proof shifts to the municipality to show that the regulation was promulgated to promote the health, safety, morals or general welfare of the community. National Merritt, Inc. v. Weist, 41 N.Y.2d 438, 443, 361 N.E.2d 1028, 1032, 393 N.Y.S.2d 379, 383 (1977); Salamar Builders Corp. v. Tuttle, 29 N.Y.2d 221, 226, 275 N.E.2d 585, 588, 325 N.Y.S.2d 933, 937-38 (1971); Overhill Bldg. Co. v. Delany, 28 N.Y.2d 449, 454, 271 N.E.2d 537, 539, 322 N.Y.S.2d 696, 699-700 (1971). If the municipality fails to meet its burden of proof, the landowner may be granted the variance requested. *See* Fulling v. Palumbo, 21 N.Y.2d 30, 33, 233 N.E.2d 272, 274, 286 N.Y.S.2d 249, 252 (1967) (variance could not be denied after landowner showed significant financial hardship, until village put on proof of public benefit to be derived from the regulation).

Following the municipality's proof that the ordinance is a proper exercise of the police power, the landowner must show there is no reasonable use or return left to his property if the zoning ordinance is enforced. *See* National Merritt, Inc. v. Weist, 41 N.Y.2d 438, 442, 361 N.E.2d 1028, 1032, 393 N.Y.S.2d 379, 383 (1977); Williams v. Town of Oyster Bay, 32 N.Y.2d 78, 82, 295 N.E.2d 788, 791, 343 N.Y.S.2d 118, 122 (1973); Forrest v. Evershed, 7 N.Y.2d 256, 262, 164 N.E.2d 841, 844, 196 N.Y.S.2d 958, 962 (1959). *See generally* Sax, note 16 *supra*.

19. Undue hardship arises when a landowner cannot reasonably use his land, and therefore may be a basis for granting a variance. *See* Jayne Estates, Inc. v. Raynor, 22 N.Y.2d 417, 239 N.E.2d 713, 293 N.Y.S.2d 75 (1968) ("unnecessary hardship" established as basis for granting variance); Otto v. Steinhilber, 282 N.Y. 71, 24 N.E.2d 851 (1939) (no variance granted where no showing of "unnecessary hardship"). *See generally* 3 R. ANDERSON, *supra* note 1, at §§ 18.16-.45.

20. 2 R. ANDERSON, *supra* note 1, at § 18.02. This important characteristic of variances is described as "relief value." D. HAGMAN, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW § 106 (1971). *Cf.* Arverne Bay Constr. Co. v. Thatcher, 278 N.Y. 222, 15 N.E.2d 587 (1938) (plaintiff proved no reasonable use under zoning ordinance, but since all property in area was similarly situated, court denied variance and invalidated ordinance).

affected[21] by balancing the individual landowner's needs against the town's overall land use objectives[22] and the impact on the local

21. There is a continuum along which each case must fall. At one end the zoning ordinance is valid as to all property to which it applies, and at the other end the ordinance creates an unconstitutional taking of private property without compensation. A variance is needed where the ordinance reasonably applies as to some, but not all, of the property it regulates. If a landowner is at the end of the continuum where his burden greatly exceeds the social value of the ordinance, he may sue for inverse condemnation, bring a declaratory judgment action to declare the ordinance invalid, or request a variance. The particular facts of each case will determine whether the landowner is entitled to relief. *See, e.g.*, HFH, Ltd. v. Superior Court, 15 Cal. 3d 508, 542 P.2d 237, 125 Cal. Rptr. 365 (1975), *cert. denied*, 425 U.S. 904 (1976) (diminution in market value from $400,000 to $75,000 not sufficient showing of hardship to obtain relief); McGowan v. Cohalan, 41 N.Y.2d 434, 361 N.E.2d 1025, 393 N.Y.S.2d 376 (1977) (diminution in value not sufficient by itself to show improper exercise of police power, given reasonable goal of maintaining neighborhood character); Grimpel Assocs. v. Cohalan, 41 N.Y.2d 431, 361 N.E.2d 1022, 393 N.Y.S.2d 373 (1977) (rezoning from business to residential use held invalid since no reasonable use for property remained); Conley v. Town of Brookhaven, 40 N.Y.2d 309, 315, 353 N.E.2d 594, 598, 386 N.Y.S.2d 681, 684 (1976) (financial hardship is a factor to be considered, though not determinative by itself); Stevens v. Town of Huntington, 20 N.Y.2d 352, 357, 229 N.E.2d 591, 594, 283 N.Y.S.2d 16, 19 (1967) (diminution in value does not automatically render restrictive zoning unconstitutional, but a significant loss in value may be an indication of lack of reasonable return); Crossroads Recreation, Inc. v. Broz, 4 N.Y.2d 39, 46, 149 N.E.2d 65, 68, 172 N.Y.S.2d 129, 133-34 (1958) ("[T]he only pertinent inquiry is whether the present allowed use is yielding a *reasonable* return. That it may not be the *most* profitable use is immaterial."). *But see* DuPage County v. Halkier, 1 Ill. 2d 491, 115 N.E.2d 635 (1953) (large reduction in property value sufficient to invalidate zoning ordinance); Phipps v. City of Chicago, 339 Ill. 315, 171 N.E. 289 (1930) (rezoning to residential use held invalid because "best use" was for commercial and industrial purposes).

22. Land use objectives are often expressed through a comprehensive plan, defined as "a general plan to control and direct the use and development of property in a municipality or a large part thereof by dividing it into districts according to the present and potential use of the properties." Miller v. Town Planning Comm'n, 142 Conn. 265, 269, 113 A.2d 504, 505-06 (1955). A municipality may use a comprehensive plan to develop a "balanced, cohesive community," and efficiently allocate available land. Berenson, v. Town of New Castle, 38 N.Y.2d 102, 109, 341 N.E.2d 236, 241, 378 N.Y.S.2d 672, 680 (1975).

The STANDARD STATE ZONING ENABLING ACT § 3 (U.S. Dep't of Commerce rev. ed. 1926), in effect in 47 states with various modifications, provides that zoning should be accomplished "in accordance with a comprehensive plan." However, the STANDARD CITY PLANNING ENABLING ACT § 2 (U.S. Dep't of Commerce 1928) made local planning optional. Construing the two Acts in conjunction with each other, the State Act has been interpreted to mean that zoning need only be based on a comprehensive review of local conditions, rather than a comprehensive *plan* per se. Mandelker, *The Role of the Local Comprehensive Plan in Land Use Regulation*, 74 MICH. L. REV. 899, 901-02 (1976). The *National Merritt* court illustrates this comprehensive review by considering residential neighborhood characteristics, flood and

neighborhood.[23] Although courts frequently contemplate the impact of local zoning regulation on areas outside the community,[24] few cases consider the question of whether facilities outside of the municipality should influence local land use decisions.

A New Jersey court addressed this problem in *Duffcon Concrete Products, Inc. v. Borough of Cresskill*,[25] sustaining a municipality's exclusion of heavy industry on the basis that such industrial uses may be relegated to the neighboring region.[26] However, the court implied that the town should also allow ample business uses to satisfy its residents' needs.[27] Similarly, the Sixth Circuit, in *Valley View Village, Inc. v. Proffett*,[28] upheld an ordinance restricting the entire village to residential use. The court sustained preservation of the village's resi-

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drainage problems, and traffic control. 41 N.Y.2d at 445, 361 N.E.2d at 1031, 393 N.Y.S.2d at 385.

In determining whether the statutory requirement for a comprehensive review of local conditions has been met, courts will consider whether the community's land use problems have been fully weighed. Udell v. Haas, 21 N.Y.2d 463, 470, 235 N.E.2d 897, 900-01, 288 N.Y.S.2d 888, 894 (1968). *See* Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926).

23. The main limitation on the municipality's zoning power is that it may not restrict the use of the land so as to amount to an unconstitutional taking without compensation. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922). Unfortunately, "[t]here is no set formula to determine where regulation ends and taking begins." Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1962). *See* notes 2, 8, and 17 and accompanying text *supra*.

24. *See* note 4 and accompanying text *supra*; note 34 and accompanying text *infra*.

25. 1 N.J. 509, 64 A.2d 347 (1949).

26. The court found it necessary to look beyond conditions prevailing within the municipality, to the "nature of the entire region" and the most advantageous use for the land in that region. The court noted that the "effective development of a region should not and cannot be made to depend upon the adventitious location of municipal boundaries." *Id.* at 513, 64 A.2d at 349-50.

27. The court was vague as to the exact standard to be applied to determine which uses were required to be permitted:

> Where there exists a small residential municipality the physical location and circumstances of which are such that it is best suited for continuing residential development and, separated therefrom but in the same geographical region, there is present a concentration of industry in an area peculiarly adapted to industrial development and sufficiently large to accommodate such development for years to come, the power of the municipality to restrict its territory to residential purposes with ample provision for such small businesses, trades and light industries as are needed to serve the residents, is clear.

Id. at 515, 64 A.2d at 351.

28. 221 F.2d 412 (6th Cir. 1955).

dential character as a valid zoning goal, "so long as the business and industrial needs of [the village's] inhabitants are supplied by other accessible areas in the community at large."[29] Other jurisdictions subsequently upheld citywide single-use zoning where residents' needs could be satisfied by nearby extra-municipal facilities.[30]

In a Missouri case, *McDermott v. Village of Calverton Park*,[31] an entire village was zoned for single-family dwelling use. Plaintiff desired to build a shopping center, but the court found that nearby commercial facilities adequately met the village's needs. In upholding the single-family zoning ordinance, the court noted that multiple-use zoning would benefit only the plaintiff and would thus ultimately reach beyond the village's police power authority.[32]

Prior to *National Merritt*, the New York court considered the problem of regional impact on local needs in *Berenson v. Town of New Castle*.[33] The New York Court of Appeals refused to grant summary judgment on the question of whether a town could validly exclude multiple-family residences. The court emphasized that "consideration must be given to regional needs and requirements,"[34] although it

29. *Id.* at 418. The court noted that Valley View was "on the periphery of a large metropolitan center," and was not a "self-contained community," but only a part of "the economic and social whole." *Id.*

30. *See, e.g.*, Cadoux v. Planning and Zoning Comm'n, 162 Conn. 425, 294 A.2d 582, *cert. denied*, 408 U.S. 924 (1972) (zoning ordinance which zoned entire town residential upheld); Connor v. Township of Chanhassen, 249 Minn. 205, 211, 81 N.W.2d 789, 795 (1957) ("a municipality on the periphery of a large metropolitan center may constitutionally pass a one-use ordinance in order to retain its residential character"); Village of Old Westbury v. Foster, 193 Misc. 47, 48, 83 N.Y.S.2d 148, 150 (1948) (village authorities may keep the village free from business, as long as not unreasonable or arbitrary). *See also* Guaclides v. Borough of Englewood Cliffs, 11 N.J. Super. 405, 78 A.2d 435 (1951) (rezoning of most of borough to single-family residential upheld).

31. 454 S.W.2d 577 (Mo. 1970).

32. *Id.* at 582.

Similarly, an entire Connecticut town was zoned residential. Plaintiff's request for establishment of a town shopping center district was denied because adequate facilities to fulfill the needs of the town's citizens already existed in a neighboring community. Cadoux v. Planning and Zoning Comm'n, 162 Conn. 425, 294 A.2d 582, *cert. denied*, 408 U.S. 924 (1972).

33. 38 N.Y.2d 102, 341 N.E.2d 236, 378 N.Y.S.2d 672 (1975).

34. *Id.* at 110-11, 341 N.E.2d at 242, 378 N.Y.S.2d at 681. The court's rationale in *Berenson* indicates the general nature of the New York law concerning local zoning's regional effect before *National Merritt*.

> There must be a balancing of the local desire to maintain the *status quo* [sic] within the community and the greater public interest that regional needs be met.

noted that a totally undeveloped community might not be able to entirely prohibit construction of multiple-family residences.[35] The Court of Appeals remanded the case to determine whether the town had adequately considered regional needs in promulgating its single-use ordinance.[36]

Although Briarcliff Manor did not adopt single-use zoning, its zoning ordinance similarly excluded certain land uses.[37] The *National Merritt* court considered the existence of large shopping centers in nearby communities[38] in reaching its conclusion that a variance was not warranted, even though this effectuated exclusion of such facili-

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> Although we are aware of the traditional view that zoning acts only upon the property lying within the zoning board's territorial limits, it must be recognized that zoning often has a substantial impact beyond the boundaries of the municipality. Thus, the court . . . should also consider the effect of the ordinance on the neighboring communities. . . . [A] town need not permit a use solely for the sake of the people of the region if regional needs are presently provided for in an adequate manner.

Id. See also Horizon Adirondack Corp. v. State, 88 Misc. 2d 619, 388 N.Y.S.2d 235 (1976) (the burden of the zoning regulation upon local owners must be balanced against the broader interests of the region and the state).

35. 38 N.Y.2d at 111, 341 N.E.2d at 242, 378 N.Y.S.2d at 681. The court cited Dowsey v. Village of Kensington, 257 N.Y.221, 177 N.E.427 (1931), in which zoning restrictions were deemed "patently unreasonable" because "framed for the purpose of excluding [apartment] buildings from the village in order to preserve it as a secluded quiet community." *Id.* at 229-30, 177 N.E. at 430.

36. 38 N.Y.2d at 110, 341 N.E.2d at 242, 378 N.Y.S.2d at 681. A recent Supreme Court case held that a small village could restrict its entire area to use as one-family dwellings. Village of Belle Terre v. Boraas, 416 U.S. 1 (1974). The *Berenson* court distinguished the town of New Castle from the village of Belle Terre on the grounds that New Castle had a population of over 17,000 while Belle Terre had only 700. 38 N.Y.2d at 110, 341 N.E.2d at 242, 378 N.Y.S.2d at 681.

37. 41 N.Y.2d at 440, 361 N.E.2d at 1030, 393 N.Y.S.2d at 381.

38. 41 N.Y.2d at 445, 361 N.E.2d at 1033, 393 N.Y.S.2d at 385.

The court noted that the proposed shopping center would have an adverse impact on the residential character of the neighborhood. 41 N.Y.2d at 444, 361 N.E.2d at 1033, 393 N.Y.S.2d at 384. However, the land admittedly was to be put to *some* commercial or industrial use. *See* note 10 *supra.*

Although the court considered the problem of traffic congestion, traffic problems alone will not support a decision to deny a variance. *See* Stevens v. Town of Huntington, 20 N.Y.2d 352, 356, 229 N.E.2d 591, 594, 283 N.Y.S.2d 16, 19 (1967) *quoting* Vernon Park Realty v. City of Mt. Vernon, 307 N.Y.493, 498, 121 N.E.2d 517, 519 (1954) (the solution to acute traffic problems "does not lie in placing an undue and uncompensated burden" on the individual landowner "in the guise of regulation"). The case cited by the *National Merritt* court merely supports the view that traffic congestion may be a proper consideration in a variance case. *See* Overhill Bldg. Co. v. Delany, 28 N.Y.2d 449, 457, 271 N.E.2d 537, 541, 322 N.Y.S.2d 696, 702 (1971).

ties from the village. The court concluded that, since two large regional shopping centers existed in neighboring communities, the village could justifiably prevent random proliferation of shopping areas to efficiently allocate its available land resources "in light of both local and regional needs."[39]

While *Berenson* laid down a moderate inclusionary rule,[40] *National Merritt* gives a municipality more power to exclude certain land uses when regional demand for the facilities is absent. By recognizing the validity of such regional review, *National Merritt* will thus allow a municipality wider latitude in denying zoning variances for developments that could adversely affect the town's character.

Although there was an efficient allocation of land uses in *National Merritt*, the implications of the decision are apparent: the acceptance of some exclusionary zoning creates a danger that municipalities will use this decision to maintain neighborhood virtues while depending on other communities' commercial facilities.[41] When municipalities exclude "undesirable" commercial uses[42] and force their neighbors to carry the burden, an inequitable allocation of land uses may result.

The need for efficient use of our dwindling land resources compels implementation of regional planning and regulation.[43] Some states have established extra-municipal agencies to regulate land uses.[44]

39. 41 N.Y.2d at 445, 361 N.E.2d at 1033, 393 N.Y.S.2d at 385.

40. *Berenson's* moderate inclusionary rule required that the town adequately provide for multiple-family residence. *See* notes 33-35 and accompanying text *supra*.

41. If municipalities take advantage of this power, inefficient and disorderly allocation of land uses will result. "To some extent then, the regionalism doctrine . . . might be branded localism—not an evaluation of the interests of the broader region as a whole. It might even be regarded as an 'isolationist' view used in the guise of 'regionalism.'" Haar, *Regionalism and Realism in Land-Use Planning*, 105 U. PA. L. REV. 513, 526 (1957). *See* text accompanying notes 42 & 43 *infra*. *See also* Mandelker, *The Role of the Local Comprehensive Plan in Land Use Regulation*, 74 MICH. L. REV. 899, 915-20 (1976); Note, *Regional Development and the Courts*, 16 SYRACUSE L. REV. 600, 606-11 (1965).

42. These unwanted uses include large shopping centers and industrial uses. The specific uses undesirable to any particular community will depend upon the existing uses accepted by the community.

43. The federal government encourages regional planning by making it a prerequisite to receiving certain federal funds. This often leads, however, to ad hoc creation of regional planning agencies, underscoring the need for comprehensive legislation establishing regional planning. Mandelker, *The Role of the Local Comprehensive Plan in Land Use Regulation*, 74 MICH. L. REV. 899, 916 (1976).

44. Hawaii divided the state into four zones (urban, rural, agricultural, and conservation), and placed statewide power in its State Land Use Commission. HAW. REV. STAT. § 205 (1976 & Supp. 1978). Counties may designate permitted uses within

Until regional planning for land use regulation gains more widespread acceptance, uncertainty will continue in zoning decisions.[45] Further effectuation of regional planning could help to relieve the courts from being forced to produce quasi-legislative zoning decisions. Only then will the competing interests of neighboring municipalities be resolved satisfactorily.[46]

Ruth M. Zimmerman

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the zones, subject to the commission's general regulation. However, the counties, rather than the commission, are responsible for enforcement.

Wisconsin adopted a Navigable Waters Protection Law to maintain the quality of the state's waterways and shorelands. WIS. STAT. ANN. § 144.26 (1974 & Supp. 1978). The Law is administered by the Department of Natural Resources, which may supervise counties' use of the shoreland. *See* Just v. Marinette County, 56 Wis.2d 7, 201 N.W.2d 761 (1972).

Massachusetts' Zoning Appeals Act established a Housing Appeals Committee within the Department of Community Affairs. It specifically provides for consideration by local zoning boards of regional housing needs and traditional local planning standards. MASS. GEN. LAWS ANN. ch. 40B, §§ 20-23 (1973 & Supp. 1978). *See* Board of Appeals v. Housing Appeals Comm., 363 Mass. 339, 294 N.E.2d 393 (1973).

For a discussion of Florida's Environmental Land and Water Management Act of 1972, FLA. STAT. §§ 380.012-.10 (1974 & Supp. 1978), which creates state guidelines and a state land planning agency, see Finnell, *Saving Paradise: The Florida Environmental Land and Water Management Act of 1972*, 1973 URBAN L. ANN. 103.

Other examples of state planning by legislation include California's Coastal Act of 1976 and the Vermont Environmental Act. CAL. PUB. RES. CODE §§ 30000-30010 (Deering Supp. 1978); VT. STAT. ANN. tit. 3 §§ 2801-2878 (1972).

See also the ALI MODEL LAND DEVELOPMENT CODE (adopted May 21, 1975), which proposed the creation of a State Land Planning Agency with authority to exercise powers granted by the Code. The Agency would not only consider the benefits and detriments within the local jurisdiction, "but shall consider all relevant and material evidence offered to show the impact of the development on surrounding areas. . . . [T]he Agency may consider, with other relevant factors, whether or not the absence of such development denies adequate facilities to the surrounding areas." *Id.* at § 7-402. *See generally* F. BOSSELMAN & D. CALLIES, THE QUIET REVOLUTION IN LAND USE CONTROL (1971), in which the authors appropriately stated that

> [t]his country is in the midst of a revolution in the way we regulate the use of our land. . . . The ancient regime being overthrown is the feudal system under which the entire pattern of land development has been controlled by thousands of individual local governments. . . . The tools of the revolution are new laws taking a wide variety of forms but each sharing a common theme—the need to provide some degree of state or regional participation in the major decisions that affect the use of our increasingly limited supply of land.

Id. at 1.

45. The difficulty has been noted that while zoning problems are regional in scope, zoning regulations are determined locally. *See* 5 N. WILLIAMS, AMERICAN LAND PLANNING LAW §§ 160.01 & 163.22 (1975).

46. "State-wide or regional control of planning would insure that interests

broader than that of the municipality underlie various land use policies." Golden v. Planning Bd., 30 N.Y.2d 359, 376, 285 N.E.2d 291, 300, 334 N.Y.S.2d 138, 150 (1972).