COMMENT

SOUTHERN BURLINGTON COUNTY NAACP v. TOWNSHIP OF MOUNT LAUREL*: MUNICIPALITIES MUST ZONE TO PROVIDE A FAIR SHARE OF REGIONAL HOUSING NEEDS

I
INTRODUCTION

Two of the biggest problems lower and moderate income people face today are housing shortages and center city unemployment. Exclusionary zoning[1] in the suburbs aggravates both problems. Most of the new blue-collar jobs that the lower classes traditionally hold are being created in the suburbs and not in the center cities where many of the poorer people live. At the same time, exclusionary zoning practices have raised the costs of suburban housing to levels that are often affordable only by wealthier people, thereby making it economically unfeasible for urban-dwelling workers to move to the suburbs. Since inexpensive, direct public transportation between urban housing and suburban jobs is seldom available, the jobs are frequently beyond the reach of the inner-city dwellers who need them.[2]

While the harmful effects of exclusionary zoning are well known, the following justifications for its use have been advanced: (1) that it maintains the rural character of an area;[3] (2) that it keeps the community homogeneous by excluding low income families and minorities;[4] (3) that it makes possible a low tax rate;[5] and (4) that it promotes public health and safety.[6] In states in which the state government plays a relatively small role in helping municipalities finance local services, the pressure for zoning to keep property taxes low may

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* 67 N.J. 151, 336 A.2d 713, *appeal dismissed*, 414 U.S. 12 (1975).

1. Exclusionary zoning refers to the use of zoning devices bearing no substantial relation to health needs or to the prevention of conflicting land use. Instances include large lot and frontage requirements, minimum house sizes, and maximum bedroom numbers.

2. These problems have been previously discussed and thoroughly documented. *See, e.g.*, Southern Burlington Cty. NAACP v. Township of Mt. Laurel, 67 N.J. 151, 205-07, 336 A.2d 713, 741-42, *appeal dismissed*, 414 U.S. 12 (1975) (Pashman, J., concurring); NAT'L COMM'N ON URBAN PROBLEMS, REPORT: BUILDING THE AMERICAN CITY 19 (1969); REPORT OF THE NAT'L ADVISORY COMM'N ON CIVIL DISORDERS 217 (1968); Note, *The Massachusetts Zoning Appeals Law: First Breach in the Exclusionary Wall*, 54 B.U.L. REV. 37, 44-45 (1974) [hereinafter Note, *Massachusetts Zoning Law*].

3. *E.g.*, Fischer v. Township of Bedminster, 11 N.J. 194, 196-98, 204-05, 93 A.2d 378, 379-80, 383-84 (1952).

4. *E.g.*, 67 N.J. at 196-97, 336 A.2d at 737 (Pashman, J., concurring); Editorial, *The Regimented Society*, Wall Street Journal, July 7, 1975, at 8, col. 2.

5. *E.g.*, 67 N.J. at 170, 336 A.2d at 723. *Id.* at 195, 336 A.2d at 736 (Pashman, J., concurring).

6. Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 STAN. L. REV. 767, 794 (1969).

be even greater than elsewhere.[7] Furthermore, a municipality may zone to retain these "advantages" for itself without regard for other municipalities in the region—many of which may follow similar zoning tactics.[8] As a result, entire regions may be zoned in an exclusionary manner.

Courts have tended to uphold exclusionary zoning plans,[9] though not without a heavy volume of criticism in legal literature.[10] However, some recent cases indicate that the position of state courts may be shifting.[11] Prominent among these cases is *Southern Burlington County NAACP v. Township of Mount Laurel*,[12] in which the New Jersey Supreme Court unanimously invalidated, in the interest of the region as a whole, a zoning ordinance which was less exclusionary than many.

II
THE CASE

The township of Mount Laurel is a developing community within the "outer ring of the South Jersey metropolitan area, . . . [including] those portions of Camden, Burlington and Gloucester Counties within a semicircle having a radius of 20 miles or so from the heart of Camden city."[13] Mount Laurel was primarily a rural agricultural area as late as 1950. Despite rapid development in subsequent years, 65 per cent of the township's land is still vacant or in agricultural use.[14]

The township's long-standing zoning ordinance provided that virtually all residential development would consist of single-family, detached dwellings.

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7. *E.g.*, 67 N.J. at 171, 336 A.2d at 723; Williams & Norman, *Exclusionary Land Use Controls: The Case of North-Eastern New Jersey*, 22 SYRACUSE L. REV. 475, 477 (1971).

8. In New Jersey and the New York City metropolitan area, for example, this has resulted in exclusionary zoning of the vast bulk of available land. Anderson, *Introduction to Symposium on Exclusionary Zoning*, 22 SYRACUSE L. REV. 465 (1971) (Westchester County in New York State); Williams & Norman, *supra* note 7, at 477 (Morris, Middlesex, Somerset, and Monmouth counties in New Jersey).

9. *See, e.g.*, Simon v. Town of Needham, 311 Mass. 560, 42 N.E.2d 516 (Sup. Jud. Ct. 1942) (one-acre minimum lot); Flora Realty & Investment Co. v. City of Ladue, 362 Mo. 1025, 246 S.W.2d 771, *appeal dismissed*, 344 U.S. 802 (1952) (three-acre minimum lot); Pierro v. Baxendale, 20 N.J. 17, 118 A.2d 401 (1955) (motels not allowed in residential area); Fischer v. Township of Bedminster, 11 N.J. 194, 93 A.2d 378 (1952) (minimum lot size); Lionshead Lake, Inc. v. Township of Wayne, 10 N.J. 165, 89 A.2d 693 (1952), *appeal dismissed*, 344 U.S. 919 (1953) (minimum living-floor space for buildings); Dilliard v. Village of North Hills, 276 App. Div. 969, 94 N.Y.S.2d 715 (1950) (two-acre minimum lot).

10. *See, e.g.*, Feiler, *Metropolitanization and Land-Use Parochialism—Toward a Judicial Attitude*, 69 MICH. L. REV. 655 (1971); Note, *Constitutional Law—Equal Protection—Zoning —Snob Zoning: Must a Man's Home Be a Castle?*, 69 MICH. L. REV. 339 (1970) [hereinafter Note, *Constitutional Law*]; Comment, *Zoning Against the Public Welfare: Judicial Limitations on Municipal Parochialism*, 71 YALE L.J. 720 (1962).

11. In the last few years, the Supreme Court of Pennsylvania has begun to invalidate exclusionary zoning plans. *See* Appeal of Kit-Mar Builders, Inc., 439 Pa. 466, 268 A.2d 765 (1970) (minimum lot sizes of two and three acres); Appeal of Girsh, 437 Pa. 237, 263 A.2d 395 (1970) (zoning scheme with no provision for apartments); National Land & Investment Co. v. Easttown Twp. Bd. of Adjustment, 419 Pa. 504, 215 A.2d 597 (1965) (minimum four-acre lot).

12. 67 N.J. 151, 336 A.2d 713 (1975).

13. *Id.* at 162, 336 A.2d at 718.

14. *Id.* at 161-62, 336 A.2d at 718.

With the exceptions noted below, all residential areas were divided into four zones. Each zone had a minimum lot area requirement (ranging from 9,375 square feet (.215 acre) to 20,000 square feet (.46 acre)), a minimum lot frontage requirement (ranging from 75 to 100 feet), and large minimum dwelling floor area requirements (ranging from 900 to 1,100 square feet).[15] The zoning ordinance allowed no apartments (except on farms for agricultural workers), no townhouses, and no mobile homes.[16] The average value of a house in these residential areas was $32,500 in 1971.[17] The minimum cost of building a new house at the time of the trial was $23,000.[18]

Planned Unit Developments (PUDs),[19] allowed by the township from 1967 to 1971, constituted one exception to the above zoning pattern. Four such projects were approved. Each PUD project expressly limited the number of apartments with more than one bedroom, and if a development had more than .3 children per unit, the developer had to pay the school expenses of the "excess" children.[20] A second exception was permitted for areas set aside for wealthy senior citizens. Wherever such apartments and townhouses were allowed, they were restricted as to number and age of occupants.[21]

The Mount Laurel zoning ordinance resulted in the effective exclusion of government-subsidized, multi-family housing. One typical example of how such exclusion was promulgated occurred in 1968, when a private, non-profit association wished to build such low-cost housing. In evaluating the prospective builder's application, the Township Committee found a need for "moderate" income housing and gave formal approval to the project. At the same time, however, it required that the project comply with the above-outlined provisions of the zoning ordinance for residential areas. Thus, what the township approved was of quite a different nature from what the builder had hoped to build. After receiving this "approval," the project was not undertaken.[22]

Not only did the township endeavor to stifle any prospective low income housing, but it also worked to rid itself of the low income housing which already existed within its boundaries. Rather than taking any action to maintain or improve its stock of approximately 300 substandard dwellings,[23] it was the

15. *Id.* at 164-65, 336 A.2d at 719-20.
16. *Id.* at 163, 336 A.2d at 719.
17. *Id.* at 164, 336 A.2d at 719.
18. Southern Burlington Cty. NAACP v. Township of Mt. Laurel, 119 N.J. Super. 164, 167, 290 A.2d 465, 467 (L. Div. 1972). This was the estimated cost for a completely bare house, with no amenities, built with non-union labor.
19. "Planned Unit Development" has been defined as

> [an area] of land, controlled by a landowner, to be developed as a single entity for a number of dwelling units, and commercial and industrial uses, if any, the plan for which does not correspond in lot size, bulk, or type of dwelling or commercial or industrial use, density, lot coverage and required open space to the regulations established in any one or more districts created, from time to time, under the provisions of a municipal zoning ordiniance enacted pursuant to the conventional zoning enabling act of the state.

U.S. ADVISORY COMMITTEE ON INTERGOVERNMENTAL RELATIONS, ACIR STATE LEGISLATIVE PROGRAM, 1970 Cumulative Supp. 31-36-00 at 5 (1969), *quoted in* D. HAGMAN, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW 431 (1971).
20. 67 N.J. at 168, 336 A.2d at 721-22.
21. *Id.* at 168-69, 336 A.2d at 722.
22. *Id.* at 169-70, 336 A.2d at 722.
23. *Id.* at 161, 336 A.2d at 718.

practice in Mount Laurel to allow dilapidated premises to be vacated, and then to forbid subsequent occupancy.[24]

Close to one-third of the land in the township was zoned for non-residential purposes. A very small portion of this (1.2 per cent of the total area) was set aside for retail purposes.[25] The remainder, 29.2 per cent of the entire township, was zoned for industry—light manufacturing, research, distribution of goods—as well as for some agricultural and retail uses. Although Mount Laurel could not reasonably expect to attract sufficient industry to occupy all this land, residential uses were precluded in the areas zoned for industry.[26]

This zoning scheme was attacked in the Law Division of the Superior Court of New Jersey[27] by a number of plaintiffs, among them the Southern Burlington County NAACP, the Camden County CORE, and numerous individuals.[28] The complaint alleged that Mount Laurel's zoning ordinance worked systematically to exclude low and moderate income families[29] from the municipality. The court agreed with the plaintiffs and held the zoning scheme invalid on the grounds that, through its zoning ordinances, Mount Laurel had exhibited economic discrimination against the poor, by excluding low and moderate income people, and by using state and federal aid for the benefit of the wealthy. It ordered the municipality to determine what new housing it would need for low and moderate income people (1) residing in the township, (2) employed in the township, and (3) projected to be employed in the township, and to submit to the court an affirmative program for encouraging and facilitating the construction of such new housing.[30]

On appeal by the township, and cross-appeal by plaintiffs who resided outside the township, the New Jersey Supreme Court affirmed the lower court ruling with modification, holding that Article I, section 1, of the New Jersey Constitution imposed the affirmative duty on developing municipalities such as Mount Laurel, through their land use regulations, "presumptively [to] make realistically possible" low and moderate income housing, "at least to the ex-

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24. *Id.* at 169, 336 A.2d at 722.

25. *Id.* at 163, 336 A.2d at 719.

26. *Id.* at 162-63, 336 A.2d at 719.

27. Southern Burlington Cty. NAACP v. Township of Mt. Laurel, 119 N.J. Super. 164, 290 A.2d 465 (L. Div. 1972).

28. The New Jersey Supreme Court described the individual plaintiffs as falling into three categories:

> (1) [P]resent residents of the township residing in dilapidated or substandard housing; (2) former residents who were forced to move elsewhere because of the absence of suitable housing; (3) nonresidents living in central city substandard housing in the region who desire to secure decent housing and accompanying advantages within their means elsewhere . . . .

67 N.J. at 159 n.3, 336 A.2d at 717 n.3.

The trial court held that the resident plaintiffs had standing, 119 N.J. Super. at 166, 290 A.2d at 466, and the Supreme Court added that the nonresident individuals also had standing. It declined to express an opinion on the standing of the organizations. 67 N.J. at 159 n.3, 336 A.2d at 717 n.3. In federal court serious standing questions would be raised concerning all the plaintiffs. *See* Warth v. Seldin, 422 U.S. 490 (1975).

29. For purposes of *Mt. Laurel* the court considered a low income family to have a top income of roughly $7,000 a year, and a moderate income family to have a top income of $10,000-$12,000 a year. 67 N.J. at 158 n.2, 336 A.2d at 716-17 n.2.

30. 119 N.J. Super. at 178-79, 290 A.2d at 473-74.

tent of the municipality's fair share of the present and prospective regional need therefore." Only by "sustain[ing] the heavy burden of demonstrating peculiar circumstances which dictate that it should not be required so to do" can a developing municipality avoid this obligation.[31]

The Supreme Court's ruling both broadens and constricts that of the trial court. It broadens the trial court's ruling in that it requires the town to provide not only for those low and moderate income persons residing in or employed within the township, but also to provide for the township's "fair share" of the region's low and moderate income residents. At the same time, it narrows the trial court's ruling with respect to what action the township must take in providing for these people, by finding that the town need take no affirmative action beyond ceasing to use exclusionary zoning provisions to keep certain people out of the township.

This Comment will examine: (1) the ways in which *Mt. Laurel* goes beyond earlier decisions in holding that a municipality must take a regional approach in its zoning matters; (2) the precedential value of the decision; (3) the desirability of the judiciary's handling such complicated problems without clearer direction from the legislature; and (4) the probable effectiveness of the type of standards announced by the court.

III
THE UNIQUENESS OF *MT. LAUREL*

The *Mt. Laurel* decision is based on the section of the New Jersey Constitution which states:

> All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.[32]

The New Jersey Supreme Court construed this section to mean that zoning regulations, like other police power regulations, are valid only if they promote public health, safety, morals or the general welfare.[33] The court pointed out that this requirement is also set forth in the New Jersey zoning enabling statute[34] which grants power to municipalities to zone "for the general welfare."[35]

The court held that "general welfare" refers to the welfare of the region or state, not solely the welfare of the enacting municipality. The rationale underly-

31. 67 N.J. at 174, 336 A.2d at 724-25.
32. N.J. CONST. art. I, § 1.
33. 67 N.J. at 175, 336 A.2d at 725.
34. N.J. STAT. ANN. §§ 40:55-30 to -57 (1967 & Supp. 1975).
35. 67 N.J. at 175, 336 A.2d at 725. The New Jersey zoning enabling statute provides that "[s]uch regulations shall be in accordance with a comprehensive plan and designed for one or more of the following purposes: . . . [to] promote health, morals, or the general welfare." N.J. STAT. ANN. § 40:55-32 (1967).

ing this interpretation is that the zoning power is an aspect of the police power of the *state* which the state delegates to the municipality. Therefore, when municipal zoning regulations create effects beyond the municipality's own borders, the local authorities responsible for such regulations, acting as agents of the state, are bound to consider the state's welfare.[36]

Mount Laurel's ordinance exemplifies the way a zoning scheme affects surrounding areas. By keeping low and moderate income people out, it forces them into other areas, burdening those other areas with a lowered tax base and a higher demand for public services to be supported by that tax base. Experience has shown that if each municipality is allowed to consider only its own welfare, it will zone to remain as exclusive as possible. This results in vast areas of available land being accessible only to the upper middle, or upper, classes, as is the case today in much of New Jersey and metropolitan New York State.[37]

Mt. Laurel is the first case to hold firmly that a municipality's zoning power is restricted by the requirement that it take into consideration the general welfare of the region. However, the lines which its "regional approach" argument took have been presaged in various contexts prior to the *Mt. Laurel* case. One commentator, in suggesting that courts use approaches other than those derived from the federal constitution, proposed that courts interpret "general welfare" more broadly when dealing with the problem of exclusionary zoning.[38]

Mt. Laurel's holding that general welfare applies to an area more extensive than one municipality also finds support in prior case law.[39] The earlier cases provide support indirectly, mostly by way of dicta. In *Village of Euclid v. Ambler Realty Company*,[40] a landmark decision, the United States Supreme Court ruled that zoning ordinances do not violate the federal Constitution unless the "provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."[41] In clarifying this standard the Court added the vague caveat that in some cases the "general public interest [might] so far outweigh the interest of the municipality that the municipality would not be allowed to stand in the way."[42] In this case, the municipal zoning ordinance was not found to violate the constitutional standard.

Some previous New Jersey cases, although upholding exclusionary zoning ordinances, also warned of the possibility that such ordinances could go too far. In *Fischer v. Township of Bedminster*[43] the New Jersey Supreme Court upheld the validity of a regulation providing for five-acre minimum lots, em-

36. 67 N.J. at 177, 336 A.2d at 726.

37. *See* Anderson, *supra* note 8 (Westchester County in New York State); Williams & Norman, *supra* note 7 (Morris, Middlesex, Somerset, and Monmouth counties in New Jersey).

38 Note, *Constitutional Law*, *supra* note 10, at 354.

39. *See* National Land & Investment Co. v. Easttown Twp. Bd. of Adjustment, 419 Pa. 504, 532-33, 215 A.2d 597, 612-13 (1965); Board of Cty. Supervisors v. Carper, 200 Va. 653, 660-62, 107 S.E.2d 390, 395-97 (1959).

40. 272 U.S. 365 (1926).

41. *Id.* at 395.

42. *Id.* at 390.

43. 11 N.J. 194, 93 A.2d 378 (1952).

phasizing the extreme rural nature of the township.[44] The court then stated: "It must, of course, be borne in mind that an ordinance which is reasonable today may at some future time by reason of changed conditions prove to be unreasonable. If so, it may then be set aside."[45]

Three years later, in *Pierro v. Baxendale*,[46] the same court responded to criticism of the *Fischer* case and another case upholding exclusionary zoning plans,[47] stating:

> In the light of existing population and land conditions within our State these powers may fairly be exercised without in anywise endangering the needs or reasonable expectations of any segments of our people. If and when conditions change, alterations in zoning restrictions and pertinent legislative and judicial attitudes need not be long delayed.[48]

Other New Jersey cases support *Mt. Laurel* more directly. In *Roman Catholic Diocese v. Ho-Ho-Kus Borough*[49] plaintiffs had bought land on which to build a school. After the purchase, the local zoning ordinance was amended to bar all schools from that area of the township. Although the court held the ordinance amendment valid, it pointed out that the plaintiffs were still free to apply for a variance.[50] It then observed that "[i]n dealing with that question, [of whether to grant a variance] the local authorities should consider the State policy favoring such exempt functions and *the fact that regional needs must be met somewhere*. Unfortunately under present law the tax burden falls upon the single municipality rather than the whole area which is benefited. Yet a variance may not be refused on that account."[51]

Another New Jersey case, *Kunzler v. Hoffman*,[52] directly ruled that the "general welfare" may extend beyond the welfare of a single municipality. *Kunzler* involved the application by a doctor for a zoning variance in the Township of Washington to build a hospital for the emotionally disturbed. He alleged a great need in New Jersey for such hospitals. The zoning board granted the variance. Plaintiffs, residents of the township, challenged the variance, in part on the grounds that the statutory requirement that a variance be granted only if it would promote the "general welfare" had not been satisfied.[53] They contended that the "general welfare" requirement referred to the welfare of the township only. The court disagreed, holding that "general welfare" in the New Jersey zoning enabling statute[54] included benefits to "re-

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44. *Id.* at 196-98, 93 A.2d at 379-80.
45. *Id.* at 205, 93 A.2d at 384.
46. 20 N.J. 17, 118 A.2d 401 (1955).
47. Fischer v. Township of Bedminster, 11 N.J. 194, 93 A.2d 378 (1952); Lionshead Lake, Inc. v. Township of Wayne, 10 N.J. 165, 89 A.2d 693 (1952), *appeal dismissed*, 344 U.S. 919 (1953).
48. 20 N.J. at 29, 118 A.2d at 408.
49. 47 N.J. 211, 220 A.2d 97 (1966).
50. *Id.* at 216-17, 220 A.2d at 100.
51. *Id.* at 217, 220 A.2d at 100 (emphasis added).
52. 48 N.J. 277, 225 A.2d 321 (1966).
53. *Id.* at 286, 225 A.2d at 325. N.J. STAT. ANN. §§ 40:55-39(d) (1967) requires that a variance be granted only for "special reasons." "Special reasons" is interpreted to include the "general welfare." 48 N.J. at 286, 225 A.2d at 326.
54. N.J. STAT. ANN. § 40:55-32 (1967), *quoted in* note 35 *supra*.

gions of the state relevant to the public interest to be served."[55] The court concluded that a municipality, when zoning, *may* look beyond its borders and consider legitimate regional needs,[56] and that courts should support such action. Recognizing New Jersey's need for hospitals for the emotionally disturbed, the court upheld the zoning board's action.

In upholding the action of this zoning board which took regional needs into consideration, the court was saying only that a municipality *might* or *should* consider regional needs, not that it *must*. *Mt. Laurel* took the final step of *mandating* consideration of regional needs, by overruling the act of a local zoning body which failed to take regional needs into consideration.

In holding that "general welfare" means regional welfare, *Mt. Laurel* employed the concept of "regionalism" to overrule exclusionary zoning practices. "Regionalism" requires the municipality to look at the region in which it is located to determine if the contested use is necessary to the general welfare of the region. If it is, the municipality must then provide its fair share of those needs.

Prior to *Mt. Laurel* the concept of regionalism had been used by the New Jersey courts, but as the basis for upholding the *exclusion* of certain land uses from a municipality. In *Duffcon Concrete Products v. Borough of Cresskill*[57] the municipality's zoning ordinance was attacked because it did not provide for any heavy industry. The *Duffcon Products* court looked at the municipality and saw that it was residential, then looked at the surrounding region and saw that it was already industrialized. Contrasting the nature of the municipality with that of the surrounding area, the court used the availability of other land in the region as an excuse for the municipality to *exclude* the unwanted use from its borders.[58] The court stated:

> [T]he most appropriate use of any particular property depends . . . [partly] 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.[59]

The *Duffcon Products* approach to regional planning is not unreasonable per se, but as long as zoning is done municipality by municipality the approach will tend to promote local interests at the expense of regional interests. *Mt. Laurel* recognized that it might frequently be sounder to restrict certain uses which are important to the region to one municipality rather than to have every use in every municipality. However, the court ruled that as long as zoning is done by each individual municipality, rather than on a regional basis or by agreement among municipalities, each municipality will be required to bear its fair share of the regional burden.[60]

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55. 48. N.J. at 288, 225 A.2d at 327.
56. *Id.* at 287, 225 A.2d at 326.
57. 1 N.J. 509, 64 A.2d 347 (1949).
58. *Id.* at 513-15, 64 A.2d at 350-51. *Duffcon Products* has been severely criticized for purporting to employ regional considerations, while actually eliminating any regional-need limits on local zoning. *See* Feiler, *supra* note 10, at 668-69.
59. 1 N.J. at 513, 64 A.2d at 349-50.
60. 67 N.J. at 189, 336 A.2d at 732-33.

IV
PRECEDENTIAL VALUE

Mt. Laurel finds its strongest precedential support in *Roman Catholic Diocese v. Ho-Ho-Kus Borough*[61] and *Kunzler v. Hoffman*,[62] cases the court cited as defining "general welfare" to include regional welfare. While the support for *Mt. Laurel* in *Roman Catholic Diocese* is mere dictum,[63] in *Kunzler* the holding itself evidences a move by the court toward the position taken in *Mt. Laurel*.[64] For example, the finding in *Kunzler v. Hoffman* that "general welfare" refers to the welfare of "regions of the State relevant to the public interest to be served,"[65] can readily be applied to *Mt. Laurel*. The public interest is in the need for housing; developing regions are especially suited to satisfy that need.

The *Mt. Laurel* court also argued that its ruling was foreshadowed by the line of earlier New Jersey cases which, while upholding certain exclusionary zoning schemes, still warned of possible limits to the validity of exclusionary zoning should conditions change.[66] Dicta in those cases support the court's ruling.[67] Furthermore, the emphasis in *Fischer v. Township of Bedminster*[68] on the highly rural nature of the township whose minimum five-acre lot size zoning requirement the court upheld[69] lends additional support to the holding of *Mt. Laurel*. The implication of the case is that the minimum lot size requirement was valid only because there was no likely need for development in the township. This lends support to the distinction in *Mt. Laurel* between duties placed on a developing municipality and those placed on a rural one. However, the fact that these cases all upheld exclusionary zoning ordinances strongly suggests that the warnings contained in the dicta as to possible harmful results from exclusionary zoning were mainly efforts to dampen criticism.

The court was on weaker ground when it cited *Duffcon Products* and *Borough of Cresskill v. Borough of Dumont*[70] as cases supporting regionalism.[71] *Duffcon Products* used regionalism to promote local interests, in direct contrast to *Mt. Laurel*'s use of regionalism to promote regional interests.[72] *Borough of Cresskill v. Borough of Dumont* did not even involve the question of regionalism. In that case, a block bordering on the residential

61. 47 N.J. 211, 220 A.2d 97 (1966).
62. 48 N.J. 277, 225 A.2d 321 (1966).
63. 47 N.J. at 217, 220 A.2d at 100. *See* text accompanying notes 49-51 *supra*.
64. 48 N.J. at 287-88, 225 A.2d at 326-27. *See* text accompanying notes 52-56 *supra*.
65. 48 N.J. at 288, 225 A.2d at 327 (1966).
66. 67 N.J at 176, 336 A.2d at 726. The court cited: Lionshead Lake, Inc. v. Township of Wayne, 10 N.J. 165, 89 A.2d 693 (1952), *appeal dismissed*, 344 U.S. 919 (1953) (minimum living-floor space for buildings); Fischer v. Township of Bedminster, 11 N.J. 194 (1952) (minimum lot size); Pierro v. Baxendale, 20 N.J. 17, 118 A.2d 401 (1955) (motels not allowed in residential area); Vickers v. Township Comm., 37 N.J. 232, 181 A.2d 129 (1962), *cert. denied*, 371 U.S. 233 (1963) (mobile home parks not allowed in township).
67. *See, e.g.*, Vickers v. Township Comm., 37 N.J. at 250, 181 A.2d at 138 (1962), *cert. denied*, 371 U.S. 233 (1963). *See also* text accompanying notes 45-48 *supra*.
68. 11 N.J. 194, 93 A.2d 378 (1952).
69. *Id.* at 196-98, 93 A.2d at 379-80.
70. 15 N.J. 238, 104 A.2d 441 (1954).
71. 67 N.J. at 177-78, 336 A.2d at 726-27.
72. *See* text accompanying notes 57-60 *supra*.

areas of four towns was granted a variance by Dumont to build a shopping center. The court overruled the variance, stating that municipalities have a duty to consider the adjacent properties of other municipalities, especially if those areas are already built up.[73] Thus the case did not focus on exclusionary zoning as such, but rather on one of the original purposes of zoning—that of preventing conflicting land uses.

An important aspect of *Mt. Laurel*'s precedential value lies in its reliance on the New Jersey, rather than the federal Constitution.[74] *Mt. Laurel*'s basis in the New Jersey state constitution shields it from United States Supreme Court review.[75] More importantly, *Mt. Laurel* stated that the requirements of the New Jersey constitution "may be more demanding than those of the federal Constitution."[76] Thus, Mt. Laurel is not only shielded from Supreme Court review but also is not affected by Supreme Court decisions which interpret the demands of the federal Constitution narrowly. To the extent that other states have constitutional provisions broader than those of the federal Constitution, either on their face or through court interpretation, *Mt. Laurel* stands as good precedent for invalidating exclusionary zoning ordinances on state constitutional grounds.

Mt. Laurel is one in a series of cases that indicates a trend toward resolving exclusionary zoning problems, as well as other legal problems, in state courts under state legal norms, rather than in the federal courts. The New Jersey Supreme Court in particular has taken an activist role in areas which the United States Supreme Court has declared off-limits to the federal courts. The issue of local property financing for public education was before the United States Court in *San Antonio Independent School District v. Rodriguez*.[77] The Court refused to declare the present means of financing public education unconstitutional but left the issue open for state courts to deal with.[78] The New Jersey Supreme Court did so in *Robinson v. Cahill*,[79] holding that New Jersey's public education financing system violated state constitutional guarantees of a thorough and efficient school system.

Similarly, local zoning, an area in which *Mt. Laurel* has actively involved the New Jersey Supreme Court, is one in which the United States Supreme Court has shown great reluctance to intervene.[80] Zoning has traditionally been considered a local issue,[81] as *Village of Belle Terre v. Boraas*[82] demonstrates.

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73. 15 N.J. at 247, 104 A.2d at 445.

74. 67 N.J. at 174-75, 336 A.2d at 725.

75. In fact the United States Supreme Court did dismiss the appeal from the state court decision. 414 U.S. 12 (1975). The only federal constitutional issues the township found to raise on appeal to the United States Supreme Court were: "(1) Does decision below violate doctrine of separation of powers thereby denying municipality's citizens republican form of government guaranteed by Article IV, section 4 of U.S. Constitution? (2) Does decision below deny municipality equal protection of laws, in violation of Fourteenth Amendment?" 44 U.S.L.W. 3074 (U.S. Aug. 5, 1975).

76. 67 N.J. at 174-75, 336 A.2d at 725.

77. 411 U.S. 1 (1973).

78. *The Supreme Court, 1972 Term*, 87 HARV. L. REV. 1, 111 n.44 (1973).

79. 62 N.J. 473, 303 A.2d 273, *cert. denied*, 414 U.S. 976 (1973).

80. Warth v. Seldin, 422 U.S. 490 (1975); Village of Belle Terre v. Boraas, 416 U.S. 1 (1974).

81. *See* Berman v. Parker, 348 U.S. 26 (1954); Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

82. 416 U.S. 1 (1974).

Belle Terre involved a small town on Long Island which by ordinance restricted land use to one-family dwellings and forbade any boarding houses. Thus, it excluded both poor people and commune dwellers. The United States Supreme Court upheld the ordinance. However, in so doing, it emphasized Belle Terre's interest in maintaining a particular life-style, rather than the exclusionary effects on the poor. Therefore *Belle Terre* is not really considered an exclusionary zoning case. In any event, the main reason *Belle Terre* did not bind the *Mt. Laurel* court is that *Belle Terre* judged the zoning ordinance against the *federal* Constitution. Furthermore, the Court reiterated its extreme deference to local zoning decisions.[83]

V
JUDICIAL VS. LEGISLATIVE SOLUTION

Mt. Laurel poses the more general question as to whether the New Jersey courts should be dealing with the issue of exclusionary zoning at all. It was only because the New Jersey legislature had failed to deal effectively with the exclusionary zoning problem that the state courts were faced with the problem. However, one may question the desirability of the judiciary's handling this type of case. Such concerns, which can be generally termed justiciability problems, fall into two areas, somewhat distinguishable but overlapping: (1) separation of powers, and (2) the majoritarian or democratic decision-making process.

The separation of powers issue was a serious concern in *Mt. Laurel.* The purpose of the separation of powers doctrine is to keep each branch from usurping the powers granted to the other two branches. Although it is clearly the province of the legislative branch to legislate, and of the judicial branch to adjudicate, the distinction between legislating and adjudicating is often fuzzy, and questions of usurpation are sometimes difficult to decide.

Legislating involves studying how a problem affects an entire state or region, then drafting laws which apply at once to a whole category of persons. A legislature generally has broad latitude in drawing distinctions, as long as the distinctions are not arbitrary or capricious. In contrast, adjudicating involves a court's deciding a case by looking primarily to the parties before the court and the way the problem affects them, although a court may sometimes take judicial notice of the fact that many other people are affected by similar problems. The court's decision will bind only the parties actually before the court. It has only an inchoate precedential effect on parties similarly situated to the ones before the court. Again in contrast to legislation, adjudication requires that distinctions be made on a principled basis.

The New Jersey constitutional doctrine of separation of powers is described in *David v. Vesta Co.*[84] as

> not . . . an end in itself, but . . . a general principle intended to be applied so as to maintain the balance between the three branches of government, preserve their respective independence and integrity, and prevent the concentration of *unchecked* power in the hands of any one branch.[85]

83. *Id.* at 5, 8, 9.
84. 45 N.J. 301, 212 A.2d 345 (1965).
85. *Id.* at 326, 212 A.2d at 358-59.

In determining whether the court overstepped the proper boundaries of its power when it decided the *Mt. Laurel* case, it is therefore important to analyze not only the extent to which the court did legislate, but also the extent to which such legislating was unavoidable given the nature of the controversy before it. This may be better understood by considering three basic ways in which the New Jersey Supreme Court could have handled *Mt. Laurel*. These will be discussed in the order of increasing court involvement in the function of legislating.

When plaintiffs properly before the court allege that they have been injured by defendants' actions, the court has an obligation to adjudicate their rights.[86] Once plaintiffs show that they have been injured by a particular zoning scheme, the court has a responsibility to evaluate that zoning scheme in light of the New Jersey constitutional requirement that zoning promote the "general welfare."

First a court faces the issue of which parties properly stand before it. At a minimum, the New Jersey Supreme Court should hear the cases of those plaintiffs in *Mt. Laurel* who meet the rigorous federal court standing requirements established in *Warth v. Seldin*.[87] According to its dicta, *Warth* finds standing for those parties who can prove that they are directly harmed by a township's actions, and that the township's actions are a but-for cause of their inability to obtain decent housing in the municipality.[88] Potential plaintiffs might include (as in *Mt. Laurel*) township residents living in substandard housing, and former residents who moved because they were not able to afford housing which satisfied the zoning laws. However, such plaintiffs would need to show that if the zoning ordinance were changed, they would be able to afford housing without public assistance.

The relief granted in such a case would be tailored to remedy the harm suffered by the particular plaintiffs, and would not be fashioned with the benefit of others in mind. It might involve the granting of zoning variances specifically designed to benefit the plaintiffs, or perhaps even awarding money damages. There would be no reason to alter the entire zoning ordinance. This first approach is one of traditional adjudication.

While this approach is formally satisfactory in that it adjudicates the rights of those properly before the court without legislating, it is abysmally unsatisfactory in that it effectively denies relief to parties suffering substantial, but indirect, injury. Very few, if any, persons could show but-for injury from an exclusionary zoning ordinance, although many people are in fact injured.

In order to adjudicate the rights of most of those actually injured, the court must apply more relaxed standing criteria. This is what the *Mt. Laurel* court did. Standing was granted to (1) residents of the township, (2) former residents forced to move because of the lack of housing, and (3) nonresidents living in central city substandard housing and desiring to secure decent housing elsewhere.[89] The court looked at the problems of these parties with standing as representative of the problems of a whole category of low and moderate income people barred from Mount Laurel by the township's zoning ordinance,[90]

86. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).
87. 422 U.S. 490 (1975).
88. *Id.* at 506-08 & nn.16 & 18.
89. 67 N.J. at 159 n.3, 336 A.2d at 717 n.3.
90. *Id.* at 159, 336 A.2d at 717.

and its holding recognized the housing needs of the region surrounding Mount Laurel.[91]

This second alternative involved the court in quasi-legislating, since the court relied in its decision on its assessment that the combined zoning practices of many municipalities (including Mount Laurel) require that judicial attitudes change in favor of a broader view of the general welfare.[92] The court was also stepping into a quasi-legislative realm in that it deeply involved itself in overseeing the drafting of a new zoning ordinance. Furthermore, since the *Mt. Laurel* court ruled as a matter of law that this ordinance must take into account the township's fair share of the region's low and moderate income housing needs, it must decide such factual questions as what constitutes such a "fair share." However, this quasi-legislating by the court is necessary once standing is granted to plaintiffs only indirectly injured. The court can evaluate the plaintiffs' claims of injury only by looking at the extent of exclusionary zoning in New Jersey. Further, once so many plaintiffs show injury from the zoning ordinance, the only effective remedy is amendment of the zoning ordinance, rather than granting of a variance. This type of remedy will inure inevitably to the benefit of others.

The court could have stepped further into the legislative role, by following the suggestion of Justice Pashman in his concurrence. Justice Pashman suggested that a court should define the region in which a municipality is located, join all municipalities in that region in the action, and, in a decision binding on all those municipalities, allocate the regional housing needs among them.[93]

This approach provides the most efficient solution to the problem presented by exclusionary zoning. Once the ruling is made that a zoning ordinance must take into account a municipality's fair share of its region's housing needs, the question as to whether a proposed ordinance satisfies that ruling can be precisely determined only if all municipalities in the region are before the court. The advantages of such an approach[94] must be weighed against the fact that it comes perilously close to violating the doctrine of separation of powers. Here a court would be usurping the legislative prerogative to evaluate a problem and then make a decision binding on a whole category of people at once. Adjudicative power involves waiting until individual cases are brought before a court. Making all potentially affected persons parties to the action makes the process an adjudication only in form.

Courts are not designed to deal with the problems resulting from unconstitutional exclusionary zoning. However, where a legislature has not abolished exclusionary zoning, courts have an obligation to adjudicate the rights of those injured. Such adjudication necessarily involves some legislative-type decision making and the doctrine of separation of powers should be flexible enough to accommodate this. In *Mt. Laurel* the court stopped short of the extreme position advocated by Justice Pashman, and appropriated legislative functions only to the extent reasonably required by the nature of the problem before it.

Although the *Mt. Laurel* decision does not violate the doctrine of separa-

91. *Id.* at 174, 336 A.2d at 724.
92. *Id.* at 159, 180, 336 A.2d at 717, 728.
93. *Id.* at 216, 336 A.2d at 747 (Pashman, J., concurring).
94. *See* text accompanying notes 96-98 *infra*.

tion of powers, it may be argued that it extends judicial power farther than is prudent, potentially involving the court in so-called "political questions." The political question doctrine is an expansion of the basic separation of powers doctrine. It attempts to provide criteria for recognizing cases which courts should refuse to hear not only on the basis of the absolute requirements of separation of powers, but also on the practical basis that the executive and legislative branches are the better institutions to decide the questions presented by these cases. In an article discussing the political question doctrine,[95] Professor Frank listed four practical grounds for the doctrine: (1) judicial incompetence; (2) the avoidance of judicially unmanageable situations; (3) the need for a quick policy decision from a single source; and (4) the clear prerogative of a branch other than the judiciary to decide the issue involved. Only the first two grounds are relevant here.

First judicial competence will be discussed.[96] The New Jersey Supreme Court required Mount Laurel to provide for the municipality's fair share of present and prospective regional housing needs.[97] This means that courts in the future will have to make factual determinations concerning what the relevant region is, what the community's fair share is, and what prospective needs will be. Courts cannot make definitions of region and fair share that are as sharply drawn as those of a legislature, but courts probably can develop general principles to be used in defining these terms in each individual case.

The real problem is likely to arise in the allocation of the fair share of housing. If one municipality is before a court, the court can decide what constitutes that municipality's fair share only by also determining the fair share of every other municipality. The court cannot do this properly unless all municipalities in the region are before the court. For example, suppose municipality *A* is before a court. The court would determine municipality *A*'s fair share by making a rough estimate of the fair shares of municipalities *B*, *C* and *D*—the other municipalities in the region. Now suppose at a later date the other municipalities are sued. Municipality *B* shows special ecological problems, and must therefore be given a fair share less than that assumed by the court originally. Municipality *C* shows that it is fully developed. Municipality *D* shows that it is not yet developing at all.

When this process is complete, it turns out that the court's original determination as to municipality *A*'s fair share was wrong, but that finding is now res judicata. So, by the very nature of the problem, the court *cannot* make a proper determination as to a municipality's fair share of housing, unless all municipalities in the region are before the court and will be bound by the court's decision. This problem could be solved by the court's joining all relevant municipalities in one suit, but that raises the separation of powers problems discussed above.[98]

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95. Frank, *Political Questions*, in SUPREME COURT AND SUPREME LAW 36, 37-39 (E. Cahn ed. 1954).

96. For other discussions of judicial competence *see* McInnis v. Shapiro, 293 F. Supp. 327, 335-36 (N.D. Ill.), *aff'd per curiam sub nom.* McInnis v. Ogilvie, 394 U.S. 322 (1969); Note, *Massachusetts Zoning Law*, *supra* note 2, at 38.

97. 67 N.J. at 174, 336 A.2d at 724.

98. *See* text accompanying note 93-94 *supra*.

The second ground—whether there is a judicially unmanageable situation —is also relevant. Courts should not make decisions that go so much against the popular will that they will not be enforced. When courts make decisions which are ineffective, public esteem for and confidence in the courts decline.

Of great concern in *Mt. Laurel* is the fact that since a court cannot itself write and administer the zoning ordinance, a municipality can indefinitely evade the court order by using tactics of delay, by advancing various excuses for not enacting the proposed type of ordinance, or by writing an ordinance that appears on its surface to satisfy the court order while actually subtly evading it. If a municipality is, or appears to be, acting in good faith, these devices are difficult ones for a court to deal with. To deal with a municipality's recalcitrance a court can make its standards more and more specific, culminating in rewriting the zoning ordinance itself.[99] But clearly, the more it proceeds along these lines, the more it legislates.

If in the future a court actually orders a municipality to spend money to provide housing, the problem of a municipality's defying a court order seems likely to occur and likely to be a severe problem.

The third and fourth grounds of the political question doctrine are not relevant here. The need for a quick and single policy refers to questions in which harm will result from either a slow determination or different pronouncements by various branches of government, usually in the area of foreign policy. The fourth ground refers to substantive areas which the federal or state constitutions clearly grant to nonjudicial branches of the government.

Thus, in the case of *Mt. Laurel* the political question problems are not sufficiently severe to justify the conclusion that the judiciary should leave the case alone, especially since the alternative to judicial action is not legislative action, but no action.

The justiciability problem also involves questions going to the nature of the democratic decision-making process, that is, the amount of deference which should be given to those who wish to live in exclusive neighborhoods.[100]

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99. The New Jersey Supreme Court has demonstrated its awareness of the complexity of these issues. On an appeal by another township whose zoning ordinance was found inadequate, the court raised, *inter alia*, the following questions:

> 11. If the Court affirms the determination of the trial court that the ordinance, as amended, still does not affirmatively provide adequately for low and moderate income housing, how specific should the Court be as to the terms of an ordinance which will satisfy *Mt. Laurel*? Do the interests of bringing this litigation to a final determination dictate some degree of specificity in the determination of the Court?
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> 12. In connection with the latter question, would it be serviceable for the Court to appoint a Special Master to consult with the municipality and frame specific zoning guidelines to assist the municipality in meeting the Court's judgment?

Questions certified by the New Jersey Supreme Court to be briefed for reargument in the appeal from Oakwood at Madison, Inc. v. Township of Madison, 128 N.J. Super. 438, 320 A.2d 223 (L. Div. 1974), letter to counsel dated September 25, 1975.

100. For an articulation of this attitude, *see* Editorial, *The Regimented Society*, Wall Street Journal, July 7, 1975, at 8, col. 2, commenting on *Mt. Laurel* as follows:

> Pluralistic communities, reflecting a wide spectrum of ethnic, economic and esthetic differences, can easily be preferable to homogeneous communities . . . . Yet a great many Americans do in fact prefer the latter, and we see no reason for anyone to look down their nose at them.

The argument runs that since New Jersey voters have not persuaded the legislature to reduce the number of areas zoned exclusively, the majority of New Jersey voters do favor exclusionary zoning. Why, these voters may ask, are people not entitled to live in rural areas on three-acre lots if they wish and can afford to do so?

There are three responses to these arguments. First, the inference that exclusionary zoning proves that everyone desires exclusive neighborhoods is an ambiguous one at best. A more important response is that one purpose of government is to balance interests (here, the desire of upper income people to live in an exclusive community versus the need of low and moderate income people for housing); indeed, one of the purposes of a constitution is to protect minority interests from the will of the majority. In the federal system, at least, the courts are expected to function as checks on majoritarian institutions.[101]

A final, and more practical response is to point out the disproportionately large areas of New Jersey zoned for single-family dwellings, despite the desperate need for low and moderate income housing in these areas. Perhaps a person should have an opportunity to live in an exclusively-zoned neighborhood, but it would be reasonable for a court to find that the wish to do so should not be permitted to deny others access to reasonable housing alternatives. In short, there is no reason to zone exclusively an entire township. It should be possible to zone part of a township for single-family dwellings, but leave a large part of the township available for other types of housing.

The justiciability problems discussed above are endemic to judicial activism. However, there are some significant differences between state and federal courts which make state judicial activism less troubling than federal judicial activism. It is desirable that states be allowed to experiment with solutions, when problems such as school financing or exclusionary zoning are involved. These problems are enormously complicated and there is great disagreement as to the most effective solution. A state court decision mandating complicated administrative action on state constitutional or statutory grounds binds only one state, whereas a Supreme Court decision binds all states. Thus a state court decision does not threaten to foreclose all experimentation by the states, as does a United States Supreme Court decision. Additionally, conditions vary enormously from local area to local area and it is much harder for the Supreme Court to handle these problems satisfactorily to all areas involved than it is for a state court to handle them on an individual state basis. Thus it may be advantageous for issues as complicated as school financing and exclusionary zoning to be resolved in state courts rather than in federal courts.

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101. *See* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943), which enjoined, as a violation of the first and fourteenth amendments, a regulation which required all public school students to participate in a flag salute ceremony. In denying that the issue should be reserved to the legislature alone, the Court stated:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

Id. at 638.

VI
EVALUATION OF THE *MT. LAUREL* STANDARDS

The special enforcement problems created by the fact that *Mt. Laurel* lays down what is in reality a legislative-type rule have been discussed earlier.[102] Remaining is the question whether, that problem aside, the standard established will be effective in producing the intended result of insuring that Mount Laurel will house its fair share of the region's low and moderate income population. This will be determined by (1) whether the standard is drafted so as to prevent evasion, and (2) whether, even if evasion is prevented, the standard the court set out will actually alleviate the critical housing shortage and high unemployment rate in center cities.

There are several means by which a township could frustrate implementation of the *Mt. Laurel* decision. The opinion expressly stated that valid environmental considerations should not be ignored,[103] thus leaving open the possibility for a municipality to defend its zoning by pointing to such considerations,[104] the validity of which may be difficult to disprove. Indeed there may be bona fide environmental concerns in some cases, as where the type of land cannot support a sewer system for a dense population. However, it should not be difficult for a court to distinguish phony from genuine environmental defenses, provided it is determined to do so.[105]

Another possibility is that a municipality could use "timed-growth" programs to keep out low and moderate income housing for a long time.[106] Timed-growth programs permit new building only as services and facilities increase sufficiently to meet the demands of residents of newly-constructed housing. In *Golden v. Planning Board*,[107] for example, the New York court specifically found that Ramapo's program was not intended to exclude population growth. Justice Pashman, concurring in *Mt. Laurel*, acknowledged that timed-growth does have validity, as long as it is not used as a substitute for exclusionary zoning.[108] Justice Pashman was concerned with the "tipping" phenomenon—the recognized fact that "when the racial and socioeconomic composition of the population of a community shifts beyond a certain point, the white and affluent begin to abandon the community."[109] Justice Pashman argued, therefore, that if a township were required to assume more than its fair share of

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102. *See* text accompanying notes 96-99 *supra*.

103. "This is not to say that land use regulations should not take due account of ecological or environmental factors or problems." 67 N.J. at 186, 336 A.2d at 731.

104. Ross, *The Mount Laurel Decision: Is It Based on Wishful Thinking?*, 4 REAL ESTATE L.J. 61, 69 (1975).

105. *See* 67 N.J. at 186-87, 336 A.2d at 731.

106. Ross, *supra* note 104, at 69-70.

107. 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138, *appeal dismissed*, 409 U.S. 1003 (1972). The case is briefly discussed in *Mt. Laurel*, 67 N.J. at 188 n.20, 336 A.2d at 732 n.20, where the court states it did not intend to indicate agreement or disagreement with the *Ramapo* decision.

108. 67 N.J. at 212-13, 336 A.2d at 745-46 (Pashman, J., concurring).

109. *Id.* at 212, 336 A.2d at 745. *See also* Note, *Racial and Ethnic Quotas: The Tipping Phenomenon in* Otero v. New York City Housing Authority, 4 N.Y.U. Rev. L. & Soc. Change 1 (1974).

regional housing needs, it might simply turn into a new rural slum,[110] consisting largely of lower income housing.

Timed-growth, however, is a more restrictive form of zoning than is necessary to avoid the "tipping" effect. Timed-growth is usually in reality a disguised exclusionary zoning device. Since timed-growth programs authorize new building only as services and facilities increase sufficiently to meet the demands of new housing, a municipality could use the timed-growth rationale to avoid new housing either by not increasing, or increasing very slowly, its services and facilities. If each municipality could use its lack of facilities as an excuse not to shoulder its fair share of housing needs, then few, if any municipalities would provide their fair share of housing needs.

A further way in which a municipality could evade *Mt. Laurel* is suggested by the court's confinement of its decision specifically to developing communities that lie in the path of future development. Mount Laurel is such a community. The court excluded developed and undeveloped communities from the coverage of its opinion.[111] This distinction, between developed, undeveloped, and developing communities, might be a weak one if a developing community could easily convince a court that it is not actually "developing." However, this does not seem too likely. The distinction between a rural community far from urban areas or major access routes, with no significant turnover in population, and a developing community with rapid population growth and farm land being converted to residential use, is quite clear. The distinction between an area where all land is already developed, and the developing community is also quite clear.[112]

One aspect of the *Mt. Laurel* opinion which clearly discourages evasion is that the affirmative obligation of a municipality to provide its fair share of housing, in *Mt. Laurel*, does not depend on a showing of intent to exclude low and moderate income people. Although the trial court specifically found such intent,[113] the New Jersey Supreme Court stated in dictum that the affirmative obligation is triggered by the exclusionary *effects* alone.[114] Proof of discriminatory motives was unnecessary.[115] This standard is of vital significance. When legal rights turn on proof of intent to exclude certain classes or races,

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110. 67 N.J. at 212, 336 A.2d at 745 (Pashman, J., concurring).

111. The court stated:

> It is in the context of communities now of this type or which become so in the future, rather than with central cities or older built-up suburbs or areas still rural and likely to continue to be for some time yet, that we deal with the question raised.

67 N.J at 160, 336 A.2d at 717.

112. There are probably many other ways in which a municipality could avoid *Mt. Laurel*. It has been argued that the need for subsidization in construction of low and moderate income housing would enable a municipality to avoid the *Mt. Laurel* holding. Ross, *supra* note 104, at 69. Acquiring these subsidies demands substantial diligence on the part of a municipality. It would be hard to prove that a municipality is not trying hard enough to get these subsidies. *Id.* at 68. However, this concern will not usually be relevant, since private developers are usually the subsidy applicants. A municipality could also frustrate the efforts of a developer by refusing to offer it any tax abatements.

113. 119 N.J. Super. at 169-70, 290 A.2d at 468.

114. 67 N.J. at 174 n.10, 336 A.2d at 725 n.10.

115. *Id.* at 159, 336 A.2d at 717. *Cf.* Kennedy Park Homes Ass'n v. City of Lackawanna, 318 F. Supp. 669 (W.D.N.Y.), *aff'd*, 436 F.2d 108 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971).

local governments can soon defeat these rights by learning to conceal their intentions. Local government officials can conceal their intentions by never explicitly mentioning them in any public or recorded governmental planning session.

Assuming the standards set forth in *Mt. Laurel* are actually carried out, it still remains to be asked whether *Mt. Laurel* will actually help to improve the housing situation. This question consists of two main issues: (1) whether the limitation of *Mt. Laurel* to developing communities is well-advised; and (2) whether the building of low-cost housing would be possible even if exclusionary zoning were eliminated.

The limitation to developing, as opposed to undeveloped communities seems reasonable in light of the basis of the court's decision—the need to provide low and moderate income housing in new areas becoming available for residential use. Rural communities have only a small number of jobs available and therefore are not usually satisfactory for low and moderate income city dwellers, whose need is for jobs and, therefore, for housing located where many jobs are available. These are not areas where exclusionary zoning is really a factor in keeping out a flood of would-be immigrants.[116]

On the other hand, the limitation of *Mt. Laurel* to developing, as opposed to developed communities is not sound. The idea of applying *Mt. Laurel* to developed areas brings to mind such problems as those attending the low-income housing project which was approved for Forest Hills, a built-up residential area of New York City,[117] and which aroused a great deal of antagonism in the community.[118] At first glance it appears that since developed areas are by definition already occupied, their land use pattern can be altered only by tremendous disruption of the people already living there. Fifth amendment issues *could* arise from such a taking of developed land. However, the fifth amendment requires only just compensation for taking of property; it does not forbid taking of property for a public use.

The main reason that developed communities should not be excluded from *Mt. Laurel* is that land patterns need not be altered by force to allow new housing opportunities. Justice Pashman, in his concurrence, argued that it is inequitable to absolve already developed communities of any responsibility for regional housing problems, and stated that they should have some obligation to allow variances at times when land does become available for redevelopment.[119] Further, fully developed communities may at any time have some land available for development. In fact, the Forest Hills project was built on land previously undeveloped because it was low-lying.[120]

Furthermore, it is possible to use already developed land for low income housing without destroying any existing buildings. For example, it might be

116. Nevertheless Justice Pashman suggests that suburbia may eventually reach these areas, and therefore they should be prevented now from adopting inherently exclusionary zoning. 67 N.J. at 217-18, 336 A.2d at 748-49 (Pashman, J., concurring). This position immediately presents the problem of what private plaintiff will enforce *Mt. Laurel* in an area not yet in demand for suburban expansion.

117. Margulis v. Lindsay, 31 N.Y.2d 167, 286 N.E.2d 724, 335 N.Y.S.2d 285 (1972).

118. *Id.* at 171, 286 N.E.2d at 725, 335 N.Y.S.2d at 286.

119. 67 N.J. at 217-18, 336 A.2d at 748 (Pashman, J., concurring).

120. N.Y. Times, Aug. 15, 1969, at 29, cols. 4-5.

possible to expand the population of a community by breaking up single-family dwellings into multi-family apartment buildings, or allowing a group of unrelated people to live in a formerly single-family house. There are many areas where the break-up of single-family dwellings into apartments would not need to be forced but would simply occur, for economic reasons, if a municipality would merely allow people to convert single-family dwellings into apartments.

Low income housing is normally generated by second-hand use of housing originally occupied by the wealthy. Therefore, developed communities are precisely the ones which should be required to provide low income housing. There is no need to construct new housing to provide housing for the poor. This eliminates the need for subsidies which, as discussed below,[121] raise a problem when new housing is to be constructed for low income people.

The second reason that the *Mt. Laurel* standards may not have a profound effect on the housing problem, is that the elimination of exclusionary zoning will not in and of itself make low income housing possible. The *Mt. Laurel* decision means only that Mount Laurel must not use its zoning regulations to keep out low and moderate income housing; it does not require Mount Laurel to build such housing, or even to finance it.[122] Clearly, the construction of low income housing requires government subsidization, either federal or state.[123] This points up the fact that new housing is beyond the price range of low and moderate income people not only because of exclusionary zoning practices, but also because of rising building costs in general. These rising building costs reinforce the idea, discussed above, that to be effective, *Mt. Laurel* should be applicable to developed communities as well as to developing communities.[124]

VII
CONCLUSION

The most significant aspect of the *Mt. Laurel* decision is that the New Jersey Supreme Court interpreted the requirement that municipalities be zoned for the "general welfare" to mean that the zoning must further the welfare of the region as a whole. By so holding, the court required municipalities to provide for their fair share of regional needs through their local zoning ordinances. While this activist decision raises concern about separation of powers and the

121. *See* text accompanying notes 122-24 *infra*.

122. The court stated only that Mount Laurel has a "moral obligation" to provide housing for its resident poor. 67 N.J. at 192, 336 A.2d at 734. Justice Pashman, in concurrence, suggested that the court impose on municipalities an affirmative obligation to facilitate, and sometimes even to provide housing for low and moderate income people, and not just an affirmative obligation to change the zoning laws. *Id.* at 210-11, 336 A.2d at 744-45 (Pashman, J., concurring). A more recent case, decided by the State Superior Court in New Jersey, appears to go somewhat beyond *Mt. Laurel*. In a decision allocating needed housing units among various Middlesex County municipalities, the court stated that "in implementing this judgment the 11 municipalities must do more than rezone not to exclude the possibility of low- and moderate-income housing in the allocated amounts," and called on the municipalities to "pursue and cooperate in available Federal and state subsidy programs for new housing and rehabilitation of substandard housing." N.Y. Times, May 6, 1976, at 65, cols. 7-8.

123. 67 N.J. at 188 n.21, 336 A.2d at 732 n.21. *Id.* at 211, 336 A.2d at 744 (Pashman, J., concurring).

124. *See* text accompanying notes 117-21 *supra*.

democratic decision-making process, this concern should not be as great when a state court intervenes in state activities as it is when a federal court similarly intervenes.

Despite some criticism of the ease with which the *Mt. Laurel* ruling might be avoided, the court has evolved workable standards for judging municipalities' zoning ordinances. The court's sound judicial reasoning should be persuasive to other courts grappling with zoning issues. However, *Mt. Laurel* does not provide grounds for unguarded optimism. It does not and cannot resolve the economic problems that make new low and moderate income housing almost impossible to construct without subsidization. Even subsidization is not a guaranteed solution, given the dismal history of publicly funded housing projects. Nonetheless, when money is available for low and moderate income housing, exclusionary zoning is the major impediment to the construction of such housing. *Mt. Laurel* will greatly aid in overcoming this impediment, adopting a firm starting point by which to fight some of the housing and resulting unemployment problems plaguing low and moderate income people today.

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