LOCAL GROWTH MANAGEMENT AND REGIONAL HOUSING NEEDS

Many American municipal governments, concerned about the shape and rate of growth in their communities, have adopted sophisticated uses of their police and tax powers to guide the course of socioeconomic development.[1] Most state courts,[2] and particularly the United States Supreme Court,[3] have eschewed an interventionist role

1. *See* Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385, 388 (1977); Rose, *Conflict Between Regionalism and Home Rule: The Ambivalence of Recent Planning Law Decisions*, 31 RUTGERS L. REV. 1 (1978).

The "police power" concept encompasses the inherent right of state and local governments to enact legislation protecting the health, safety, morals or general welfare of the people within their jurisdiction. See J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 389, 389-410 (1978) [hereinafter cited as NOWAK], for a general overview of the development of the "police power" concept in relation to the exercise of various governmental interests.

Courts apply one of two tests in determining whether an exercise of the police power is constitutional. The "reasonable means" test requires only that the means chosen by a governmental entity reasonably or rationally relate to the effecutation of a legitimate public purpose. The much stricter "strict scrutiny" test requires that the means chosen relate in the most narrow way to attainment of a compelling public interest. As a result, a court applying "strict scrutiny" will invalidate ordinances not supported by a compelling interest, or which are either overinclusive or underinclusive. *See generally* F. MICHELMAN & T. SANDALOW, GOVERNMENT IN URBAN AREAS 308-10 (1970).

2. *E.g.*, Vickers v. Gloucester Township, 37 N.J. 232, 181 A.2d 129 (1962), *cert. denied*, 371 U.S. 233 (1963) (municipal freedom of action under zoning and general police powers read broadly to allow total prohibition of trailer parks). *See generally* Comment, *The Need for Accommodation in Growth Control Ordinances:* Associated Homebuilders of the Greater Eastbay, Inc. v. City of Livermore, 12 U.S.F.L. REV. 357 (1978).

3. The United States Supreme Court apparently has attempted in recent years to steer land-use cases out of the federal courts.

In Berman v. Parker, 348 U.S. 26 (1954) the Supreme Court upheld the validity of an urban renewal program, and set the federal tone of approach to municipal land use programs. The Court stated that the choice of a policy goal and an implementing strategy by a local legislative body is conclusive unless some constitutionally protected interest is impaired by the governmental action. *Id.* at 32.

Permissive Supreme Court review of municipal land use policy contrasts sharply with Congress' activism in the land use and growth management field since World War II, and particularly during the last decade. Though Congress has not enacted a

with respect to these growth management plans. They accord a general presumption of validity to municipal land use policies.[4] Some state courts, however, have begun to scrutinize municipal land use policies with greater vigor.[5] Activist judges employ particular socio-economic perspectives to determine the best balance between land use restrictions and regional needs.[6] By dictating the substantive

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general land use law, it has taken major actions that directly and indirectly affect the land use area. One recent study identified over one hundred federal programs that had an impact on land and growth management. *Symposium—Growth Policy in the Eighties*, 43 LAW & CONTEMP. PROB. 5, 112 & n.4 (1979) [hereinafter cited as *Symposium*].

4. *Compare* Associated Home Builders v. City of Livermore, 18 Cal. 3d 582, 604, 557 P.2d 473, 486, 135 Cal. Rptr. 41, 54 (1976) (en banc) ("courts recognize that such ordinances are presumed to be constitutional, and come before the court with every intendment in their favor") *with* Berman v. Parker, 348 U.S. 26 (1954) (unanimous opinion) (subject to specific constitutional limitations, the legislative enunciation of the public interest is conclusive). Some state courts, however, have exercised more stringent substantive review though ostensibly applying the "rational relation" test. *See, e.g.*, Matthews v. Board of Zoning Appeals, 218 Va. 720, 237 S.E.2d 128 (1977).

The seminal case of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), established the general validity of a comprehensive governmental regulation of land use and the permissibility of a local government's exercise of that authority. Specifically, *Euclid* established two principles that have been pivotal in the evolution of American land use law: (1) Government in general may regulate comprehensively land use patterns, even if a use prohibited by a zoning ordinance would not be so noxious by itself to warrant a finding of nuisance; and (2) State governments may delegate their regulatory authority in the land use field to local units of government. *But see* note 5 *infra*.

In dictum the Court tempered these broad propositions with principles of limitation. The Court asserted that landowners have the right to attack the constitutional validity of a zoning ordinance as applied to their tract of land, even though the overall zoning power existed and was exercised reasonably. *Id.* at 395, *quoted in Symposium, supra* note 3, at 6-7 & nn.6-8. *See generally* D. MANDELKER & R. CUNNINGHAM, PLANNING AND CONTROL OF LAND DEVELOPMENT 201-17 (1979) [hereinafter cited as MANDELKER].

5. *See, e.g.*, Southern Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 336 A.2d 713 (1975); notes 25-33 and accompanying text *infra*; Waynesborough Corp. v. Easttown Township Zoning Hearing Bd., 23 Pa. Commw. Ct. 137, 350 A.2d 895 (1976) (lower court correct in concluding that ordinance did not make reasonable allowances for multifamily dwellings within the township).

Municipalities exercise their police power at the pleasure of the states. Local governments only possess authority expressly or impliedly granted by either state constitutional or legislative provisions. D. MANDELKER & D. NETSCH, STATE AND LOCAL GOVERNMENT IN A FEDERAL SYSTEM 147-55 (1977). Typically, states have delegated their police power authority in the land use field to local units of government by means of enabling legislation, which allows local governmental bodies to implement land use planning and regulatory functions.

6. *E.g.*, 1980 Cal. Stat. ch. 1144 § 1

The Legislature . . . declares that local government ordinances which severely

terms of municipal growth, these courts have aroused concerns about judicial infringement on the legislative domain.[7]

The term "growth management" encompasses potentially all land

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restrict the number of housing units which may be constructed have an effect on the supply of housing within the region, may exacerbate the housing market conditions in surrounding jurisdictions, and may limit access to affordable housing within the jurisdiction and in the region. . . . [I]ncreasing public need for adequate housing requires that local governments properly establish the need for such ordinances and balance the need for such ordinances against the need for new housing opportunities.

7. Surrick v. Zoning Bd., 476 Pa. 182, 382 A.2d 105, 114-15 (1977) (Roberts, J., concurring). *See* notes 48-52 *infra*. *But see* Construction Indus. Ass'n v. City of Petaluma, 522 F.2d 879 (9th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976), in which the Court of Appeals declared that "being neither a superlegislature nor a zoning board of appeal, a federal court is without authority to weigh and appraise the factors considered or ignored by the legislative body in passing the challenged zoning regulation." *Id.* at 906 (footnote omitted). The concurrence in *Surrick* recognized that legislative and administrative inaction could justify judicial intervention in the land use planning process. 476 Pa. at 199 n.1, 382 A.2d at 114 n.1 (1977). *Cf.* Southern Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 336 A.2d 713 (1975) (township zoning ordinance which discriminated against low and moderate cost housing invalidated; extensive trial record showed that deference to local legislature would impede measures essential to the regional welfare).

Unlike some state courts, lower federal courts generally defer to municipal zoning decisions, sustaining the laws against constitutional attack. *See* Steel Hill Dev., Inc. v. Town of Sanborton, 469 F.2d 956 (1st Cir. 1972) (rebuffing constitutional attacks on three and six acre minimum lot size requirements). Certain lower federal courts have relied on the abstention doctrine in order to force complaining landowners to seek relief in state courts. *See* Sea Ranch Ass'n v. Cal. Coastal Zone Comm'n, 537 F.2d 1058 (9th Cir. 1976) (abstention proper when state court's interpretation of statute could leave no federal constitutional questions for federal court disposition).

The abstention doctrine is a principle of federal jurisdiction designed to allow the state court to rule definitively on the interpretation of state law before federal court determination of federal constitutional issues involved in the same case. The practical and policy reasons underlying the abstention doctrine are that the state court determinations of the state law questions may make the federal constitutional issues moot or present them in a different posture to federal courts. The exercise of federal jurisdiction could be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern. For a concise and insightful discussion of the abstention doctrine see NOWAK, *supra* note 1, at 93-100.

In a recent case, Colorado River Water Conserv. v. United States, 424 U.S. 800 (1976), the Supreme Court reiterated that abstention from the exercise of federal jurisdiction is the exception rather than the rule. *Id.* at 813. Moreover, the Court stated that the use of abstention is limited. *Id.* at 814-17. *See* NOWAK, *supra* note 1, at 96. *See also* Rose, *Regionalism and Home Rule*, 31 RUTGERS L. REV. 1 (1977). The author asserts that the conflict between regionalism and home rule is more a political than legal one, but adds that the political inability of most state legislatures to address possible regional approaches has created a void that can tempt judicial intervention. *Id.* at 21. In addition, the author provides an excellent development and analysis of

use controls, so long as the intended result is control of the rate of development.[8] Zoning, the preferred growth management device, is inherently exclusionary.[9] Zoning ordinances are designed to create districts in which some uses, activities, or structures are permitted and others excluded.[10] The term "exclusionary zoning,"[11] however, has an even narrower meaning.[12] It refers to land use controls or techniques which exclude certain segments of the population or types of housing from the housing market without serving a legitimizing public purpose.[13]

A notable development is the recognition by some state courts that municipalities have a duty[14] to modify or limit their use of growth

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the constitutional ramifications of growth control devices' impact on the freedom of interstate travel. *See generally* MANDELKER, *supra* note 4, at 987-1083.

8. Simply increasing minimum lot sizes has been used as a technique to control growth, though this technique may present exclusionary problems. *E.g.*, Steel Hill Dev., Inc. v. Town of Sanborton, 469 F.2d 956 (1st Cir. 1972) (increased minimum lot size upheld since area not faced with existing demand for suburban expansion).

9. *See* Smith, *Exclusionary Zoning*, in MODERN CONTROL OF LAND DEVELOPMENT 103 (1979).

10. *Id.*

11. " 'Exclusionary zoning' is a phrase popularly used to describe suburban zoning regulations which have the effect, if not also the purpose, of preventing the migration of low and middle income persons." Construction Indus. Ass'n v. City of Petaluma, 522 F.2d 897, 905 n.10 (9th Cir. 1975).

Conversely, the term "inclusionary zoning" refers to ordinances which encourage or mandate the construction of a broad range of housing types, especially low and moderate income housing. SMITH, *supra* note 9, at 103. *See generally* MANDELKER, *supra* note 4, at 445-574.

12. *See* notes 28-33 and accompanying text *infra*.

13. SMITH, *supra* note 9.

14. For emphatic statements of this duty, see Southern Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 336 A.2d 713 (1975) (each municipality exerting a substantial external impact through a land use regulation has a presumptive obligation to provide reasonable opportunity for an appropriate variety of housing to meet the needs, desires, and resources of all categories of people who may wish to live within its boundaries); Berenson v. Town of New Castle, 38 N.Y.2d 102, 341 N.E.2d 236, 378 N.Y.S.2d 672 (1975) (in enacting a zoning ordinance, consideration must be given to regional needs and requirements). *See also* National Land & Inv. Co. v. Kohn, 419 Pa. 504, 215 A.2d 597 (1965) (zoning may not be used to avoid responsibilities and economic burdens which time and natural growth ultimately bring).

Even the United States Supreme Court, usually very restrained in its approach to municipal zoning, anticipated this duty to a broader public interest. It stated in Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), that its holding in favor of the village did not exclude the possibility of cases in which the general public interest

management techniques in order to respond affirmatively to present and future regional needs.[15] Even state court decisions not resulting in invalidation of zoning ordinances have expressed concern about the impact of growth limitations on regional resource capabilities. More importantly, growing recognition of the finiteness of many public resources is likely to cause courts, which in the past have been deferential to local policies, to require municipal consideration of regional needs.[16]

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would so far outweigh the local interest that the locality would not be allowed to stand in the way. *Id.* at 390.

15. The first case to stress the importance of integrating regional needs and resources into the municipal zoning decision was Duffcon Concrete Prod., Inc. v. Borough of Cresskill, 1 N.J. 509, 64 A.2d 347 (1949). The *Duffcon* court expressed its viewpoint as follows:

> What may be the most appropriate use of any particular property depends not only on all the conditions . . . prevailing within the municipality and its needs . . . but also on the nature of the entire region in which the municipality is located and the use to which the land in that region has been or may be put most advantageously. The effective development of a region should not and cannot be made to depend on the adventitious location of municipal boundaries.

Id. at 513, 64 A.2d at 349-50.

The *Duffcon* court's view contrasts with the traditional approach of courts which requires only that a municipality consider the welfare of the zoned unit. *See* Comment, *Exclusionary Zoning: An Overview*, 47 TUL. L. REV. 1056 (1973).

16. In recent years there has been a public tendency to favor more provincial land uses. With the rise of the environmental movement in the late 1960s and early 1970s, resource conservation became a widely approved value, and restrictions on rapid suburban growth received a more sympathetic response from commentators. *See, e.g.*, Freilich and Ragsdale, *Timing and Sequential Controls—The Essential Basis for Effective Regional Planning: An Analysis of the New Directions for Land Use Control in the Minneapolis-St. Paul Region*, 58 MINN. L. REV. 1009 (1974); Deutsch, *Land Use Growth Controls: A Case Study of San Jose and Livermore, California*, 15 SANTA CLARA L. REV. 1 (1974); Note, *Time Controls on Land Use: Prophylactic Law for Planners*, 57 CORNELL L. REV. 827 (1972). *See also* Marcus, *Mandatory Development Rights Transfer and the Taking Clause: The Case of Manhattan's Tudor City Parks*, 24 BUFFALO L. REV. 77 (1974).

Many commentators in the early 1970s, however, argued that judicially approved controls on growth were functionally indistinguishable from regulations previously deemed too exclusionary. *See, e.g.*, Bosselman, *Can the Town of Ramapo Pass a Law to Bind the Rights of the Whole World?*, 1 FLA. ST. U.L. REV. 234 (1973).

Professor Ellickson, an eminent authority on growth management, has noted that much of the housing inhibited by growth control measures would be superior in quality to most current housing. Ellickson, *supra* note 1, at 490. Ellickson would modify the *Mount Laurel* holding by allowing suburbs to impose elite standards for housing construction if they are willing to compensate persons injured by those standards. *Id.* at 506.

I. DEVELOPMENT OF THE "FAIR SHARE" DOCTRINE

Golden v. Planning Board of Town of Ramapo,[17] the watershed case for the standard of judicial review in growth management cases, prefigured the present-day balancing of local growth limitations against the regional repercussions of those limitations.[18] In *Ramapo*, the town initiated a phased eighteen-year capital improvement program prescribing the location and sequence of capital improvements for essential public services and facilities. This multifaceted program resulted from planning studies contemplating maximum development.[19] Critical to the court's approval of Ramapo's growth management plan was the lack of permanent restrictions on development.[20] Rather than impose an absolute limit on the rate of future growth, Ramapo had imposed *temporary* restrictions upon land use in resi-

17. 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138 (1972), *appeal dismissed*, 409 U.S. 1003 (1972). The municipality in *Ramapo* conditioned residential development upon issuance of special permits. The municipality based the issuance of the permits on availability of designated essential services, such as sewers, parks, schools, and roads. *Id.* at 368, 285 N.E.2d at 295, 334 N.Y.S.2d at 143-44. The rationale of the *Ramapo* plan was to coordinate residential growth with the town's timetable for providing facilities and services. *Id. See generally* Freilich, *Interim Development Controls: Essential Tools for Implementing Flexible Planning and Zoning*, 49 J. URB. L. 65 (1971).

18. The *Ramapo* court did not specifically discuss the regional implications of the town's growth control measures, but it did focus on factors of efficiency and fairness. The court stated:

> We only require that communities confront the challenge of population growth with open doors. Where in grappling with that problem, the community undertakes, by imposing temporary restrictions upon development, to provide required municipal services in a rational manner, courts are rightfully reluctant to strike down such schemes.

30 N.Y.2d at 379, 285 N.E.2d at 302, 334 N.Y.S.2d at 153. *See generally Symposium, supra* note 3, at 165-66 & n.38.

19. 30 N.Y.2d at 368, 285 N.E.2d at 295, 334 N.Y.S.2d at 143.

One federal district court found that a restrictive development plan which could not accommodate expected, natural growth was arbitrary and therefore unconstitutional. The appellate court, however, reversed because the trial court had imposed a standard of review stricter than the rational relationship test. Construction Indus. Ass'n v. City of Petaluma, 375 F. Supp. 574 (N.D. Cal. 1974), *rev'd*, 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976).

20. 30 N.Y.2d at 378, 285 N.E.2d at 302, 334 N.Y.S.2d at 152. *Accord* Steel Hill Dev., Inc. v. Town of Sanborton, 469 F.2d 956, 961-62 (1st Cir. 1972) (great increase in minimum lost size sustained only as a stop-gap growth control mechanism; different result if the new minimum lot size were permanent). See *Symposium, supra* note 3, at 144, for an extensive discussion of growth management criteria and public values and concerns underlying growth management policies.

dential areas while contemporaneously committing itself to a program of development.[21] In effect, Ramapo utilized a comprehensive development plan,[22] coupling growth restrictions with large scale provisions for low and moderate income housing.[23] The New York court considered the growth management plan, both at its inception and implementation, as a reasonable attempt to provide for the sequential, orderly development of land in accordance with the needs of the community.[24]

The landmark case to date for espousal of the regional need principle is *Southern Burlington County NAACP v. Township of Mount Laurel*.[25] The court in *Mount Laurel* went beyond the mere enunciation of principle, however, by requiring the defendant-township to make affirmative provision for its "fair share"[26] of the housing needs of the

21. 30 N.Y. 2d at 378, 285 N.E.2d at 302, 334 N.Y.S.2d at 152.

22. *Id.* at 380, 285 N.E.2d at 303, 334 N.Y.S.2d at 153.

23. *Id.* The court's concern that the development plan provide low and moderate income housing was a precursor to the more express egalitarianism pervading the "fair share" cases. *See* notes 27, 30, 34 *infra*. *See generally Symposium, supra* note 3, at 187.

24. 30 N.Y.2d at 380, 285 N.E.2d at 303, 334 N.Y.S.2d at 153 (1972). Thus, Ramapo's growth control program satisfied the "rational relation" standard of review. *Contra* City of Boca Raton v. Boca Villas Corp., 371 So.2d 154 (Fla. Dist. Ct. App. 1979). *In Boca Raton*, a zoning ordinance created an absolute limit of forty thousand additional dwelling units within the city boundaries. Because the ceiling was not based on a reasonable, balanced assessment of the growth potential of the city, the court invalidated the ordinance. "[A]n excessive restriction on the use of private property which does not contribute substantially to the public health, morals, safety, and welfare is arbitrary and unreasonable and thus unconstitutional." 371 So.2d at 157.

25. 67 N.J. 151, 336 A.2d 713 (1975).

26. *Id.* at 179-80, 336 A.2d at 724-25. Justice Hall, the writer of the *Mount Laurel* opinion, stated that the limitation in types of homes, minimum lot and floor size requirements, and the disproportionately large amount of land zoned industrial constituted a prima facie breach of the town's fair share duty. *Id.* at 183-85, 336 A.2d at 729-30. *See generally* MANDELKER, *supra* note 4, at 445-574.

Other state courts have also espoused the "fair share" principle. For example, the court in Waynesborough Corp. v. Easttown Zoning Hearing Bd., 23 Pa. Commw. Ct. 137, 350 A.2d 895 (1976), articulated factors that a court may consider in applying the "fair share" principle: (1) percentage of land made available for multiple family use, *id.* at 142, 350 A.2d at 897 & n.3; (2) history of zoning within the locality in question, *id.*, 350 A.2d at 898; (3) whether the locality is a logical place for development opportunity, *id.* at 143, 350 A.2d at 898, *quoting* Girsh Appeal, 437 Pa. 237, 245, 263 A.2d 396, 398 (1970).

The court in *Waynesborough* also stated that a locality cannot implement a zoning scheme that makes no reasonable provision for apartment uses. 23 Pa. Commw. Ct.

region. Specifically, Mount Laurel and other "developing" communities[27] in New Jersey would have to make available an appropriate amount of suitable land for low and moderate income housing.[28] Only a demonstration of unusual circumstances could excuse this affirmative obligation.[29]

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at 142, 350 A.2d at 897-98, *quoting* Girsh Appeal, 437 Pa. 237, 243, 263 A.2d 395, 398 (1970). Such a scheme would directly violate the "fair share" principle.

Finally, the *Waynesborough* court asserted that intent to exclude is not necessary to make a growth control policy unconstitutional. "When other facts and circumstances indicate an unreasonable restriction on the use of land for multifamily dwellings, a conclusion that the ordinance is unconstitutional will stand without a finding of intent to exclude." 23 Pa. Commw. Ct. at 143, 350 A.2d at 898.

27. For what constitutes a "developing" community, see Rose and Levin, *What is a "Developing Municipality" Within the Meaning of the Mount Laurel Decision?*, in 4 REAL EST. L. J. 359 (1976).

In Glenview Dev. Co. v. Franklin Township, 164 N.J. Super. 563, 397 A.2d 384 (1978), the court discerned a six-point test in *Mount Laurel* for characterizing a "developing municipality." The six points are: (1) sizeable land area; (2) location outside the central cities and other built-up suburbs; (3) substantially divested of rural characteristics; (4) great population increase since World War II or presently undergoing a great increase; (5) not completely developed; (6) situated for inevitable future residential, commercial and industrial demand and growth. *Id.* at 567-68, 397 A.2d at 386.

As expected, New Jersey courts after *Mount Laurel* did not apply the "fair share" principle to "non-developing" municipalities. *See, e.g.*, Pascack Ass'n v. Mayor of Wash. Township, 74 N.J. 470, 379 A.2d 6 (1977); Windmill Estates v. Zoning Bd. of Adjustment, 147 N.J. Super. 65, 370 A.2d 541 (1976).

28. One land use analyst claims that the ad hoc "fair share" approach derives from the impracticality of imposing a uniform standard on every municipality in a region. One municipality may be suited for many more land uses than another. *See* Hall, *A Review of The Mount Laurel Decision*, in AFTER MOUNT LAUREL: THE NEW SUBURBAN ZONING 44 (1977). For criticism of the approach taken in *Mount Laurel*, see Ellickson, *supra* note 1, at 505-06.

The "fair share" requirement is meant to benefit low- and moderate-income residents of a region. Two recent New Jersey decisions held that the concept does not imply a duty to provide housing for middle- or upper-income groups. Castroll v. Township of Franklin, 161 N.J. Super. 190, 391 A.2d 544 (1978) (variance for garden apartment complex denied); Swiss Village Assocs. v. Township of Wayne, 162 N.J. Super. 138, 392 A.2d 596 (1978) (zoning amendment to permit high rent apartments denied).

The reasoning in *Mount Laurel* was that, because localities have regional responsibilities to promote the general welfare and because housing is a component of the general welfare concept, localities have a duty through their land use plan to "make realistically possible an appropriate variety and choice of housing." 67 N.J. at 174, 336 A.2d at 724.

29. *Id.*, 336 A.2d at 724-25 (1975). Professor Ellickson, on the other hand, generally favors an activist judicial role with respect to distribution of a community's limited resources. Ellickson, *supra* note 1, at 511.

Pointing out that the local zoning authority acts only as a delegate of the state's police power,[30] the *Mount Laurel* court stated that the determinant of the "fair share" obligation is whether the zoning regulations or policies under review have a substantial external impact.[31] If a substantial external impact exists, the municipality must not only consider, but also take steps to promote the welfare of the state's citizens beyond its borders. Conversely, the municipality cannot adopt regulations or policies which thwart the opportunity of any category of persons in the region to live within the municipal boundaries.[32]

In a subsequent New Jersey case, *Oakwood at Madison, Inc. v. Township of Madison*,[33] the court declined to fashion a judicial rule for determining "fair share" issues. It left the questions of regional need and "fair share" to be decided on a case by case basis.[34] The *Madison* court noted that *Mount Laurel* had not devised a formula for estimating "fair share," and added that such a formulation remains the province of those with the requisite expertise:[35] the municipal planning adviser, the county planning boards, and the state planning agency.[36] In essence, the court believed that the problem of

30. State courts have traditionally showed great respect for Dillon's Rule, which calls for the strict construction of municipal powers under state enabling acts. *See* 1 J. DILLON, MUNICIPAL CORPORATIONS 448-55 (5th ed. 1911).

31. 67 N.J. 151, 177, 336 A.2d 713, 726 (1975).

32. The geographical scope of the region whose public welfare must be considered presents a definitional problem to the courts. In Associated Home Builders v. City of Livermore, 18 Cal.3d 582, 607 n.24, 557 P.2d 473, 487-88 n.24, 135 Cal. Rptr. 55-56 n.25 (1976), the California Supreme Court stated that the trial court should determine the size of a region significantly affected by a land use restriction as a question of fact. After making this factual determination, the trial court could assess whether the contested restriction reasonably relates to the regional welfare. *Id.* at 601, 607, 557 P.2d at 483, 487, 135 Cal. Rptr. at 51, 55 (1976).

Following the ground breaking *Mount Laurel* decision, the township revised its zoning ordinance. A New Jersey trial court found the revised ordinances valid, except for a few provisions. The trial court, applying the "fair share" requirement, invalidated the ordinance's total exclusion of mobile homes. Southern Burlington County NAACP v. Township of Mount Laurel, 161 N.J. Super. 317, 391 A.2d 935 (1978).

33. 72 N.J. 481, 371 A.2d 1192 (1977).

34. *Id.* at 541-42, 371 A.2d at 1222. The *Oakwood* Court stated emphatically that the task of devising a formula for estimating the "fair share" requirement was not a task for the courts. *Id.*

35. *Id.* at 541, 371 A.2d at 1222.

36. *Id.* The court imposed the duty on these municipal land use strategists to "adjust . . . zoning regulations so as to render possible the 'least cost' housing, consistent with minimum standards of health and safety, which private industry will under-

devising a "fair share" formula was a legislative and administrative one.[37]

In *Berenson v. Town of New Castle*,[38] the New York Court of Appeals imposed a two-fold obligation. First, the court agreed with the *Mount Laurel* approach that a developing municipality must take regional needs into consideration. Second, the court recognized the necessity of assessing the community's needs—inquiring whether the town's growth management plan provided for a balanced, well-ordered community.[39] *Berenson* recognized that most communities differ substantially from each other, hence what is appropriate for one community may be grossly inappropriate for another.[40]

Significantly, the *Berenson* court declined to adopt in New York as extensive a "fair share" requirement as found under the New Jersey rule. *Berenson* reiterated judicial interest in a regional standard, but held that a community need not permit a land use solely for the sake of the residents of the region if the region adequately provides for their needs.[41] The court stated that an ordinance was not invalid as a matter of law for bearing an insubstantial relation to the "public health, safety, morals or general welfare"[42] if other areas in the community at large fulfilled regional and local needs for low and moder-

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take, and in amounts sufficient to satisfy the deficit in the hypothesized fair share." *Id.* at 512, 371 A.2d at 1207.

The *Oakwood* court noted that market economics stood in the way of the production of multi-family housing, and therefore stated that "developing communities" should use density bonuses as an incentive to build such houses. *Id.* at 516-17, 371 A.2d at 1209. Although the court held that a developing municipality should act affirmatively to help provide for sufficient lower-income housing, it did not extend this affirmative duty to include an obligation that the municipality build or subsidize multi-family housing. *Id.* at 499, 517, 371 A.2d at 1200, 1209.

37. *Id.* at 541-42, 371 A.2d at 1222.

38. 38 N.Y.2d 102, 341 N.E.2d 236 (1975).

39. *Id.* at 109, 341 N.E.2d at 242 (1975). The court did not impose a requirement that each zone contain balanced housing. Instead, the stated goal of the court was development of a balanced *community* which would make efficient use of the town's land. *Id.* at 109, 341 N.E.2d at 241-42.

40. *Id.* at 108, 341 N.E.2d at 240.

41. Like the New Jersey court in *Oakwood*, the New York Court of Appeals in *Berenson* did not mandate a quantitative proportion between various types of development. The *Berenson* court explained that such a rigid requirement would militate against the stated goal of orderly municipal development to meet public needs. *Id.* at 109, 341 N.E.2d at 241-42.

42. *See* definition of "police power," note 1 *supra*.

ate income housing.[43]

On remand, the trial court imposed a housing quota and other specific limitations on growth control upon the town's zoning authorities.[44] New York's intermediate court of appeals overturned these limitations.[45] The appellate court held that "fair share" was not meant to cover market-rate housing.[46] In effect, the court abstained from stretching *Mount Laurel*'s "fair share" requirement to the point of strict, detailed judicial control over the substantive terms of growth management programs.

The Pennsylvania Supreme Court decision in *Surrick v. Zoning Hearing Board of Township of Upper Providence*[47] further illustrates the spreading influence of the *Mount Laurel* court's emphasis on the regional welfare. In *Surrick*, the court adopted the "fair share" approach to exclusionary zoning.[48] At one point in the opinion, the court recognized the common concern that adoption of the "fair share" test forces courts to perform functions that are legislative or administrative in nature.[49] Nevertheless, the *Surrick* court devised its own analytic procedure for judging subsequent exclusionary zoning cases. It considered the percentage of zoned community land available for multiple-family dwellings, current population growth

43. 38 N.Y.2d at 111, 341 N.E.2d at 243 (1975).

44. For an account of the trial court's decision, see 30 ZONING DIG. 11 (No. 2 1978).

45. Berenson v. Town of New Castle, 67 A.D.2d 506, 415 N.Y.S.2d 669 (1979).

46. *Id.* at 521, 415 N.Y.S.2d at 678. Moreover, the court asserted that the trial court's imposition of a "fair share" quota had no support in case law or public policy. *Id.* The court noted that even the more demanding New Jersey and Pennsylvania courts had not imposed quotas. *Id.* at 521-22, 415 N.Y.S.2d at 678. Third, the court said that a specific judicial order was not the proper way to react to unmet local or regional need for multi-family housing. Instead, judicial intervention into local housing policy should limit itself to a determination of the degree of reasonableness exemplified by local planning. *Id.* at 522, 415 N.Y.S.2d at 679.

47. 476 Pa. 182, 382 A.2d 105.

48. *Id.* at 198-201, 382 A.2d at 114-15 (Roberts, J., concurring). Justice Roberts expressed concern about excessive judicial intervention into local planning matters. Specifically, Roberts protested the adoption in Pennsylvania of the "fair share" framework for analyzing zoning ordinances. *Id.* at 200-01, 382 A.2d at 115. *But cf.* Berenson v. Town of New Castle, 38 N.Y.2d 102, 111, 341 N.E.2d 236, 243 (1975) ("[I]t is quite anomalous that a court should be required to perform the tasks of a regional planner. . . . Until the day comes when regional, rather than local, governmental units can make such determinations, the courts must assess the reasonableness of what the locality has done.").

49. 476 Pa. at 191, 382 A.2d at 109. *See* text accompanying note 38 *supra*.

pressure within the locality and region, and total amount of undeveloped land in the township.[50] The *Surrick* court concluded that the ordinance under its review did not provide a "fair share" of township land for development of multi-family dwellings.[51]

Finally, the California Supreme Court recently adopted a regional need approach to exclusionary zoning ordinances.[52] In *Associated Home Builders v. Livermore*,[53] the California Supreme Court expanded the breadth of its review of zoning ordinances from the welfare of the municipality to the welfare of the region[54] where the ordinance has significant regional impact.[55] Despite expressions of judicial deference to municipal zoning ordinances throughout the opinion,[56] the court emphasized the pressing need for its adoption of a broader scale of review.[57]

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50. *Id.* at 194-95, 382 A.2d at 111.

51. The court based this conclusion on the fact that the ordinance provided only a little more than one percent of the township's land for multi-family housing. In addition, multi-family housing was but one of more than a dozen uses permitted on this very small percentage of land. *Id.* at 195-96, 382 A.2d at 111-12. *See generally* Comment, *The Pennsylvania Supreme Court and Exclusionary Suburban Zoning: From Bilbar to Girsh—A Decade of Change*, 16 VILL. L. REV. 507 (1971) (development of judicial sensitivity to regional needs and the duty of the suburbs to provide for them).

52. Though the California Supreme Court did not exercise explicit "fair share" review, its adoption of a regional needs test clearly expressed the egalitarian values underlying the "fair share" concept.

53. 18 Cal.3d 582, 557 P.2d 473, 135 Cal. Rptr. 41 (1976).

54. *Id.* at 607, 557 P.2d at 487, 135 Cal. Rptr. at 55.

55. *Id.* at 601, 557 P.2d at 483, 135 Cal. Rptr. at 51.

56. *Id.* at 601, 604-05, 610, 557 P.2d at 483, 485, 486, 489, 135 Cal. Rptr. at 51, 53, 54, 57.

The California Supreme Court in *Livermore* distinguished the absolute, impartial ban on *all* residential construction effected by the land use ordinance under its review from ordinances banning or limiting only less expensive forms of housing. The latter tends primarily to exclude would-be residents on grounds of race and wealth, a factor warranting a stricter level of review than the "reasonable means" test. *Id.* at 601, 557 P.2d at 484, 135 Cal. Rptr. at 52.

57. *Id.* at 607, 557 P.2d at 487-88, 135 Cal. Rptr. at 55-56.

The movement in California towards a broader, more encompassing review of local land use planning took a dramatic step forward in 1980. That year the California legislature extensively revised certain legislation to require localities to consider regional housings needs as a mandatory housing element of their comprehensive plans. The legislation codifies the *Mount Laurel* "fair share" rule. *See* MANDELKER, *supra* note 4, at 103-05 (1981 Supp.).

CAL. GOV'T. CODE § 65584(a) (Deering Supp. 1982) states:

[A] locality's share of the regional housing needs includes that share of the housing need of persons at all income levels within the area significantly affected by a

II. FINDING A MIDDLE GROUND

In retrospect, the promise of balanced growth supplied by the *Ramapo* planning scheme[58] has hardened into judicial doctrine in some states. *Mount Laurel*'s "fair share" principle gave life to the aspect of compromise inherent in *Ramapo*-type ordinances between the positive capacity for growth in a developing community[59] and the public desire to moderate the rate of growth. The value of egalitarian humanism[60] embodied in the *Mount Laurel* opinion has affected decisions of other state courts. In a time of adjustment and readjustment at all levels of government to vanishing, finite resources, the notion of a municipal duty to accommodate regional needs is gathering momentum.

It is conceptually convenient to view the *Berenson*[61] decision as a half-way point between the extremely deferential "reasonably" or "substantially related means" standard of review[62] and the more de-

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jurisdiction's general plan. The distribution of regional housing needs shall . . . take into consideration market demand for housing, employment opportunities, the availability of suitable sites and public facilities, commuting patterns, type and tenure of housing need, and the housing needs of farm-workers. The distribution shall seek to avoid further impaction of localities with relatively high proportions of lower income households. . . .

In addition, revised CAL. EVID. CODE § 669.5(a)-(b) (Deering Supp. 1982) makes the procedural burden on localities much more severe:

§ 669.5(a) Any ordinance enacted by the governing body of a city, county, or city and county which directly limits, by number, (1) the building permits that may be issued for residential construction or (2) the buildable lots which may be developed for residential purposes, is *presumed* to have an impact on the supply of residential units available in an area which includes territory outside the jurisdiction of such city, county, or city and county. (Emphasis added).

(b) With respect to any action which challenges the validity of such an ordinance, the city, county, or city and county enacting such ordinance shall bear the burden of proof that such ordinance is *necessary* for the protection of the public health, safety, or welfare of the population of such city, county, or city and county. (Emphasis added).

Section 669.5(b) apparently implies the "strict scrutiny" standard of judicial review.

58. *See* notes 17-25 and accompanying text *supra*.

59. *See* note 28 *supra*.

60. *Associated Home Builders v. City of Livermore* characterized the competing interests involved in land use restriction cases as egalitarian humanists and environmental protectionists. 18 Cal.3d 582, 608, 557 P.2d 473, 488, 135 Cal. Rptr. 41, 56 (1976).

61. *See* notes 39-47 and accompanying text *supra*.

62. *See* note 1 *supra*; (Associated Home Builders v. City of Livermore, 18 Cal.3d 582, 604, 607, 557 P.2d 473, 485, 487, 135 Cal. Rptr. 41, 53, 55).

manding impositions of the *Mount Laurel* court.[63] While *Berenson* required municipal consideration of regional need, it did not formulate a substantive standard by which to bind municipal zoning experts.[64] Thus, *Berenson* imposed some limitations upon exclusionary zoning ordinances, while simultaneously giving municipalities substantial elbow room in which to maneuver around nettlesome resource allocation problems.

Similarly, the court in *Livermore* stated the obligation of municipalities to satisfy a broad, undefined regional welfare standard,[65] without imposing specific implementation requirements. Advocates of the "fair share" plan can justifiably criticize the *Livermore* approach for upholding a total, albeit temporary, ban[66] on residential construction. Despite its sincere tone, *Livermore* may have merely paid lip service to the egalitarian value of providing housing for outlying regional areas. Nonetheless the California court, heretofore extremely deferential to local zoning programs, expanded the welfare obligation of municipalities.

In view of the cases discussed, *Berenson* represents the preferable approach to review of exclusionary zoning ordinances. The *Berenson* court reasonably asserted that there is no requirement for a municipality to make room for a land use if an appraisal of regional needs indicates that those needs are being otherwise satisfied.[67] Thus, the

63. *Cf.* Construction Indus. Ass'n v. City of Petaluma, 375 F. Supp. 574 (N.D. Cal. 1974), *rev'd* 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976). (application of the "strict scrutiny" test to a municipal ordinance severely limiting residential construction reversed).

64. 38 N.Y.2d at 109, 341 N.E.2d at 242.

65. 18 Cal.3d at 607, 557 P.2d at 487-88, 135 Cal. Rptr. at 55-56.

The land use doctrines that have evolved in the New Jersey, New York, Pennsylvania, and California courts were designed to offset the exclusionary impact of local growth restrictions deemed undesirable by these courts. These doctrines stress three related concepts: (1) Even in the absence of legislation, state courts have an obligation to factor regional needs into the process of judicial review. (2) The regional focus should be implemented by the imposition of a substantive duty on "developing" communities to bear their "fair share" of regional housing needs. (3) There should be a requirement that "developing" communities subsidize some forms of development because to adopt a "new growth must pay its own way" philosophy will have consequences deemed socially undesirable by the courts.

But cf. Oakwood at Madison, Inc. v. Township of Madison, 72 N.J. at 517-18, 371 A.2d at 1200, note 37 *supra* (court did not require municipalities to build or subsidize multi-family housing); *Symposium, supra* note 3, at 34-35.

66. 18 Cal.3d at 589 & n.2, 557 P.2d at 475-76 & n.2, 135 Cal. Rptr. at 43-44 & n.2.

67. 38 N.Y.2d at 110-11, 341 N.E.2d at 242-43.

Berenson court saw community diversity as an important, positive value, if not attained at the expense of the region. Finally the *Berenson* court, by imposing a regional standard without articulating a substantive standard such as "fair share," allowed localities considerable planning flexibility. At the same time, however, the court made clear that it would exercise procedural oversight by requiring the development of regional data, projections on regional needs, and other planning measures. This type of judicial review puts the initial responsibility on communities to determine a fair balancing of local and regional needs. It also allows the reviewing court to avoid entanglements in the fundamental aspects of planning.

III. Conclusion

The new "fair share" ideology requires a delicate balance between the state courts' right of review and local prerogative. State enabling acts and state court review should allow municipalities, given their immediate relation to local growth management problems, the upper hand in policy control and direction. Otherwise, state courts may usurp, beyond their range of competence, sophisticated planning functions ill-suited to judicial determination. So long as state courts assume the restrained approach of the *Berenson* court, the "fair share" ideology can produce greater fairness without unduly burdening growth management planners.

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