BEYOND THE CITY LIMITS:

REGIONAL EQUITY AS AN EMERGING ISSUE*

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During the 1960's and the 1970's, the singleminded pursuit of growth for its own sake was drawn into question in many communities across the country. Countering a two-hundred year history of equating growth directly with progress, communities began to address the implications of unrestrained growth on the protection of natural resources, the ability of local governments to meet demands for public services while preserving fiscal stability, and the maintenance or enhancement of the quality of life for community residents. Increasingly, managed growth—affirmatively guiding development

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in an integrated and systematic manner to achieve various community objectives—became a basic approach to local planning and decisionmaking.[1]

Simultaneously, there was a developing awareness that many growth problems transcend political boundaries and, thus, exceed the capacity of any single unit of government to develop effective solutions. The regional council, formed to deal with multijurisdictional problems and issues, evolved as one solution to fill this institutional gap. Defined as a substate public organization encompassing a multijurisdictional regional community that includes local government representatives on its governing body, the regional council concept has spread rapidly across the country since the early 1960's. At the start of 1978, there were 655 regional councils in the United States, located in forty-nine of the fifty states.[2]

While both local growth management and regional councils attempt to mitigate the impacts of unrestrained growth, their courses have not yet converged. Local growth management programs often ignore the regional effects of their actions, and regional councils often duck the volatile issues involved in guiding growth. It is, however, increasingly clear that the two efforts must ultimately be linked to achieve effective development of the economic, environmental, and human resources of our urban areas.

Our thesis is that this linkage depends upon definition and achievement of *regional equity*: fairness in the distribution of, and opportunities for access to, developed urban land. Along with environmental protection and fiscal efficiency, regional equity is a necessary element of an effective and responsible regional growth policy. One of the genuine new ideas in recent times, the concept of regional equity is being incorporated into federal and state policy statements, court decisions, and progressive planning practices. We will use illustrations from each of these areas to outline a working definition of regional equity, and will show how it is being pursued.

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1. For a comprehensive treatment of growth management, see D. GODSCHALK, D. BROWER, L. MCBENNETT & B. VESTAL, CONSTITUTIONAL ISSUES OF GROWTH MANAGEMENT (1977) [hereinafter cited as CONSTITUTIONAL ISSUES].

2. NATIONAL ASSOCIATION OF REGIONAL COUNCILS, DIRECTORY '78 (1977). There are no regional councils in Hawaii, perhaps partly due to that state's unique state-wide planning efforts. *See* HAWAII REV. STAT. § 205-1 (Supp. 1974).

I. FEDERAL AND STATE POLICY & REGIONAL EQUITY

In recent years federal policy, as reflected in legislative and administrative requirements, has been the primary catalyst for institutionalizing a regional perspective. In early 1964, only five federal programs had planning requirements for an area-wide perspective.[3] As of 1972, there were at least twenty-four such programs, representing approximately $8.6 billion in federal aid expenditures.[4] By 1976 there were thirty-two federal programs supporting substate regional activities.[5]

These programs reflect federal recognition that effective management of urban facilities and natural resources must transcend political boundaries. For example, HUD's planning program[6] under section 701 of the Housing Act of 1954[7] now requires areawide comprehensive planning that includes, at a minimum, adopted and certifiable housing and land use elements.[8] Another example is section 208 of the Environmental Protection Agency's Water Quality Management Planning Program,[9] which implements the objective of

3. *See, e.g.*, HUD Section 701 Areawide Comprehensive Planning Grants, 40 U.S.C. § 461 (Supp. V 1975); HUD Open Space Grants, 42 U.S.C. § 3535(d) (1970); Urban Mass Transportation Planning Grants, 49 U.S.C. § 1604 (1970).

4. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, REGIONAL DECISION MAKING: NEW STRATEGIES FOR SUBSTATE DISTRICTS 168-70 (1974) [hereinafter cited as REGIONAL DECISION MAKING]. For examples, see notes 9-14 and 16-20 *infra*.

5. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, REGIONALISM REVISITED: RECENT AREAWIDE AND LOCAL RESPONSES 11-19 (1977) [hereinafter cited as REGIONALISM REVISITED]. *E.g.*, Section 8 Housing, 42 U.S.C. § 1437(f) (Supp. V 1975); Community Development Block Grants, 42 U.S.C. § 5303 (Supp. V 1975); Coastal Zone Management Program, 16 U.S.C. §§ 1451-1463 (Supp. V 1975). *See also* note 3 *supra* and notes 9-14, 16-20 *infra*.

6. 24 C.F.R. § 600 (1977).

7. 40 U.S.C. § 461 (Supp. V 1975). 1974 amendments to the Act sought spatial deconcentration of lower income groups. The Act requires localities to plan for the housing needs of lower income persons "expected to reside in the community." 42 U.S.C. § 5304(a)(4)(A) (Supp. V 1975). Regulations governing this subject appear at 24 C.F.R. § 891.502 (1976). A recent case relied on this provision to challenge the award of HUD grants to suburbs that failed to set realistic housing goals. City of Hartford v. Hills, 408 F. Supp. 889 (D. Conn. 1976).

The Fair Housing Act (Title VIII of the Civil Rights Act) states a national policy of providing fair housing throughout the United States. 42 U.S.C. § 3601 (1970). One exclusionary zoning case has been decided on the basis of this Act. United States v. City of Black Jack, 508 F.2d 1179 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975) (Court held Black Jack's actions were racially discriminatory).

8. 40 U.S.C. § 461 (Supp. V 1975).

9. 40 C.F.R. § 131 (1976).

the Water Pollution Control Act Amendments of 1972[10] to restore the chemical, physical, and biological integrity of the nation's water by 1985 through facilitating the development and implementation of areawide waste treatment management plans.[11] Additional areawide programs address urban development,[12] rural development,[13] economic development,[14] and the provision of public services and facilities, including open space,[15] transportation,[16] solid waste,[17] health,[18] manpower,[19] and law enforcement.[20]

The federal government has served as the pre-eminent force urging local governments to adopt a regional perspective. Yet an analysis of these federal programs, conducted by the Advisory Commission on Intergovernmental Relations (ACIR) in 1971, as part of a comprehensive study of the emergence of regionalism,[21] indicated that the significant ". . . overlap, inconsistencies, and absence of concerted purpose and policy among the two dozen federal programs with an areawide thrust"[22] often hindered the development of a comprehensive regional perspective and inhibited the major institutional reform

10. 33 U.S.C. § 1251 (Supp. V 1975).

11. *Id.* § 1251(a).

12. Title I of the Housing and Community Development Act of 1974, 42 U.S.C. § 5304(b) (Supp. V 1975); 24 C.F.R. §§ 570.404, 891.501 (1977) (Areawide Housing Opportunity Plans).

13. *E.g.*, Agricultural Act of 1970, 42 U.S.C. § 3122(c) (1970); Consolidated Farmers Home Administration Act of 1961, 7 U.S.C. § 1926(a)(11) (1970).

14. Public Works and Development Act of 1965, 42 U.S.C. § 3121 (1970); 13 C.F.R. § 305.1 (1977).

15. Housing and Urban Development Act, § 7(d), 42 U.S.C. § 1500(d) (1970); 24 C.F.R. §§ 540-541 (1977).

16. Projects of the Federal Highway Administration and the Urban Mass Transportation Administration must satisfy the "3-C" planning process, which is a "continuing, cooperative, and comprehensive transportation process that results in plans and programs consistent with the comprehensively planned development of the [appropriate] urbanized area[s]." 23 C.F.R. § 450.100 (1976). The "3-C" regulations were issued to comply with the Federal Highway Act, 23 U.S.C. § 134 (1970) and the Urban Mass Transportation Act, 49 U.S.C. §§ 1602(a)(2), 1603(a), 1604(g)(1) (Supp. V 1975).

17. Resource Recovery Act of 1970, 42 U.S.C. § 3254a(b) (1970).

18. Comprehensive Health Planning and Assistance Act, 42 U.S.C. § 246(b) (1970); 42 C.F.R. § 51.4(c)(6) (1976); Public Health Service Act, 42 U.S.C. §§ 3001-3003 (1970).

19. Manpower Act, 42 U.S.C. § 2610a (1970); Comprehensive Employment and Training Act, 29 U.S.C. § 811 (1970).

20. Omnibus Crime Control Act of 1970, 42 U.S.C. §§ 3722-3727, 3732-3737 (1970).

21. REGIONAL DECISION MAKING, *supra* note 3, at i.

22. *Id.* at 347.

necessary to ensure that a single organization could serve as an effective and responsible regional decisionmaker. ACIR's three part strategy—strengthened regional councils, local government modernization and reorganization, and functional assignment of responsibilities between the two levels—was designed to overcome the confusion and inconsistencies that characterized regionalism through its early years.[23]

In a 1972 survey of mayors and county executives, ACIR found that political traditions opposing metropolitan/regional government were the most significant barriers to expanded regional action on local and areawide problems.[24] In response, ACIR advocated a federated form of regional institution[25] in which functions[26] are assigned on the basis of economic efficiency, equity, political accountability and administrative effectiveness.[27]

Economic Efficiency, according to ACIR,[28] dictates that functions should be assigned to jurisdictions that a) are large enough to realize economies of scale and small enough not to incur diseconomies of scale; b) are willing to provide alternative service offerings (*e.g.*, sewer, water, or school facilities, police protection, health care programs) at a price range and level of effectiveness acceptable to local citizenry; and c) adopt pricing policies for their functions when appropriate.

Equity[29] suggests that functions should be assigned to jurisdictions that a) are large enough to absorb all costs and benefits of a function or are willing to compensate other jurisdictions for the service costs

23. REGIONALISM REVISITED, *supra* note 4, at 4-5.

24. REGIONAL DECISION MAKING, *supra* note 3, at 113-38.

25. Federated systems have a two-tier organization in which the upper level exercises some control over the lower level governments. American federalism is a good illustration: the states yielded certain powers to the union, retaining others.

26. Examples of these functions include the preparation of areawide comprehensive plans and the exercise of review powers over local zoning and planning activities that might affect the region. These functions may be assigned or transferred by local governments to a regional institution which they have created, by the state legislature to a regional council it has created and supports, or by a comprehensive urban county to an organization it has created. REGIONALISM REVISITED, *supra* note 4, at 4.

27. ACIR recommended that these criteria be employed as factors in determining which functions should be transferred or retained, not that some mathematical formula be devised in the process. *See* ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, THE CHALLENGE OF LOCAL GOVERNMENTAL REORGANIZATION 10-14 (1974).

28. *Id.* at 10-11.

29. *Id.* at 11-12.

imposed on or benefits received by them; b) have an adequate fiscal capacity to finance their public service responsibilities in a manner that ensures interpersonal and interjurisdictional equalization; and c) are able to absorb the financial risks involved.

Political Accountability[30] requires that functions be assigned to jurisdictions that a) are controlled by, and accessible and accountable to their residents; and b) maximize the conditions and opportunities for active and productive citizen participation.

Administrative Effectiveness[31] mandates that functions be assigned to jurisdictions that a) are responsible for a sufficient number of functions and can balance competing functional interests; b) encompass a logical geographic area for effective performance of a function; c) explicitly determine the goals and means of discharging assigned public service responsibilities, including periodic reassessment of program goals in light of performance standards; d) are willing to pursue intergovernmental cooperation to reduce conflicts; and e) have adequate legal authority and management capability to perform a function.

ACIR's 1977 *Regionalism Revisited* reiterates the need for stronger regional institutions:

> The ACIR's strengthened regional council strategy clearly relies on the raw materials now at hand at the substate level. But it goes far beyond the status quo, in all but a few regions, in its quest for an effective overarching agency that can deal with the growing demand for decisive decision-making in those programs and policies that necessarily are and should be areawide. As currently constituted, most councils of governments and regional planning bodies have not been equal to the tasks thrust upon them. They have become classic examples of organizations with responsibilities which far surpass their authority to carry them out. The problems which regional bodies are expected to solve typically are those which local jurisdictions, the states and the Federal government have found too difficult to manage, yet the powers to resolve the situations are denied to the region. Thus, past failures at the regional level should have been expected, and future ones surely remain in store for these bodies unless they are given greater authority.[32]

ACIR's organizational model classifies regional councils[33] as agen-

30. *Id.* at 12-14.

31. *Id.* at 14.

32. REGIONALISM REVISITED, *supra* note 4, at 35.

33. *Id.* at 34-37.

cies of local government when a minimum of sixty percent of the governing board is composed of locally elected officials appointed by member governments, although deriving legal status from the state. Although not yet legislatively adopted, ACIR's recommendations have influenced federal policy. This organizational model has been incorporated into revised planning regulations promulgated in the past few years for many of the federal programs having an areawide thrust. Most notable in this regard have been the joint UMTA/FHWA transportation planning regulations[34] and HUD's section 701 and Areawide Housing Opportunity Plan regulations.[35]

Additional impetus has originated with federal planners and legislators. Recently, in an effort to strengthen regional planning and coordination, two new federal proposals have been made. First, HUD is in the process of developing a program to encourage regional growth management planning consistent with those national goals relating to the reversal of negative urban trends. The proposed Regional Strategy Incentive Plan would rely primarily on federal funds as leverage in encouraging local participation and in giving power to regional councils.[36] Under this proposal, HUD would certify those areawide plans that provide housing alternatives for low and moderate income groups, mandate land use patterns consistent with energy conservation measures, try to match jobs with unemployment, share their healthy tax base with neighbors whose tax bases have stagnated, and encourage the use of mass transit.[37] Certified plans would be eligible for larger federal grants and other assistance.[38] Second, the Magnuson-Ashley Bill currently before Congress,[39] would amend the Intergovernmental Cooperation Act of 1968[40] by adding a new areawide planning requirement. The purpose of the amendment is to strengthen areawide planning agencies, to provide consistency among federal requirements placed on areawide agencies, and to encourage efficient and effective management of urban growth and redevelop-

34. 23 C.F.R. § 450 (1976).

35. *See* text accompanying notes 6-8 *supra.*

36. *See* Current Developments, *HUD Nearing Final Stages in Drafting Regional Strategy Incentive Plan*, [1977] 5 HOUS. & DEV. REP. (BNA) 263.

37. *Id.*

38. *Id. See also* Embry, *Embry Proposes Regional Solutions to Urban Problems*, 7 PRACTICING PLANNER 4-6 (1977).

39. The Intergovernmental Coordination Act of 1977, S. 892, 95th Cong., 1st Sess. (1977) (sponsored by Sen. Magnuson and others); H.R. 4406, 95th Cong., 1st Sess. (1977) (sponsored by Rep. Ashley and others). The two bills are identical.

40. 42 U.S.C. § 4201 (1970).

ment.[41]

The proposed Intergovernmental Coordination Act would require that, as a condition for further receipt of federal funds, every areawide agency designated as an A-95 clearinghouse[42] must "prepare, adopt, and update annually a program for the coordinated use of federal areawide planning assistance to develop and implement a unified and comprehensive areawide development plan" within two years from the date of enactment of the bill.[43] In addition, no assistance under any federal program would be provided to local general or special purpose governments within the jurisdiction of an areawide agency that does not adopt a plan within four years of the date of enactment.[44] Finally, where a plan has been adopted by the areawide agency, federal funds would not be provided to any unit of local government, or to any special purpose unit for use within the local government jurisdiction, which has not individually adopted such plan.[45] Activities necessary to develop this plan would be eligible for assistance under any federal program that provides funds for areawide planning or review.[46]

The Act also requires that, prior to providing any federal funds or "recognition" to any agency whose jurisdictional area comprises more than one unit of local government and is not an A-95 clearinghouse, the federal agency head must require a memorandum of agreement with the A-95 agency specifying the manner activities will be coordinated.[47] In addition, no federal agency can provide assistance to a project or program which, based upon review by the A-95 agency with final determination by the federal agency, is inconsistent with areawide development planning.[48]

The HUD proposals for certification of regional development strategies, the Magnuson-Ashley proposals for comprehensive areawide

41. The Intergovernmental Coordination Act of 1977, note 39 *supra*.

42. Office of Management and Budget, *Circular No. A-95*, 1976 Amendments. This circular, issued pursuant to the Intergovernmental Corporations Act of 1968, 42 U.S.C. § 4201 (1970), set up a system to provide designated state, local, metropolitan and regional agencies an opportunity to evaluate proposed federally assisted projects. It created a number of "clearinghouses" whose purpose is to coordinate agency input. *Id.* at § 4231.

43. The Intergovernmental Coordination Act of 1977, *supra* note 39, at § 703.

44. *Id.* § 703(d).

45. *Id.*

46. *Id.* § 706.

47. *Id.* § 703(c).

48. *Id.* § 703(e).

development plans, and the ACIR proposals for increased authority for regional institutions all seek the same goal. The current federal proposals make strong, persuasive arguments for regional growth management planning through strengthened regional councils to ensure resolution of critical regional planning and resource allocation issues.[49]

At the same time, some interesting new policy proposals for state growth management explicitly recognize a regional role. Two of the most recent initiatives by state governments are those of Massachusetts and California. They join previous actions by Florida,[50] Vermont,[51] and other states[52] to inject regional review into development decisions at the local level.

The Massachusetts Growth Policy Report[53] recognizes that "[g]rowth-related problems frequently extend beyond municipal boundaries."[54] It recommends that

> [e]nabling legislation should be submitted to allow the existing regional planning districts upon a vote of a majority of its constitutent communities to exercise regional review and approval functions over developments of regional import and areas of critical environmental concern.[55]

The Report notes that frequently the context of local development decisions is not broad enough and that regional review may be needed to evaluate those impacts that spill onto other communities.

The Urban Development Strategy for California[56] stresses the need for intergovernmental planning, noting that the primary role

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49. Other recent federal studies dealing with the need to coordinate and strengthen substate planning programs include: COMPTROLLER GENERAL OF THE U.S., FEDERALLY ASSISTED AREAWIDE PLANNING: NEED TO SIMPLIFY POLICIES AND PRACTICES (1977); INTERAGENCY TASK FORCE ON FEDERAL PLANNING REQUIREMENTS, OFFICE OF MANAGEMENT AND BUDGET, PRELIMINARY WORKING PAPERS: REVIEW OF FEDERAL PLANNING REQUIREMENTS (1977).

50. Florida Land and Water Management Act of 1972, FLA. STAT. ANN. § 380.012 (West Supp. 1974).

51. VT. STAT. ANN. tit. 10, §§ 6001-6091 (Cum. Supp. 1977).

52. *E.g.*, ME. REV. STAT. tit. 38, §§ 481-488 (Supp. 1977); N.Y. EXEC. LAWS. Art. 27 (McKinney Supp. 1974); ORE. REV. STAT. § 197.005 (1977).

53. MASSACHUSETTS OFFICE OF STATE PLANNING, CITY AND TOWN CENTERS: A PROGRAM FOR GROWTH (1977).

54. *Id.* at 81.

55. *Id.* at 82.

56. CALIFORNIA OFFICE OF PLANNING AND RESEARCH, AN URBAN DEVELOPMENT STRATEGY FOR CALIFORNIA (1977).

belongs to local governments working together through regional councils. The strategy states: "Cooperative regional planning, too long given lip service, must play a much more prominent role."[57] In a series of three strong policy statements, each with explicit recommended implementation actions, the California strategy stakes out an advanced position on regional growth guidance:

Policy: Local urban development decisions shall consider all needs for housing, industrial sites and regional public facilities.

Actions under this policy would require cities and counties, working through councils of governments, to assess and allocate regional urban development needs for low and moderate income housing, industrial development, and regional public facilities such as open space and transportation systems. Further, all local general plans and housing plans would have to include a specific finding of conformity with the regional needs assessments and allocations. Each metropolitan COG would review the local plans, assess their cumulative effects, and prepare an annual report to the Governor and Legislature.

Policy: The adverse effects of government actions on the citizens of surrounding jurisdictions shall be minimized: all affected communities shall be able to participate in development decisions.

Actions under this policy would establish a process for resolving intergovernmental conflicts over urban development out of court. When negotiation proves unsuccessful, councils of government would be authorized to appoint arbitration panels empowered to alter plans and development proposals. Lead agencies would be required to consult with councils of government on major projects.

Policy: The plans and regulator actions of special-purpose regional agencies shall be coordinated with the regional land-use plan.

Actions under this policy would require all state and regional agencies and special districts to meet with appropriate councils of government to develop and implement memoranda of understanding and prepare joint work programs, budgets, and concurrence on population and economic assumptions and projections.[58]

Both the Massachusetts and California policy proposals recognize the importance and necessity of regional equity concerns. It will be instructive to see how these proposals fare in the legislative arena,

57. *Id.* at 27.

58. *Id.* at 65-68.

especially in terms of the response by local government lobbies in the two states. Meanwhile, the policies represent additional evidence of the recognition of a need to integrate regional equity concerns into state and local growth management.

II. Regional General Welfare: The Courts Review Local Plans

The second impetus toward a regional perspective in growth management derives from judicial interpretation of the constitutionality of local growth management plans. As local governments increasingly question the value of unrestrained growth and attempt to actively influence development, affected parties challenge in court the authority of local government to manage growth. A new important challenge to *local* growth management efforts is that they violate the constitutional protection afforded by the concept of *regional* general welfare.[59]

The regional general welfare challenge is based on the due process requirement of most state constitutions that the objective of local government regulatory power is to further the health, safety, morals, or general welfare.[60] This has been interpreted by a number of state courts to include not only the general welfare of the specific locality but of the surrounding region as well.[61] Thus, often, a locality must concern itself in its growth management effort with the regional welfare.

Most states have not yet recognized a regional general welfare standard. This may be due to a lack of opportunity to rule on the question, or to the traditional holding that the minimal constitutional

59. Constitutional Issues, *supra* note 1, at 65-75.

60. *See* 1 P. Nichols, The Law of Eminent Domain § 4.1 (rev. 3d ed. 1973).

61. Michigan: Green v. Township of Lima, 40 Mich. App. 655, 199 N.W.2d 243 (1972); Bristow v. City of Woodhaven, 35 Mich. App. 205, 192 N.W.2d 322 (1971). *Contra*, Kropf v. City of Sterling Heights, 391 Mich. 139, 215 N.W.2d 179 (1974). New Jersey: Oakwood at Madison, Inc. v. Township of Madison, 72 N.J. 481, 371 A.2d 1192 (1977); Southern Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 336 A.2d 713 (1975), *cert. denied*, 423 U.S. 808 (1975). New York: Berenson v. Town of New Castle, 38 N.Y.2d 102, 341 N.E.2d 236, 378 N.Y.S. 2d 672 (1975), *on rem'd*, — N.Y.2d —, — N.E.2d —, — N.Y.S.2d — (Dec. 6, 1977); Golden v. Planning Bd. of Ramapo, 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S. 2d 138 (1972) *cert. denied*, 409 U.S. 1003 (1972). Pennsylvania: In the application of Friday, — Pa. Commw. Ct. —, 381 A.2d 504 (1978); Surrick v. Zoning Bd., — Pa. —, 382 A.2d 105 (1977); Township of Willistown v. Chesterdale Farms, Inc., 462 Pa. 445, 341 A.2d 466 (1975); Appeal of Kit-Mar Builders, Inc., 439 Pa. 466, 268 A.2d 765 (1970); Appeal of Girsh, 437 Pa. 237, 263 A.2d 395 (1970); National Land Inv. Co. v. Kohn, 419 Pa. 504, 215 A.2d 597 (1965).

requirement is that the community further its own welfare.[62]

Some states appear to accept an "open door" policy whereby a locality may not act in a way that would cause injury to the regional welfare.[63] Under this formulation a locality may not exclude certain groups, such as racial minorities, and may not exclude housing for lower income groups if the locality has the only feasible site for such a project in the whole region.

Other state courts fully embrace the regional equity concept, holding that a locality has a responsibility to actively enhance the regional welfare by providing housing opportunities for all income groups, including its fair share of low and moderate income residents, in the present and future regional population.[64] Even these courts, however, have not yet extended this concept to require that a locality provide a fair share of employment opportunities, or accept its fair share of major governmental installations necessary for the functioning of the region, or to other things that could easily be viewed as having regional importance. The courts have not gone as far as progressive regional agencies, such as the Metropolitan Washington Council of Governments, in this respect.[65]

Even under the most advanced judicial interpretations of regional general welfare, the community has a responsibility only to provide an *opportunity* for housing to accommodate lower income groups.[66] This usually requires a change in existing land use controls to allow

62. Historically, the definition of "general welfare" has remained vague. This has resulted from the reluctance of most courts to evaluate local legislative judgments: zoning actions are ordinarily upheld unless the challenger is able to shoulder the heavy burden of proving them unreasonable. *See* Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). *But see* Fasano v. Board of Comm'rs, 264 Ore. 574, 507 P.2d 23 (1973). Most of the cases dealing with an exercise of the police power have examined its relation to the health, safety, morals or general welfare *of the community*. *See, e.g.*, Berman v. Parker, 348 U.S. 26, 33 (1954); Hadacheck v. Sebastian, 239 U.S. 394, 410 (1915).

63. Pennsylvania: *see* cases collected in note 61 *supra*. Michigan: *see* cases collected in note 61 *supra*. New York: Golden v. Planning Bd. of Ramapo, 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138 (1972), *cert. denied*, 409 U.S. 1003 (1972).

64. New Jersey: *see* cases collected in note 61 *supra*. New York: Berenson v. Town of New Castle, 38 N.Y.2d 102, 341 N.E.2d 236, 378 N.Y.S.2d 672 (1975) (illustrating New York's evolution from its earlier "open doors" approach).

65. For a detailed description of the activities of the Washington COG, see D. GODSCHALK, D. BROWER, D. HERR, & B. VESTAL, RESPONSIBLE GROWTH MANAGEMENT: CASES AND MATERIALS, Chapter 17 (Center for Urban and Regional Studies, University of North Carolina, 1977) [hereinafter cited as RESPONSIBLE GROWTH MANAGEMENT].

66. Oakwood at Madison, Inc. v. Township of Madison, 72 N.J. 481, 371 A.2d

higher density uses without superfluous, cost-adding restrictions. It does not require that the locality actually build the housing. Moreover, at least in New Jersey, the leading regional welfare state, the fair share requirement applies only to "developing" communities[67] not to those which are already substantially developed,[68] nor to those which are primarily undeveloped and are experiencing little growth.[69] In developing municipalities, the obligation to accept a fair share may be avoided only if the municipality proves the existence of particular circumstances why it should not be required to do so.[70] Proof of substantial environmental harm, or other extreme impact such as doubling the population, might be sufficient.[71]

Two major decisions concerning the rapidly-evolving area of the regional general welfare were recently handed down. These cases involved challenges to development regulations of Madison Township, New Jersey and Livermore, California.

The New Jersey Supreme Court modified and expanded the landmark *Mount Laurel*[72] case in its 1977 decision in *Oakwood at Madison, Inc. v. Township of Madison*.[73] The court unanimously affirmed the trial court's invalidation of the municipal zoning ordinance as exclusionary, using *Mount Laurel* standards.[74] The court, however, modified *Mount Laurel*, holding that neither the locality nor the reviewing court are required to devise and adopt "specific formulae for estimating the precise fair share of the lower income

1192 (1977); Southern Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 160, 336 A.2d 713, 724 (1975), *cert. denied*, 423 U.S. 808 (1975).

67. Southern Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 179-80, 336 A.2d 713, 727-28 (1975), *cert. denied*, 423 U.S. 808 (1975). *See* notes 125-29 and accompanying text, *infra*.

68. *See, e.g.*, Nigito v. Borough of Closter, 142 N.J. Super. 1, 359 A.2d 521 (App. Div. 1976).

69. Southern Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 189-91, 336 A.2d 713, 733 (1975), *cert. denied*, 423 U.S. 808 (1975). The definition of "developing" is explored in Ackerman, *The Mount Laurel Decision: Expanding the Boundaries of Zoning Reform*, 1976 U. ILL. L.F. 1; Rose & Levin, *What is a "Developing Municipality" within the Meaning of the Mount Laurel Decision?*, 4 REAL ESTATE L. J. 359 (1976).

70. Southern Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 180, 336 A.2d 713, 728 (1975), *cert. denied*, 423 U.S. 808 (1975).

71. *Id.* at 186-87, 336 A.2d at 731.

72. *Id.* at 151, 336 A.2d 713 (1975).

73. 72 N.J. 481, 371 A.2d 1192 (1977).

74. *Id.* at 552, 371 A.2d at 1227.

housing needs of a specifically demarcated region."[75] The court justified this holding by citing the many different approaches taken by experts as to how a region should be defined and which criteria are relevant to an equitable fair share allocation.[76] In light of this diversity of opinion the court was not prepared to embrace a single method as being the most appropriate.

Rather than fair share quotas, the court stressed a new mode of granting relief: making good faith efforts toward eliminating or minimizing undue cost-generating requirements in the challenged zoning ordinance with respect to reasonable areas within the developing municipality.[77] This new zoning should make possible "least cost housing," the cheapest dwelling units feasible in the unsubsidized housing market that still meet minimum standards for adequate safety and health.[78] Although this housing is not expected to immediately meet the needs of low and moderate income people, the court felt it would eventually filter down to these people and might aid generally by increasing the housing supply.[79]

While the New Jersey Supreme Court discouraged trial courts from estimating precise numbers of least cost housing units that would be required, the decision left courts with more narrowly defined remedial powers that could be exercised without establishing precise quotas.[80] Additionally, dicta in the decision emphasized an important role for administrative agencies in establishing proper housing allocation patterns. Trial courts are allowed to give prima facie judicial acceptance to regions and housing allocations established by regional planning commissions or state-wide housing allocation plans.[81] The relief directed in this case, probably typical of the relief available under *Madison*, required modification of the zoning ordinance to allow for substantial areas of single family dwellings on small lots, and sought to eliminate restrictions in multifamily and PUD areas that discourage construction of dwellings having more than two bedrooms. It also forced a change in PUD requirements to eliminate undue cost-generating restrictions, and then required modification of undue cost-generating restrictions in areas for least

75. *Id.* at 498-99, 371 A.2d at 1200.

76. *Id.*

77. *Id.*

78. *Id.* at 512-14, 371 A.2d at 1207-08.

79. *Id.* at 513 n.22, 371 A.2d at 1207-08 n.22.

80. *Id.* at 553, 371 A.2d at 1228.

81. *Id.* at 531-36, 371 A.2d at 1217-19.

cost housing.[82]

In the other major recent decision, the California Supreme Court appears to have adopted a regional general welfare criterion to test proper exercise of the local police power. In *Associated Home Builders of Greater East Bay, Inc. v. City of Livermore*,[83] a developer challenged the right of the city to pass an ordinance by initiative that prohibited the issuance of any residential building permits until a certain level of public services had been achieved. The court upheld the city to the extent that enactment by initiative did not violate the state enabling act[84] and held that the ordinance itself was not void by reason of vagueness.[85] But in an innovative departure from precedent, the court remanded the case to give plaintiff a chance to show that the ordinance was not a constitutional exercise of the city's police power.[86] Articulating the standards that should be used on remand, the court established as a proper constitutional test whether the ordinance reasonably relates to the welfare of those whom it significantly affects.[87] With regard to the particular challenged ordinance, the court wrote: "if . . . the ordinance may strongly influence the supply and distribution of housing for an entire metropolitan region, judicial inquiry must consider the welfare of that region."[88]

This regional welfare test is to be used only where the locality's action has ramifications for a larger geographic area. The existence of this broader impact, along with the definition of the region, is to be determined as a question of fact by the trial court.[89] The trial court is to forecast the probable effect and duration of the restriction, identify competing interests affected by the restriction, and determine whether the ordinance, in light of the probable impact, is a reasonable accommodation of the competing interests.[90] While a presumption of validity is to be accorded a legislative determination that there is a real and substantial relation to the public welfare, there must be a reasonable basis in fact to support this determination.[91]

82. *Id.* at 553, 371 A.2d at 1228.
83. 18 Cal.3d 582, 557 P.2d 473, 135 Cal. Rptr. 41 (1976).
84. *Id.* at 590-96, 557 P.2d at 476-81, 135 Cal. Rptr. at 44-49.
85. *Id.* at 596-601, 557 P.2d at 481-83, 135 Cal. Rptr. at 49-51.
86. *Id.* at 601-10, 557 P.2d at 483-89, 135 Cal. Rptr. at 51-57.
87. *Id.* at 601, 557 P.2d at 483, 135 Cal. Rptr. at 51.
88. *Id.* at 607, 557 P.2d at 487, 135 Cal. Rptr. at 55.
89. *Id.* at 607-09, 557 P.2d at 487-88, 135 Cal. Rptr. at 55-56.
90. *Id.* at 608-09, 557 P.2d at 488, 135 Cal. Rptr. at 56.
91. *Id.* at 609, 557 P.2d at 488-89, 135 Cal. Rptr. at 56-57.

While the California court expressly rejects the New Jersey and Pennsylvania regional general welfare cases as controlling, because they are based on state law[92] and involve a situation where only poorer people are prevented from moving into the locality,[93] *Livermore* is entirely consistent with those cases. The California standard is a little different in the use of the presumption of validity and in the role given to the trial court,[94] but the basic result requires local actions be tested for constitutionality according to their impact on an affected region.[95]

The protection afforded by the regional general welfare standard extends primarily to potential residents of the locality and to the residents of the region. Developers may assert this claim as well in instances where they desire to build more units or a different type of unit than presently allowed by local ordinance. Whether a particular plaintiff has standing will be a close question that depends on the standards of the state in which suit is brought.[96] In many instances, however, the standing hurdle can be cleared if plaintiffs represent a variety of interests that include a developer who wishes to build in the locality but is prevented by the challenged ordinance,[97] and lower income persons who are the intended residents of the developer's precluded project.[98] While in some courts neither the developer nor the potential residents could bring a regional general welfare challenge alone,[99] in other states either might be sufficient.[100] Thus, to avoid a

92. *E.g.*, Southern Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 174, 336 A.2d 713, 724 (1975), *cert. denied*, 423 U.S. 808 (1975).

93. 18 Cal.3d at 607, 557 P.2d at 473, 135 Cal. Rptr. at 55.

94. The California Court requires a more substantial initial burden to be met before the traditional presumption is rebutted.

95. 18 Cal. 3d at 601, 557 P.2d at 483, 135 Cal. Rptr. at 51: "[T]he constitutionality of the restriction must be measured by its impact not only upon the welfare of the enacting community but upon the welfare of the surrounding region."

96. CONSTITUTIONAL ISSUES, *supra* note 1, at 35-42.

97. *Id.* at 39-40. *See* Warth v. Seldin, 422 U.S. 490, 510 (1975).

98. *See* CONSTITUTIONAL ISSUES, *supra* note 1, at 39-42. *See, e.g.*, Warth v. Seldin, 422 U.S. 490, 508 (1975); Parkview Heights Corp. v. City of Black Jack, 467 F.2d 1208 (8th Cir. 1972); Crow v. Brown, 457 F.2d 788 (5th Cir. 1972); Kennedy Park Homes Ass'n, Inc. v. City of Lackawanna, 436 F.2d 108 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971); Bailey v. City of Lawton, 425 F.2d 1037 (10th Cir. 1970).

99. *See* Moskowitz, *Standing of Future Residents in Exclusionary Zoning Cases*, 6 AKRON L. REV. 189, 198 (1973). *But see* Gautreaux v. Chicago Housing Auth., 265 F. Supp. 582 (N.D. Ill. 1967).

100. Moskowitz, *Standing of Future Residents in Exclusionary Zoning Cases*, 6 AKRON L. REV. 37-40 (1973).

regional general welfare challenge, planning officials attempting to influence the rate, amount or type of growth will have to consider the impact of the growth management program on developers, regional residents and potential residents.

A. *Influencing Rate of Growth*

By influencing the rate of its growth a locality may have an impact on the region if the allowable rate is substantially below that which would have occurred absent growth controls. This may divert potential residents to second or third choice living environments. It may harm the residents in the rest of the region by forcing them to pay for a disproportionate share of the infrastructure needed to accommodate the area's new residents. Finally, rate controls may upset developers by frustrating immediate project plans.

Ramapo, New York, is one example where a court examined growth controls in terms of their impact on the region.[101] In reviewing an adequate facilities ordinance and the capital improvements program, which were to have the effect of staging growth over an eighteen year period, the New York court appeared to be willing to evaluate the impact of the controls from a long-range rather than short-range perspective.[102] Instead of emphasizing short-term distortions in the regional housing market, the court was convinced that the regional impact was not unconstitutionally harsh since the staging was motivated by a desire for orderly and efficient population assimilation, not exclusion. The plan was called "a bona fide effort to maximize population consistent with orderly growth."[103] Because it was confronting the challenge of growth with open doors, the possible eighteen year delay in being allowed through those doors was held not to be so harmful to the region as to require invalidation.

The distinction between eventual assimilation and exclusion has been important to other courts as well. For example, in the litigation over Petaluma's growth management system,[104] while invalidating the system on grounds that infringed on the right to travel (closely related to the regional welfare),[105] the district court stressed that the

101. Golden v. Planning Bd. of Ramapo, 30 N.Y.2d 459, 285 N.E.2d 291, 334 N.Y.S.2d 138 (1972).

102. *Id.* at 381, 285 N.E.2d at 303, 334 N.Y.S.2d at 153-54.

103. *Id.* at 379, 285 N.E.2d at 302, 334 N.Y.S.2d at 152.

104. Construction Ind. Ass'n v. City of Petaluma, 375 F. Supp. 574 (N.D. Cal. 1974), *rev'd*, 422 F.2d 897 (9th Cir. 1975), *cert. denied*, 425 U.S. 934 (1976).

105. CONSTITUTIONAL ISSUES, *supra* note 1, at 93-104.

"urban extension line"[106] had the effect of setting a maximum population far below the projected uncontrolled population level.[107] In reversing the lower court and upholding the system, the California Court of Appeals rejected the idea that the plan set any maximum population and instead emphasized that the plan was only to be effective for a five year period.[108]

In some cases, controls on growth rate may be challenged as having the effect of excluding lower income people. *Mount Laurel* suggests in dictum that timed development schemes can be protected from successful regional general welfare attacks by providing for a mix of building types and income groups at an early stage.[109]

The early indication is that controls on rate for a relatively short period of time that do not in fact set a maximum population, and controls on rate over a longer period that accommodate a population close to the level that would have been attained without growth controls, are not vulnerable to regional general welfare attacks.

B. *Influencing Amount of Growth*

Attempts to control the total amount of growth, as in population caps,[110] appear to be more vulnerable to regional general welfare challenges. This occurs because controls on growth amount are perceived as more permanent than controls on growth rate. They are seen as attempts to avoid the local responsibility to accept "natural growth." Finally, their effects are more easily measured by the court since they identify a specific end state. By definition, they aim at exclusion rather than assimilation.

In the course of invalidating Boca Raton's population cap, a Florida trial court examined the impact of the cap on the region.[111] Since this system, which limited the total size of the city to 40,000 dwelling

106. An urban extension line designates the boundary beyond which municipal services will not be extended, and is expected to direct future growth to already-serviced areas.

107. Construction Ind. Ass'n. v. City of Petaluma, 375 F. Supp. 574, 576 (N.D. Cal. 1974).

108. City of Petaluma v. Construction Ind. Ass'n., 522 F.2d 879, 902 (9th Cir. 1975).

109. Southern Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 188 n.20, 336 A.2d 713, 732 n.20 (1975).

110. A population cap is a figure representing maximum allowable population. An annual building permit cap would be imposed to indirectly effectuate the same objective.

111. Boca Villas Corp. v. Pence, 45 Fla. Supp. 65 (1976).

units, projected a detailed end state,[112] the court was able to draw conclusions about the precise number of new single and multifamily units that would be available to low and moderate income families.[113] In addition, evidence was introduced about the inflationary impact of the cap on the price of existing housing units.[114] While the Florida Supreme Court has not yet accepted a regional standard for measuring the general welfare, the trial court did state in dictum that land use decisions of substantial magnitude should be reviewed, to some extent, in terms of whether they unnecessarily shift a locality's unwanted housing responsibilities to neighboring communities.[115] This was found to be the effect in Boca Raton.[116]

It is doubtful whether this result would be reached in an attack on a plan in which the locality's fair share of housing has been reasonably determined and provided for. An example of such a plan is found in Sanibel, Florida.[117] Not only does the Sanibel plan contain inclusionary policies based on a study of the need for low and moderate income housing on the island, but the plan also examines its impact on all types of housing in the county.[118] The plan finds that, even if all of the residents who previously could have lived on the island were to move to surrounding Lee County, persons denied Sanibel residence by the city's downzoning would constitute only 1.8% of the county's 1995 population.[119] This was felt an insignificant shifting of an economic or environmental burden to a county and other nearby cities which are currently encouraging growth.[120] Considering the strong health and safety reasons for Sanibel's downzoning,[121] it is probable that a court would agree, though this issue has not been litigated.

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112. CHARTER OF THE CITY OF BOCA RATON, *as amended by* § 12.09 (1972).

113. Boca Villas Corp. v. Pence, 45 Fla. Supp. 65, 78-79 (1976).

114. *Id.* at 79.

115. *Id.*

116. *Id.* at 79-80.

117. The Sanibel Plan is described in RESPONSIBLE GROWTH MANAGEMENT, *supra* note 65, at chap. 11.

118. CITY OF SANIBEL, COMPREHENSIVE LAND USE PLAN, CITY OF SANIBEL, LEE COUNTY, FLORIDA 153, 164-65 (1976).

119. *Id.* at 153.

120. *Id.*

121. *See, e.g.*, J. CLARK, THE SANIBEL REPORT 102-09, 114-17 (1976).

C. *Influencing Type of Growth*

Limits on the type of growth are likely to produce regional general welfare challenges when the restrictions tend to preclude the types of housing normally occupied by people of lower income, or when they raise housing costs within relevant housing types such that lower income people cannot afford to live in the jurisdiction. These are the kinds of controls involved in the landmark New Jersey regional general welfare cases.

This sort of controversy is most likely to arise in a suburban context. The incentives for regulating types of growth in this manner may range from pure racial or economic exclusionary motivations to a perceived need to protect the jurisdiction's fiscal base to environmental rationalizations. While there has been much analysis concerning whether these motivations are in fact supported by either the realities of the situation or the law,[122] courts accepting the regional standard have adopted the view that only very extreme circumstances justify a jurisdiction's refusal to accommodate a full range of housing types.[123]

The Mount Laurel township consciously adopted policies designed to result in economic discrimination and the exclusion of substantial segments of the area population.[124] These policies were justified as being in the best present and future fiscal interest of the municipality and its residents. While the township maintained that its actions to influence type of growth were legally permissible, the New Jersey Supreme Court did not agree.

In the landmark 1975 decision of *Southern Burlington County NAACP v. Township of Mount Laurel*,[125] the New Jersey Supreme Court held that all developing municipalities must, by their land use regulations, make realistically possible the accommodation of their fair share of the present and prospective regional need for an appropriate variety and choice of housing, especially for low and moderate income people.[126]

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122. *E.g.*, M. BROOKS, HOUSING EQUITY AND ENVIRONMENTAL PROTECTION: THE NEEDLESS CONFLICT (1976).

123. *See* text accompanying notes 70-71 *supra*.

124. Southern Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 169, 174 n.10, 336 A.2d 713, 722, 725 n.10 (1975).

125. 67 N.J. 151, 336 A.2d 713 (1975).

126. *Id.* at 188, 189, 336 A.2d at 732, 733.

The decision left open several exceptions under which accommodation of the locality's fair share would not be required and a type of growth could be regulated. The decision applied only to developing communities,[127] not to those already predominantly developed nor to those not experiencing a demand for substantial growth.[128] In addition, a municipality may be excused from its fair share quota if it can demonstrate that greater detriment would result if the city was required to provide for lower cost housing (*e.g.*, substantial environmental injury).[129] While these exceptions have only been articulated in the New Jersey state court, it is probable that other states accepting the regional welfare standard will similarly limit application in challenges of growth management systems regulating the type of growth.

D. *Implications for System Design*

Planners and local officials operating in states where a regional standard has not yet been adopted technically need not utilize measures that decrease the risk of a regional general welfare challenge. Yet there are compelling reasons for them to design their system as if this challenge were available to developers, regional residents, and potential residents in their area. First, their courts may accept the regional standard in the future. The state courts adopting the regional test are generally acknowledged to be in the forefront of land use law, and it is expected that additional states will follow this lead. Once the standard is adopted, existing systems, not just those implemented after the judicial adoption, will be judged according to the regional standard.

Additionally, future comprehensive land use legislation may require consideration of regional impacts at the time of plan formation for plans to be valid.[130] Where this type of legislation is a possibility, planning efficiency suggests that regional impacts be considered from the outset.

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127. *Id.* at 179, 180, 336 A.2d at 727-28.

128. *See* notes 68-69 *supra*.

129. Southern Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 185, 336 A.2d 713, 731 (1975).

130. *E.g.*, The Florida Local Government Comprehensive Planning Act of 1975, FLA. STAT. ANN. § 163.3161-.3191 (West 1977).

Third, it is more socially responsible to plan for the regional welfare rather than considering only the narrower local welfare. While this argument may not be considered compelling by local taxpayers, it should be considered during initial system design. It might be that, by using certain techniques and development patterns, maximizing the local welfare and maximizing the regional welfare are not inconsistent goals.

This analysis of situations in which to anticipate a regional general welfare challenge suggests several basic prevention measures that vary, depending on the growth management technique chosen. A local government trying to influence the growth *rate* will probably be more successful if the annual limit is not far below the projected annual uncontrolled growth rate, if it emphasizes the temporary nature of the rate limitations (*i.e.*, that it is not a de facto population cap) and if it justifies the regulation as a more efficient means of assimilating population increases and not an exclusion. Moreover, the rate regulation is less suspect as an attempt to only gather regional benefits while avoiding regional burdens if it limits all kinds of growth—industrial, commercial, and transient facilities as well as residential facilities. Finally, the rate regulation will be more secure if it avoids a disproportionate economic impact by making express provisions for an early mix of building types and housing prices.

Those places trying to limit the total *amount* of growth are probably well advised to avoid setting an accommodation far below the projected uncontrolled number without very good justifications backed by professional studies of regional and local impact. Especially because of the probable inflationary impact of a population cap, these cities must make special arrangements to accommodate their regional fair share of lower income housing.

Finally, jurisdictions directly regulating the *type* of growth will have to temper controls by recognizing their responsibility to provide at least their fair share of the region's need for lower cost housing. There are a range of techniques available for determining a "fair share" and for making realistic accommodations. One of the basic techniques for guaranteeing accommodation of a locality's fair share of lower income residents is through a fair share housing allocation agreement such as that used by the Miami Valley Regional Planning Commission, the Metropolitan Washington Council of Governments, and others.[131]

131. *E.g.*, METROPOLITAN WASHINGTON COUNCIL OF GOVERNMENTS, THE WASHINGTON METROPOLITAN AREA'S AREAWIDE HOUSING OPPORTUNITY PLAN

Other steps that may be taken by an advisory regional agency, limited by a lack of direct regulatory powers, include using its A-95 review powers[132] in a systematic manner to promote a wider range of housing opportunities, designing prototype plans for adoption by local jurisdictions, developing a regional growth policy statement, and offering a source of ready information for use by local jurisdictions.

While implementation of these steps usually depends on persuasion and/or local action, there is an indication that some courts will give more weight to fair share housing allocation agreements. In *Madison Township*,[133] in dictum, the New Jersey Supreme Court said that a court may give prima facie judicial acceptance to regional boundary determinations and sub-area housing allocations of official state, regional, or multicounty planning efforts.[134] In states following this approach, officially adopted policies such as a fair share housing formula, with its statement of need for low and moderate cost housing by jurisdiction, could form the basis of judicial intervention to prevent growth management efforts inconsistent with the regional welfare. This *Madison Township* formulation goes a step farther than *Mount Laurel*, which gave presumptive weight to regional fair share housing allocation agreements only when they were binding on all jurisdictions in the region.[135]

While fair share agreements are one way of determining how many units of lower cost housing a municipality should prepare to accommodate, they do not, in themselves, assure the construction of the needed housing. Rezoning an amount of land sufficient to accommodate the jurisdiction's fair share or small single family lots or multifamily units is one of the first steps. Toward this end, studies have been made of the rezoning necessary to produce certain housing types and costs.[136] In a proper case, courts will find this type of rezoning mandatory.[137]

(1976); D. LISTOKIN, FAIR SHARE HOUSING ALLOCATION (1976). For a brief description of how a fair share housing allocation agreement operates, see text accompanying notes 175-76 *infra*.

132. *See* note 42 *supra*.

133. Oakwood at Madison, Inc. v. Township of Madison, 72 N.J. 481, 371 A.2d 1192 (1977).

134. *Id.* at 531-37, 371 A.2d at 1217-19.

135. Southern Burlington County v. Township of Mount Laurel, 67 N.J. 151, 188-89, 336 A.2d 713, 732-33 (1975).

136. *E.g.*, E. BERGMAN, ELIMINATING EXCLUSIONARY ZONING: RECONCILING WORKPLACE AND RESIDENCE IN SUBURBAN AREAS 165-177 (1974).

137. *See* Oakwood at Madison, Inc. v. Township of Madison, 72 N.J. 481, 552,

A second way to increase the amount of lower cost housing may be through municipal establishment of a local housing authority. This organization would pursue whatever federally assisted lower cost housing is available, subject to any fair share allocation agreement about the location of federally assisted housing. This tactic depends on local initiative, since no court has been willing to order establishment of a local housing authority as part of a judicial remedy.[138]

A third way to encourage lower cost housing may be through a total reexamination of subdivision regulations, housing codes, building codes, and the zoning ordinance with the purpose of amending them to make possible the jurisdiction's fair share of lower-cost housing. This "least cost housing" approach was endorsed in *Madison Township* as a means of getting away from artificial quotas or formula-based estimates of specific unit "fair shares."[139] It recognizes that reliance on federal housing subsidies for major amounts of lower cost housing is misplaced at this time,[140] and instead encourages the construction of least cost unsubsidized housing consistent with minimum standards of health and safety. While this housing may not be inexpensive enough to directly house the region's lower income population, in theory it will increase the supply of housing and indirectly make better housing available to lower income residents by shortening the filtering chain.[141]

371 A.2d 1192, 1228 (1977); Southern Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 191, 336 A.2d 713, 734 (1975).

138. For example, the *Mount Laurel* court mentioned only a "moral obligation . . . to establish a housing agency pursuant to state law to provide housing for its resident poor." Southern Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 192, 336 A.2d 713, 734 (1975). In *Oakwood*, the Court noted that "[m]unicipalities do not themselves have a duty to build or subsidize housing." Oakwood at Madison, Inc. v. Township of Madison, 72 N.J. 481, 499, 371 A.2d 1192, 1200 (1977).

139. *See* text accompanying notes 75-79 *supra*.

140. *See* Oakwood at Madison, Inc. v. Township of Madison, 72 N.J. 481, 512, 371 A.2d 1192, 1207 (1977). In January 1973, President Nixon announced a moratorium on spending under the principal subsidized housing programs. There is hope for revitalization of these programs or for their replacement by new programs. *Id.* at 511 n.20, 371 A.2d at 1206 n.20.

141. *Id.* at 514 n.22, 371 A.2d at 1208 n.22. The "filtering" or "trickle down" effect has been extensively discussed in housing literature. Basically, it is argued that the provision of additional homes at the upper-income housing market level will result in a progressive movement of home dwellers upward into better units, ultimately opening up additional homes for low income families. *See* J. LANSING, C. CLIFTON & J. MORGAN, NEW HOMES AND POOR PEOPLE: A STUDY OF CHAINS OF MOVES (1969); W. GRIGSBY, HOUSING MARKETS AND PUBLIC POLICY 84-130 (1963); Mallach, *Do Lawsuits Build Housing?* 6 RUTGERS-CAMDEN L.J. 653, 666 (1975). The New

A fourth technique to encourage the construction of lower cost housing would utilize density bonuses for housing under certain rental or sales prices.[142] This method would probably be most useful where the allowed densities are below the carrying capacity of the land and where the locality wants to encourage a mix of dwelling types and costs within a single subdivision. New Britain Township in Bucks County, Pennsylvania, is one of the many jurisdictions using density bonuses to encourage lower cost housing.[143] In "Planned Residential Developments," the New Britain zoning ordinance allows a maximum bonus density of up to 105% for meeting specific criteria beyond the basic performance standards. While there are several different ways of adding to allowed density, one method provides a density bonus of two units for each unit of housing having two or more bedrooms, built to sell below $26,000.[144] Certain requirements are imposed so that only eligible families can purchase these units.[145] The effect of this bonus is limited, to some extent, by providing that construction of moderate income housing can contribute a maximum of ten percent of the total 105 percent density bonus. Thus, as structured, the bonus is only an incentive to construct up to five percent moderate income housing.

A fifth technique involves locally imposed restrictions that encourage lower cost housing by requiring a mix of housing types within a subdivision. Concentrating on a mix of dwelling unit types without paying particular attention to the rental or sales price of those units appears to be the approach taken by some courts accepting the regional general welfare standard.[146] The theory is based on the notion that if those dwelling unit types, especially multifamily, which traditionally supply lower cost housing are allowed, they will be built if there is a demand. New Britain Township has translated this philosophy into its zoning ordinance, providing that subdivisions of a certain size must contain a minimum number of dwelling unit

Jersey Court hopes that the injection of new moderate-cost housing into the market ("shortening the chain") will result in more rapid provision of housing for low-income persons.

142. Oakwood at Madison, Inc. v. Township of Madison, 72 N.J. 481, 517 n.27, 371 A.2d 1192, 1209-10 n.27 (1977). *See also* Joseph v. Town Bd., 24 Misc.2d 366, 198 N.Y.S.2d 695 (1960) (explains need for density bonuses).

143. NEW BRITAIN TOWNSHIP, BUCKS COUNTY, PA., COMPREHENSIVE AMENDMENT OF 1973.

144. *Id.*

145. *Id.*

146. *See* note 50 *supra*.

types, with maximum and minimum percentages for any one type.[147] These unit mix provisions appear to be helpful supplements but should not be relied upon as a major technique for accommodating one's fair share of the region's lower income residents.

Another more direct technique that has been advocated would require all developers to include a certain percentage of lower cost units in each subdivision over a certain size. The New Jersey court has indicated its disapproval of this technique in dictum,[148] and the Virginia court struck down the Fairfax County mandatory inclusionary scheme.[149] While this technique may help ward off a regional general welfare challenge, it appears vulnerable to taking and equal protection challenges.[150]

Finally, as a sixth approach, some places have chosen to confront the problem of encouraging all localities to enhance the regional welfare by making adjustments through their power to tax rather than through direct police power regulations. Changes in the taxation scheme have great potential for making localities willing to accommodate their fair share if tax changes reduce the fiscal incentive for exclusionary zoning. On the negative side, however, it is not known to what extent any exclusionary propensity of suburban residents would continue even where they did not see a correlation between increased economic integration and increased tax burden. In addition, changes in the tax scheme are usually not within the power of localities since the state legislature must enact the changes,[151] and even it may be constrained by certain provisions in the state constitution.[152]

147. *See* NEW BRITAIN TOWNSHIP, *supra* note 143, at 14.

148. Oakwood at Madison, Inc. v. Township of Mount Laurel, 72 N.J. 481, 518 n.28, 371 A.2d 1192, 1210 n.28 (1977) ("rent skewing").

149. Board of Supervisors v. DeGroff Enterprises, Inc., 214 Va. 235, 198 S.E.2d 600 (1973). The Fairfax County scheme included a requirement that developers sell or rent 15% of their units at prices affordable by low and moderate income persons. *Id.* at 235-36, 198 S.E.2d at 601.

150. *Id.*

151. *E.g.*, City of Atlanta v. Gower, 216 Ga. 368, 370, 116 S.E.2d 738, 740-41 (1960). As a general rule a municipal corporation has no power to tax unless the power is "plainly and unmistakably granted by the state." 216 Ga. at 370, 116 S.E.2d at 740.

152. *See* 2A C. ANTIEAU, MUNICIPAL CORPORATION LAW § 21.56 (1976). Typical state constitutional provisions provide that "taxes shall be levied and collected for public purposes only." *Id.* at § 21.92. Another frequent limitation is that a tax may not be prohibitive, confiscatory, capricious or unreasonable. *Id.* at § 21.42. Taxation is also generally required to be uniform. *Id.* at § 21.48.

Despite these difficulties, at least two places have altered their tax scheme to lessen the incentive for fiscal zoning. The New Jersey legislature, under pressure from the courts, made revisions in school financing so that funding of local schools is no longer borne solely by the locality.[153]

And, in a more direct effort to make the local welfare synonymous with the regional welfare, the Minnesota legislature passed a tax base sharing system for the Minneapolis-St. Paul region.[154] To prevent wasted resources and development distortions that might result from individual localities engaging in intense competition for tax-productive commercial and industrial development, the Act provides for sharing, throughout the region, forty percent of the tax increase since 1971 attributable to increased commercial or industrial valuation.[155] While the idea of a tax base sharing system of this sort has been praised by theorists, it appears that the practical impact in Minneapolis-St. Paul has been minimal. These problems, however, may be attributed to political compromises that so weakened tax incentives they were no longer effective, and not to inherent weaknesses in the theory of tax base sharing itself.

This brief survey shows many different approaches that may be used to encourage or require the accommodation of a locality's fair share of the region's lower income population. The way a planning body chooses to meet that need will depend to a large extent on the degree of commitment to economic integration, the type of housing that can be supported by local facilities, and the amount of power or influence it can muster.

In the future, the courts may expand the concept of regional general welfare to encompass services, employment, and regional facilities as well as lower cost housing. If this happens many of these same techniques will lend themselves to guaranteeing compliance with the regional standard. In addition, more specific techniques such as regional capital facilities programs, regional fair share agreements that go beyond housing, coordinated regional plans, and stiffer regional review should draw more attention. Because the regional general welfare analysis is of recent origin, it is impossible to say with certainty

153. N.J. STAT. ANN. tit. 18A §§ 13-23 to -24. (West 1977).

154. *See, e.g.*, MINN. STAT. ANN. ch. 473F.01-.13 (West 1971). The Minnesota scheme has withstood equal protection and lack of uniformity challenges. Village of Burnsville v. Onischuk, 301 Minn. 137, 222 N.W.2d 523 (1974).

155. The Metropolitan Fiscal Disparities Act, MINN. STAT. ANN. § 473F.08 (West 1971).

what its ultimate bounds will be, but from all indications it is probable that both the use and the scope of this constitutional imperative will be expanded.

III. Regional Planning Practice: The Washington COG Example

Planners, from Lewis Mumford in the early 20th century[156] to the present, have recognized that urban problems do not stop at the city limits. They have seen that, in its most basic form, regional equity is concerned with fairness in the distribution of, and access to, developed urban land especially in terms of public facilities and housing for all income groups.

Many regional planners have not been able to cope with regional growth management because they lack authority and because of local government fragmentation. One metropolitan region that has dealt with regional equity issues more successfully than most is the Metropolitan Washington Council of Governments.[157] In the process, they have developed some useful new tools for ensuring that equity concerns are included in regional growth decisions.

Member jurisdictions in the Metropolitan Washington Council of Governments (COG) include four Virginia counties, two Maryland counties, the District of Columbia, and eight cities. Its intergovernmental situation is one of the more complex in the country, involving not only interstate but also federal jurisdictional relationships. However, its powers are as limited as those of the typical voluntary membership COG, centering on planning coordination, and A-95 review.

During the 1960's Washington was the fastest growing of the nation's twelve largest metropolitan areas. Much of Washington's growth between 1960 and 1970 took place in its suburban jurisdictions. Prince William County, Virginia, on the outer edge of the metropolitan area, tripled in population to become the nation's fastest growing large county. The Washington urbanized area, as defined by the Census Bureau, increased from about 340 square miles to 495 square miles.

In the first years of the 1970's, the Washington area growth rate fell sharply. Recent estimates of an average annual growth rate of 40,000 persons per year are only slightly over half the 1960's rate of 79,000

156. *See, e.g.*, L. Mumford, Culture of Cities (1938).

157. *See generally* Responsible Growth Management, note 65 *supra*.

persons per year.[158] Previous growth forecasts have been revised to account for this slower rate. The present 1995 forecast is for a population of 4.23 million people, about a twelve percent decrease from previous forecasts. However, substantial growth is still expected and, based upon current forecasts and local plans, Montgomery, Prince George's and Fairfax Counties are expected to receive seventy-eight percent of the region's population growth over the next twenty years.

In 1971, the Metropolitan Washington Council began a metropolitan review of regional development goals and objectives, including discussions of findings from a re-examination of the Year 2000 Plan.[159] In response to requests made by local governments and citizens during that review, COG issued a *Proposal for a Metropolitan Growth Policy Program*[160] in 1975.

This Proposal defined growth as change in the amount, type, and location of people and jobs within the Washington metropolitan area. It dealt not only with urbanization in fringe areas but also with problems in the older central city and suburbs. The declared intent of the program was:

1. To provide a metropolitan framework that would serve as a foundation for local growth management efforts and as a means of effecting coordination among these different efforts;
2. To assure consistency among COG's current metropolitan functional planning activities in the areas of transportation, housing, land use, water resources, energy and air quality;
3. To increase communication and coordination among local, state and federal agencies whose activities affect the Washington area;
4. To assist local governments and functional planning bodies in developing programs to meet legally mandated requirements such as air and water quality standards.[161]

The Washington region has a small number of large government jurisdictions, with highly professionalized local planning programs.

158. METROPOLITAN WASHINGTON COUNCIL OF GOVERNMENTS, IMPACT ASSESSMENT: 1980, 1985, 1995, LAND USE AND GROWTH PATTERNS IMPLICATIONS OF FORECASTS 6 (1977).

159. METROPOLITAN WASHINGTON COUNCIL OF GOVERNMENTS, AREAWIDE LAND USE ELEMENT—1972 (1972).

160. METROPOLITAN WASHINGTON COUNCIL OF GOVERNMENTS, note 158 *supra*.

161. METROPOLITAN WASHINGTON COUNCIL OF GOVERNMENTS, COOPERATIVE FORECASTING: SUMMARY REPORT—1976 (1976).

The proposed growth policy program is distinguished from typical planning efforts by three innovative elements that recognize the situational constraints faced by a voluntary membership COG having strong local government members and lacking regulatory and taxing powers. These unique elements are: (1) a cooperative *forecasting* process, (2) a series of *impact analyses*, and (3) an action program that seeks to develop policy and implement regional plans by means of *negotiated agreements* among local jurisdictions.

The COG formulated a cooperative process to analyze growth and change and to develop forecasts of population, households, and employment for use in metropolitan planning programs. The program incorporates a twofold approach in making forecasts. Each of the local governments developed forecasts for its own jurisdiction, while at the same time the Council of Governments, the National Capital Planning Commission, and the Washington Center for Metropolitan Studies collaborated on a system for making regional projections. The sum of the forecasts made by the local governments and the independently-developed regional projections were then compared and evaluated to produce a set of reconciled forecasts for use in COG's metropolitan planning programs.

In the second phase of the program, impact assessments were used to translate forecast information into the potential effects of such growth on future living conditions in the metropolitan area. After investigating assessment methodologies, the COG chose a pragmatic approach that restricted assessments to fields where there are current metropolitan-scale planning programs. Assessments were performed in six areas for which the COG had developed analytical techniques and had some planning responsibilities for land use,[162] air quality,[163] energy,[164] transportation,[165] water resources,[166] and housing.[167] Through its impact assessment program, the COG tied together anal-

162. METROPOLITAN WASHINGTON COUNCIL OF GOVERNMENTS, note 158 *supra*.

163. METROPOLITAN WASHINGTON COUNCIL OF GOVERNMENTS, IMPACT ASSESSMENT: 1980, 1985, 1995, AIR QUALITY IMPLICATIONS OF GROWTH FORECASTS (1977).

164. METROPOLITAN WASHINGTON COUNCIL OF GOVERNMENTS, IMPACT ASSESSMENT: 1980, 1985, 1995, ENERGY IMPLICATIONS OF GROWTH FORECASTS (1977).

165. METROPOLITAN WASHINGTON COUNCIL OF GOVERNMENTS, IMPACT ASSESSMENT: 1980, 1985, 1995, TRANSPORTATION IMPLICATIONS OF GROWTH FORECASTS (1977).

166. METROPOLITAN WASHINGTON COUNCIL OF GOVERNMENTS, IMPACT ASSESSMENT: 1980, 1985, 1995, WATER RESOURCES IMPLICATIONS OF GROWTH FORECASTS (1977).

167. METROPOLITAN WASHINGTON COUNCIL OF GOVERNMENTS, RESOLUTION

yses of individual functional programs which would not otherwise be coordinated or presented to the public as a series of related findings concerned with regional development policy.

The impact assessments were purposely designed as a bridge between the forecasting process and the action program, or policy development phase. The general conclusion that the COG drew from the impact assessments is that nearly all of the negative impacts anticipated are related to a dispersed pattern of growth that has been forecast, particularly for residential development. Although the growth pattern forecast is not one of uncontrolled sprawl, it is sufficiently dispersed to cause further environmental deterioration, increase automobile dependency in the major suburban jurisdictions, and create service demands and costs which probably cannot be met. A more compact development pattern with a more focused effort to conserve resources would lessen or prevent many of the expected negative impacts.[168] All of the assessments appear to point toward the desirability of attempting, as a matter of policy, to modify the forecast growth pattern.

A *Metropolitan Growth Policy Statement* was drafted in response to the assessments.[169] Its theme emphasizes compact development and conservation of resources. The proposed policies depart, to some extent, both from existing development trends[170] and from the pattern of future growth currently forecast by metropolitan area local governments.[171] Key elements of the proposed policy include encouraging growth in specific growth centers (policies are proposed for four types of centers) and identifying urban and rural conservation areas where primary emphasis would be placed on preserving natural resources and neighborhood character.

The proposed policy statement is intended to replace the *Resolution on Development Policies for the Year 2000*[172] adopted by the COG

ENDORSING THE ADOPTION OF FISCAL YEAR 1977 FAIR SHARE IMPLEMENTATION PROCEDURES (1977).

168. The more compact an area is, the less expensive it is to service the area, generally speaking. Pipelines are shorter, bus routes are shorter, it is easier to walk where you want to go, etc.

169. METROPOLITAN WASHINGTON COUNCIL OF GOVERNMENTS, PROPOSAL FOR A METROPOLITAN GROWTH POLICY PROGRAM (1975).

170. METROPOLITAN WASHINGTON COUNCIL OF GOVERNMENTS, COOPERATIVE FORECASTING: SUMMARY REPORT—1976 (1976).

171. *Id.*

172. METROPOLITAN WASHINGTON COUNCIL OF GOVERNMENTS, RESOLUTION ON DEVELOPMENT POLICIES FOR THE YEAR 2000 (1964).

Board in 1964. The basic function of the statement would provide a basis for regional decisions made through the COG as a forum of the region's local governments.[173] The COG also hopes to make it a touchstone for the independent decisions of local, state and federal governments, regional agencies, private businesses, and citizen groups.

Meanwhile, the COG has had several years of experience in using intergovernmental negotiation as the cornerstone of a nationally recognized areawide Fair Share Housing Plan. The specific techniques to be discussed here are the use of fair share housing agreements and an affirmative action housing plan to deal with welfare and equal protection issues.

A. *Fair Share Housing*

One of the first and most effective regional housing allocation programs, the Washington COG's fair share housing formula was originally adopted in January 1972[174] to promote a wider range of housing opportunities throughout the metropolitan area. Its primary function has provided a basis for development of a regional consensus on the distribution of federal housing subsidies.

Throughout the United States, fair share housing formulas have most often been used to persuade reluctant suburbs to accept a reasonable proportion of the low and moderate income housing demand within a metropolitan area.[175] The factors and relationships used in these formulas can vary widely. The Miami Valley (Ohio) Regional Planning Commission increased the percentage of assisted housing located in the suburbs of Dayton from five to almost fifty percent between 1970 and 1975.[176] The Metropolitan Council of the Twin Cities (Minnesota) saw an increase from twelve to eighteen percent outside the core cities between 1972 and 1975.[177]

The situation in the Washington area differs dramatically from regions such as Hartford, Connecticut, where the central city sued its

173. METROPOLITAN WASHINGTON COUNCIL OF GOVERNMENTS, PROPOSAL FOR A METROPOLITAN GROWTH POLICY PROGRAM (1975).

174. METROPOLITAN WASHINGTON COUNCIL OF GOVERNMENTS, FAIR HOUSING AFFIRMATIVE ACTION PLAN: A GUIDE FOR THE WASHINGTON METROPOLITAN AREA (1972).

175. *See* D. LISTOKIN, FAIR SHARE HOUSING ALLOCATION 27-86 (1976).

176. *Id.* at 125.

177. HUD, NEWS RELEASE ON HOUSING OPPORTUNITY PLANS AWARDED SUPPLEMENTAL SECTION 8 RENTAL SUBSIDY FUNDS (Aug. 30, 1976).

suburbs for failing to accept their share of low and moderate income housing.[178] The Washington COG's member governments actively compete for the available federal housing funds, which they view as scarce and valuable resources. According to the COG:

> The major problem encountered in continuing implementation of the Fair Share Plan in the Washington Metropolitan area has not been one of encouraging local governments to participate, since most jurisdictions view their Fair Share target percentage as an 'entitlement' figure. Rather, the problem is one of insufficient Federal housing subsidies to allocate through the Plan.[179]

The present Fair Share Plan consists of three components: (1) a statement of guiding principles, (2) an allocation formula, and (3) a set of annually updated implementation procedures. The fair share principles give policy guidance and identify long term goals:

- All residents of a local jurisdiction should have the opportunity to be accommodated in housing units which are comfortable, safe, and sanitary.
- All residents of a local jurisdiction should have the opportunity to be accommodated in housing units of adequate size.
- Those persons who work in a local jurisdiction should have the opportunity to live there if they so desire.
- The number of households which should be accommodated in a local jurisdiction should be limited to those which could feasibly be absorbed in the jurisdiction, in terms of the amount of vacant land or unutilized housing stock in the jurisdiction.
- The number of low and moderate income households located cated in a local jurisdiction should be proportionate to the jurisdiction's ability to pay for the needed public services which accompany these units.
- Low and moderate income housing should be located within easy access of job opportunities.
- Overconcentrations of low and moderate income housing should be avoided.[180]

The *Housing Assistance Allocation Formula* provides the target percentage of federal housing subsidies to be used in each of the

178. City of Hartford v. Hills, 408 F. Supp. 889 (D. Conn. 1976).

179. METROPOLITAN WASHINGTON COUNCIL OF GOVERNMENTS, THE WASHINGTON METROPOLITAN AREA'S AREAWIDE HOUSING OPPORTUNITY PLAN 5 (1976).

180. *Id.* at 1-2.

COG's member jurisdictions. The current formula is the average of the percentage of four factors:

1. *housing need characteristics*, as measured by 1970 census data on overcrowding (number of units with more than 1.5 persons per room), deficient units (number lacking some or all plumbing), and overpayment for rent (number of households paying twenty-five percent or more for rent).
2. *1972 distribution of lower income employment*, another need indicator, calculated with data from COG's 1968 home interview survey on income of full time workers by at-place-employment (to establish relationships between Standard Industrial Classification (SIC) groups and income characteristics) applied to data from COG's 1972 Regional Employment Census.
3. *distribution of 1968-1972 increase in lower income employment*, an indication of job opportunity change as determined by the difference in lower income jobs by jurisdiction between 1968 and 1972.
4. *an inverse proportion of lower income housing units*, designed to avoid undue concentrations by assessing the existing amount of lower income housing from the 1970 Census in each member jurisdiction as a percentage of its total housing stock, and then applying standard interval multipliers to those jurisdictions whose lower income housing is less than fifty percent of their total stock.[181]

The resulting formula is:

$$\frac{\text{Housing Need (\%)} + \text{Lower Income Employment (\%)} + \text{Increase in Lower Income Employment} + \text{Concentration of Lower Income Housing (\%)}}{4} = \text{Fair Share Target}$$[182]

The formula provides a target percentage of lower income housing subsidies for each member jurisdiction.

The *implementation procedures* are developed annually to coincide with that fiscal year's allocation of federal housing subsidy funds to the Washington area. The process involves close cooperation between the COG, the Washington HUD area office, and the individual local governments to transform the fair share targets from a paper plan to funded projects. This process follows six steps:

1) The Washington, D. C., HUD Area Office formally notifies COG of the total federal housing subsidy contract authority

181. *Id.* at Appendix D: Fair Share Housing Formula Methodology (1976).

182. *Id.*

available to the metropolitan area, identifies any constraints on the use of the contract authority, and requests COG's recommendations on the jurisdictional allocation of these funds in accordance with the Fair Share Plan.

2) Proposed recommendations on Fair Share implementation procedures are developed through COG's Housing Technical Committee, Human Resources Policy Committee and Human Recources Citizen Advisory Committee for consideration by the COG Board of Directors.
3) The COG Board of Directors reviews the proposed recommendations, enacts amendments as deemed appropriate, and adopts the implementation procedures through a formal resolution.
4) The Board of Directors' resolution is formally transmitted to the Washington, D.C., HUD Area Office for concurrence.
5) The HUD Area Office agrees to honor the COG Board's recommendations to the maximum extent possible in approving the commitment of contract authority for programs and projects in each of COG's member jurisdictions.
6) The implementation procedures adopted by the COG Board of Directors are utilized as a basis for the preparation of COG's Metropolitan Clearinghouse A-95 review comments on all appropriate housing projects which propose the use of federal subsidy funds. In addition, since the advent of the Community Development Block Grant Program, the Fair Share implementation procedures have served as a basis for review of housing assistance goals contained in local Housing Assistance plans.[183]

Following acceptance of the COG's recommendations by the HUD Area Office, concerted action is taken to ensure that acceptable applications are developed, that subsidy funds are committed by HUD, and that housing assistance is ultimately provided. Responsibility for followthrough on the Fair Share Plan is shared by all parties concerned in a remarkably cooperative spirit, demonstrating that a voluntary membership COG can engage in effective growth management even without direct regulatory powers.

B. *Affirmative Action Housing Plan*

In addition to its Fair Share Housing Plan, the Washington COG has developed a number of complementary programs: (1) a Fair

183. *See* note 179 *supra*.

Housing Affirmative Action Plan,[184] (2) a demonstration Minority Real Estate Career Development and Advancement Program, (3) a work program on residential displacement caused by public development activities, including an annual metropolitan replacement housing demand survey, and (4) a computerized Subsidized Housing Information file containing data on all federally assisted and public housing in the metropolitan area.

The Fair Housing Affirmative Action Plan contains a comprehensive strategy that includes the parties to all transactions involved in the rental, sale, and financing of housing units in a voluntary, cooperative program to promote the concept of equal housing accessibility. Its specific goals are:

- To ensure the availability of all housing on a non-discriminatory basis, including the elimination of "institutional" practices which tend to be discriminatory in effect;
- To inform minority residents of the availability of housing in areas in which they might not ordinarily look for housing, and to encourage them to seek housing in such areas;
- To educate the entire metropolitan community as to everyone's right to live wherever he or she chooses, and the desirability of heterogeneous communities; and
- To develop mechanisms through which progress toward these goals can be systematically measured.[185]

The basic thrust of the Affirmative Action Plan is to ensure availability of housing to all persons regardless of race, color, religion, or national origin. In addition, the Plan seeks equal accessibility to housing for all persons, regardless of sex, marital status, age, or number of children.[186] The Plan covers all types of housing rental, sale and financing activities including advertising, marketing, office procedures, training and employment of housing and home finance industry personnel, and public and private assistance and enforcement programs.[187]

Participating parties are local governments, associations and individual members of the housing industry and financial institutions, the U. S. Department of Housing and Urban Development, private and

184. METROPOLITAN WASHINGTON COUNCIL OF GOVERNMENTS, FAIR HOUSING AFFIRMATIVE ACTION PLAN: A GUIDE FOR THE WASHINGTON METROPOLITAN AREA (1974).

185. *Id.* at 3-4.

186. *Id.*

187. *Id.*

public interest groups, and members of the metropolitan community. For each party, specific recommendations for affirmative action are provided, along with model agreements for use by professional associations and individual firms, in concert with local governments and HUD. Practices are recommended for equal housing opportunity advertising, employee recruitment and training, setting eligibility and application criteria, and standardizing monitoring and report procedures.[188]

The growth management program of the Metropolitan Washington COG is a significant illustration of what can be done by an innovative COG to influence development. The tools it has created for cooperative forecasting, impact assessment, and action programs are important prototypes for regional agencies throughout the country. Its proposed use of negotiated agreements, not only for housing policy but also for federal agency locations, wastewater treatment, solid waste disposal, and other metropolitan issues, represents a very important advance in the conceptual foundation of regional equity.

Regional planning practice in several other areas has also pioneered the development of concepts and tools for achieving regional equity. Space does not permit description of these other innovative efforts here, but one of the leading examples is the Twin Cities Metropolitan Council.[189] Its use of the concept "metropolitan significance"[190] to identify those functions of concern to the Council, its effective fair share housing policy, and its framework plan for public facilities and services are important advances in introducing regional equity factors into regional growth guidance.

IV. CONCLUSION: PROSPECTS FOR REGIONAL EQUITY

In the final analysis regional equity is a concept much broader than simply a means to provide more lower cost housing. It is a matter of fairness in the regional distribution of, and opportunities for access to, developed urban land. Under an equitable system, all regional

188. *Id.*

189. *See* RESPONSIBLE GROWTH MANAGEMENT, *supra* note 65, at ch. 18. *See generally* P. RICHERT, GROWTH MANAGEMENT IN THE TWIN CITIES METROPOLITAN AREA: THE DEVELOPMENT FRAMEWORK PLANNING PROCESS (1976); R. FREILICH & J. RAGSDALE, A LEGAL STUDY OF THE CONTROL OF URBAN SPRAWL IN THE MINNEAPOLIS-ST. PAUL METROPOLITAN REGION (1974).

190. MINN. STAT. ANN. § 473.173 (West 1971). The Council has the power to review "any proposed matter" within its jurisdiction to determine whether that proposal is of "metropolitan significance." *Id.*

residents should have a reasonable opportunity to live, work, and use public facilities such as roads, sewers, schools, and parks at the regional locations of their choice. Thus, regional allocation of developed urban land, including its supporting public services, is a crucial issue for regional equity.

Traditionally, intervention into the private land development process has been a concern only of individual local governments, who are delegated power by the state to regulate development. Increasingly, it has been recognized that enhancement of the local welfare alone may have undesirable effects on neighboring communities and might exclude those who desire to move into a particular locality. In other words, furthering the local interest through growth management may subvert the larger regional interest, unless a concern for regional equity is placed in the forefront of all local actions.

Three significant forces encourage expansion of local growth management to encompass a regional perspective. Federal and state policy initiatives, progressive state court decisions, and innovative work by regional councils combine to establish regional equity as a viable and forceful concept.

There are still a number of unanswered questions concerning the future of regional growth management. How long will it be before the notion of regional responsibility for growth management is balanced by a corresponding expansion of regional authority? What is the local governmental reaction to the federal and state push for a regional perspective on development decisions? What strategies can regional councils employ to increase the effectiveness of their growth guidance planning and implementation process? Increasing delegation of responsibilities to regional councils typically is not associated with a corresponding delegation of authority. While federal intervention in regionalism has been described as transforming ". . . areawide confederalism from a wholly independent undertaking to a largely federally financed surrogate for metropolitan government,"[191] few regional councils have any governmental powers or operating responsibilities. Without authority to compel participation or implementation of its decisions a regional council must rest on the good will of constituent local governments for its existence, and rely on consensual decisionmaking to facilitate rather than enforce resolution of areawide issues. It must spend much energy on procedural efforts to balance demands for local independence with needs from area-

191. REGIONAL DECISION MAKING, *supra* note 3, at 52.

wide interdependence. It must make the best of whatever limited authority participating jurisdictions, collectively or individually, will allow.

Prospects for an immediate turnaround in these constraints are slim. So far, the regional general welfare concept has only been accepted by the courts of five states: New Jersey, New York, Pennsylvania, Michigan, and California. Current federal and state policy initiatives are still only proposals; none has yet been adopted. The number of regional councils able to deal effectively with regional equity issues is greatly outnumbered by the number of regional councils that have done little or nothing on this front. Realistically, we would expect regional responsibilities to be greater than formal regional powers for many years to come.

Given a planning environment where regional formal authority is minimal, what is the likely response of local governments to these regional councils attempting to develop and implement a viable growth management planning process through federal support? Here again, the prospects are sobering. The realities of the local political process ensure that any attempts by state or federal governments to increase regional council authority will be resisted by local governments who feel a threat to their autonomy. Yet without authority, the effectiveness of regional efforts is open to question.

Without formal authority, there may be alternate means to increase the legitimacy or power of a regional agency. This appears to be one of the most promising areas for study. Advances by regional councils such as the Washington COG suggest that it is possible to do a great deal with minimal authority when the proper decision environment is created and when maximum use is made of informal coordination and negotiation, along with focused analyses of regional information and timely response to development issues. If backed up with new federal or state authority, these advances could be further amplified.

Beyond a few case studies, little attention has been directed toward systematically assessing the effectiveness of regional planning and growth management. Often policymakers assume that local and state governments are basically supportive of regional councils, only requiring the right federal funding "carrot" to actively support the regional perspective. This assumption fails to confront political realities associated with regional planning: the question of state versus local control, the shifts in power relationships that will be necessary to establish authoritative regional councils and, therefore, the vested

interest of both state and local government in seeing that regional councils do not acquire too much authority or become too effective.

Despite these admittedly serious problems, we are cautiously optimistic about the emerging thrust toward recognizing regional equity as a key feature in decisions on growth and development. There is evidence from places like the Metropolitan Washington Council that regional agencies can go a long way toward overcoming their lack of authority by using their coordinative mandate in a creative and aggressive fashion. There is heartening activity in federal circles that shows a willingness to devise new program and legislative initiatives in support of regional growth management. And finally, there is the threat of legal challenge to inspire lagging areas to recognize that areawide planning and development guidance can be both a legally defensible and a constitutionally responsible means to achieve regional equity.