ON FROM *MOUNT LAUREL*: GUIDELINES ON THE "REGIONAL GENERAL WELFARE"†

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The mid-1970's is a time of major transition in American planning law. This transition can be briefly described as a movement away from that judicial deference to municipal autonomy and home rule which was the predominant note in the case law in most of the leading states during the 1950's and 1960's.[1]

As usual in this area of the law, the initiative for major change has come from the courts, rather than from the legislatures. The change in attitude is apparent in three different lines of cases. The most important (and most dramatic) of these has of course been in the rapid expansion of anti-exclusionary case law.[2] The same underlying skeptical attitude as to what local governments are doing also has been apparent recently in two other areas: an almost complete turn-about in the case law dealing with the now increasingly-recognized importance of the comprehensive plan as the basis for zoning; and a tightening of the criteria for granting variances.

There has been a long anti-exclusionary tradition in American law, for the courts recognized from the start that land use controls had a potential for such purposes. In the early leading case on zoning,[3] the Supreme Court held that a Cleveland suburb was not le-

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1. On the other hand, the courts are apparently prepared to accept an expansion of the public powers, state and local (and regional), to deal with environmental protection.

2. The anti-exclusionary case law is particularly timely, since the late 1970's and the 1980's will be a period when the most pressing need in the housing market will be for relatively small dwelling units, for young married couples and the elderly—and that is in effect the opposite of what is permitted under prevailing land use requirements in most areas.

3. Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

gally required to accommodate an alleged regional trend of industrial development, and could determine its own policy in this respect; but the Court added an explicit warning:

> It is not meant by this, however, to exclude the possibility of cases where the general public interest would so far outweigh the interest of the municipality that the municipality would not be allowed to stand in the way.[4]

Moreover, the early case law was more explicit in warning against the misuse of zoning controls to prevent inexpensive housing. In the earliest leading cases upholding single-family districts, the argument was made that such districts would be inherently exclusionary; but the courts thought otherwise, on the ground that at that time new single-family housing was available at moderate cost.[5] Again, in the early Massachusetts and New York cases upholding acreage zoning, the opinions recognized that such requirements might be exclusionary, and stated that this would be invalid.[6]

This long-standing anti-exclusionary attitude faded for a while, during the period of extreme judicial deference to municipal autonomy, but it has returned in strength in the 1970's.

Mount Laurel

Mount Laurel[7] provides, at long last, a well thought out argument which holds invalid both the general principle of exclusionary zoning and an entire pattern of exclusionary devices. The rationale of the opinion is based upon the notions of "regional general welfare" and "fair share," and these in turn are derived from broad language[8] in the New Jersey State Constitution, rather than being based upon a statutory or a federal constitutional ground.

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4. *Id.* at 390.

5. Brett v. Bldg. Comm'r of Brookline, 250 Mass. 73, 145 N.E. 269 (1924); Miller v. Bd. of Pub. Works of Los Angeles, 195 Cal. 477, 234 P. 381 (1925), *appeal dismissed*, 273 U.S. 781 (1926); and *see* State *ex rel.* Twin City Bldg. and Inv. Co. v. Houghton, 144 Minn. 1, 174 N.W. 885 (1919), *rev'd on rehearing*, 145 Minn. 13, 176 N.W. 159 (1920). *See generally* N. WILLIAMS, AMERICAN LAND PLANNING LAW, §50.02-50.09, (1974).

6. Simon v. Town of Needham, 311 Mass. 560, 42 N.E.2d 516 (1942); Gignoux v. Village of Kings Point, 199 Misc. 485, 99 N.Y.S.2d 280 (Sup.Ct., Nassau Co., 1950).

7. S. Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 336 A.2d 713 (1975), *appeal dismissed and cert. denied*, 423 U.S. 808 (1975).

8. Deriving originally from the Declaration of Independence.

The *Mount Laurel* decision is the culmination[9] of a major trend in the 1970's. While nearly a dozen other states have given a clear indication of an anti-exclusionary attitude in various types of cases, mostly in dictum, *Mount Laurel* is thus the most important zoning opinion since *Euclid*.[10] It is reasonable to assume that similar lawsuits and holdings will be forthcoming in other states, and so a detailed analysis of the *Mount Laurel* opinion is in order.

Under the decision, the "general welfare" is not only a broad

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9. It is wholly fitting that this reversal should have come in New Jersey for two reasons. First, the New Jersey Supreme Court has been fortunate in having as one of it members a most distinguished judge in this field of law, Justice Frederick Hall. Justice Hall has been primarily responsible for turning the American judiciary around on this critical issue. Second, the rationale to uphold exclusionary zoning was developed in that state, and therefore needs to be destroyed there. This rationale, developed in the 1950's and early 1960's, was intended to (and did) encourage municipalities to practice exclusionary zoning and depended upon the following propositions:

1. The statutory and constitutional power to zone for the "general welfare" is intended to provide municipalities with broad powers to control land use for various purposes, and should be interpreted as referring to the welfare of each municipality as a separate unit.
2. The vague phrases deriving from the end of §3 of the Standard Zoning Enabling Act (conservation of property values, taking into consideration the character of the district and its peculiar suitability for particular uses, and encouraging the most appropriate use of land) represent additional grants of municipal power, and serve to justify exclusionary zoning.
3. There is something called "balanced zoning," which in practice turns out to mean no more multiple dwellings, and
4. "Fiscal zoning" to improve a municipality's position on tax ratables is an appropriate goal for police-power action.

The rationale has been used to uphold a broad variety of restrictive devices, as follows:

(1) On the exclusion of multiple dwellings from a community: *see* Guaclides v. Borough of Englewood Cliffs, 11 N.J. Super. 405, 78 A.2d 435 (App. Div. 1951); and Fanale v. Borough of Hasbrouck Heights, 26 N.J. 320, 139 A.2d 749 (1958);

(2) On the exclusion of mobile homes: *see* Napierkowski v. Township Comm. of Gloucester, 29 N.J. 481, 150 A.2d 481 (1959), and Vickers v. Township of Gloucester, 37 N.J. 232, 181 A.2d 129 (1962), *appeal dismissed*, 371 U.S. 233 (1963);

(3) On minimum building size regulations: *see* Lionshead Lake, Inc. v. Wayne Township, 8 N.J. Super. 468, 73 A.2d 287 (L. Div. 1950), *rev'd*, 9 N.J. Super. 83, 74 A.2d 609 (App. Div. 1950), and 13 N.J. Super. 490, 80 A.2d 650 (L. Div. 1951), *rev'd*, 10 N.J. 165, 89 A.2d 693 (1952), *appeal dismissed*, 344 U.S. 919 (1953); and

(4) On minimum lot size: *see* Fischer v. Township of Bedminster, 11, N.J. 194, 93 A.2d 378 (1952). (five acres).

10. Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

additional ground which is available to justify zoning and other land use regulations as against challenges brought by developers; it is also the basis for an affirmative requirement to which local governments are required to conform—that is, that land use regulations must be shown to operate to promote, and not be contrary to, the general welfare. Furthermore, adequate provision for housing is explicitly found to be an important element of the "general welfare."

More specifically, making "realistically possible an appropriate variety and choice of housing"[11] normally includes making provision for a variety of housing types—presumably including a range of density levels, building types, and (quite emphatically) costs, or at least low- and moderate-cost housing. In effect, housing has been promoted to the status of a preferred use.[12]

Moreover, the need for housing, as part of the general welfare, is defined as the regional need,[13] and not merely the need within that particular municipality. Each [developing] municipality has the responsibility of helping meet the regional need, by providing an

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11. S. Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 173, 336 A.2d 713, 724 (1975), *appeal dismissed and cert. denied*, 423 U.S. 808 (1975).

12. As indicated below, the notion of a preferred use under *Mount Laurel* is quite different from the notion in (for example) a series of recent Michigan cases, where the idea was eventually disapproved. Since the Michigan courts normally are rather developer-minded, the notion of a "preferred use" was there interpreted to imply that a developer could choose his own site, and that the town then had very little power to dispute that location. *See* Kropf v. City of Sterling Heights, 391 Mich. 139, 215 N.W.2d 179 (1974), *overruling* Bristow v. City of Woodhaven, 35 Mich. App. 205, 192 N.W.2d 322 (1971), and Simmons v. City of Royal Oak, 38 Mich. App. 496, 196 N.W.2d 811 (1972).

13. This holding follows a strong trend in New Jersey case law over recent decades. As early as 1949, in Duffcon Concrete Products, Inc. v. Borough of Cresskill, 1 N.J. 509, 64 A.2d 347 (1949), the court held that there was no need for a small town on the Palisades to zone for industrial development, because it was appropriate to take into account regional considerations, including the existence of better industrial land not far away. Moreover, in a more recent (and little-noticed) decision, Kunzler v. Hoffman, 48 N.J. 277, 225 A.2d 321 (1966), the court took a step farther, which in effect undermined the established rationale for exclusionary zoning discussed in Note 9 *supra*. In that case, a town in outer Morris County approved a "d" variance for a mental hospital, and this approval was challenged by neighbors on grounds that such a facility would cater to the general welfare of a larger region, and not to the welfare of that particular municipality. The court upheld the variance, and praised the municipal authorities for taking a broader view of general welfare.

See also Borough of Cresskill v. Borough of Dumont, 15 N.J. 238, 104 A.2d 441 (1954); Kozesnik v. Township of Montgomery, 24 N.J. 154, 131 A.2d 1 (1957); Roman Catholic Diocese of Newark v. Borough of Ho-Ho-Kus, 42 N.J. 556, 202 A.2d 161 (1964), and 47 N.J. 211, 220 A.2d 97 (1966).

opportunity for such housing through local land use regulations.

As a logical consequence of this view, the opinion specifically grants standing to challenge local restrictions to certain nonresidents of a municipality who might wish to live there, but are in effect prevented from doing so.

Finally, the decision is explicit on another critical point. If a municipality accepts some intensive and/or low-cost housing, this does not necessarily mean that it must open its doors to unlimited amounts of such housing: each municipality's responsibility is limited to its "fair share" of the regional need.

Turning to the town's affirmative defenses, the *Mount Laurel* opinion dealt with the two obvious arguments, fiscal and ecological. Regarding the first, the court reaffirmed the New Jersey doctrine that it was appropriate—as against suits brought by neighbors—for a municipality to seek out and encourage "good" tax ratables. However, the opinion was equally explicit in ruling out fiscal considerations as a justifiable basis for excluding "bad" ratables, such as low- and moderate-cost housing.

On the ecological issue, the court held that such considerations could provide an appropriate defense against proposed more intensive housing in a specific location—that is, in suits brought by developers. However, the court was obviously conscious of the fact that many municipalities might attempt to use such arguments too broadly, and so took a quite restrictive view of the role of ecological justifications, holding that this argument would be effective only where the ecological problems are "substantial and very real."[14]

The net result of the above was to establish equal access to housing as being of fundamental constitutional importance at the state level. This "right" was somewhat limited by the notion of equitable distribution of housing between municipalities (fair share), so that this right of access to housing is not a "personal" right in any given plaintiff to move wherever he might choose.

As a result, developing municipalities in New Jersey are on

14. S. Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 187, 336 A.2d 713, 731 (1975), *appeal dismissed and cert. denied*, 423 U.S. 808 (1975).

notice that they no longer have the power to totally exclude all intensive or less expensive housing; they must accept their fair share of regional needs. Moreover, they do not have the final say on what is their "fair share." However, they do have the assurance that there is a limit: that is to say, permitting one low-income project does not necessarily set a precedent requiring them to accept an indefinite number of similar units. This assurance is essential if cooperation is to be expected from a substantial number of towns. Moreover, the towns retain a substantial degree of locational control, since as long as an adequate amount of appropriate land is zoned or otherwise made available to permit more intensive housing in some way (specifically including by special permit), a town could, for example, guide the location of such housing away from ecologically-sensitive sites, or from locations where the resulting traffic would create special danger. Therefore, at least in the first instance, towns have the power to decide where such housing should go. If they do not exercise this,[15] they should expect to be subject to litigation and judicially-imposed remedies.

Finally, every developing municipality must make possible, via its land use regulations, a mixture of building types, density levels, and income groups. As long as this is done, it would seem that a town is then free, if it so chooses, to zone other areas for low-density development. Furthermore, the opinion strongly implies (without actually deciding) that a town may also regulate its own rate of growth, so long as provision is made for low- and moderate-income housing at an early date in such a scheme.

The questions which remain unsettled after this opinion are manifold. Some of the more important of these are as follows: (1) The opinion does not make clear how affirmative a duty is involved in connection with low- and moderate-income housing opportunities, or the provision of such units. (2) There is no mention of the problem of the extent of the duty in connection with more expensive (and intensive) housing. (3) The opinion is in terms specifically limited to developing municipalities with substantial development pressure and substantial vacant land. No attempt is made to lay down the appropriate principles either for rural municipalities with-

15. Or if they do so unreasonably, as by zoning only a quarry for more intensive housing.

out development pressure, or for substantially built-up towns.

Under the *Mount Laurel* case, therefore, in the absence of significant planning reasons justifying otherwise, every developing municipality must provide the opportunity for a heterogeneous mixture of housing types. There is a strong presumption, but not a completely irrebutable one, that this opportunity must be provided; if a town wishes to argue to the contrary, the reasons which would point to a different conclusion must be substantial ones. (The same types of reasons of course are relevant in regard to a decision on what is a "fair share.")

The Legal Background

Mount Laurel is not an isolated phenomenon, but the logical culmination of a major trend in current law. Anti-exclusionary case law has expanded suddenly in the 1970's, but without any clearly-defined rationale or theoretical basis until *Mount Laurel*. Several different rationales have been tried out in the rather substantial volume of such litigation.

The prevailing rationale in *Mount Laurel*—that zoning must be shown to promote the regional general welfare—is almost (but not quite) original in that decision, and so there is not much to be said in tracing the history of this doctrine. It is of course familiar law that the "general welfare" is an appropriate basis for action under the police power, and this has served as additional support for restrictions on the use of land, as against claims made by developers, as for example often in the case of aesthetic restrictions. It was in the *Madison* case,[16] also in New Jersey, that this doctrine was first invoked as a restriction on the powers of local governments on behalf of those excluded by zoning restrictions; the New Jersey Supreme Court decided to adopt this as the basis for the definitive opinion in *Mount Laurel*.

Most of the other cases have been argued primarily on equal protection grounds, following the lead of the cases on racial segregation by governmental action; the courts have handled this in various

16. Oakwood at Madison, Inc. v. Township of Madison, 117 N.J. Super. 11, 283 A.2d 353 (L. Div. 1971), and *see also* 128 N.J. Super. 438, 320 A.2d 223 (L. Div. 1974).

ways. Two important federal decisions have explicitly adopted a rationale which is at least closely allied to equal protection.[17] Under this approach, a town is under no duty to use the power to regulate land use; but if it does, it must use it on behalf of all groups in the population.[18]

A second and basically different rationale has evolved in a series of decisions from Pennsylvania. In these decisions, specific zoning devices have been held invalid per se, but without much concern for providing an effective remedy.[19] The resulting rationale is purely mechanical, and there is no indication whatever of any special concern for low- and moderate-cost housing; in keeping with the current attitude in Pennsylvania zoning law generally, these decisions are strongly developer-minded.

A more recent line of federal cases has taken still another and different line. As the flood of anti-exclusionary litigation has increased, an increasing number of rather doubtful cases have been brought involving rather difficult side issues, serious counter-arguments, or rather unusual remedies; it is not surprising that plaintiffs have begun to lose in such cases. In such decisions, following the lead of the Supreme Court,[20] the courts have tended to reject

17. Southern Alameda Spanish-Speaking Organization v. City of Union City, Cal., 424 F.2d 291, 295-96 (9th Cir. 1970); Kennedy Park Homes Assn., Inc. v. City of Lackawanna, 318 F. Supp. 669, 696-97, (W.D.N.Y., 1970), *aff'd on somewhat different grounds*, 436 F.2d 108 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971).

18. For more recent Federal cases with a similar attitude, *see* Joseph Skilken and Co. v. City of Toledo, 380 F. Supp. 228 (N.D. Ohio 1974); United Farm Workers of Florida Housing Project v. City of Delray Beach, CA72-1270 (S.D. Fla. 1972), *rev'd*, 493 F.2d 799 (5th Cir. 1974).

19. National Land and Inv. Co. v. Kohn, 419 Pa. 504, 215 A.2d 597 (1965) (4-acre zoning); Appeal of Kit-Mar Builders, Inc., 439 Pa. 466, 268 A.2d 765 (1970) (2-acre zoning); Appeal of Girsh, 437 Pa. 237, 263 A.2d 395 (1970) (no multiple dwellings). For a comparison of the two rationales, in their actual effect, *see* Williams, Doughty and Potter, *The Strategy on Exclusionary Zoning: Towards What Rationale and What Remedy?*, 1972 LAND USE CONTROLS ANNUAL 177,201.

20. The cases which have come before the Supreme Court have not brought out the serious questions involved in the exclusionary pattern, and so the Court has clearly been reluctant to enter this field. As a result, in a series of cases, all of which involved difficult side issues, the Court has been moving towards the doctrine that housing (unlike the right to vote) is not a "fundamental interest," and thus that a challenge on equal protection grounds can be met merely by a showing of some rational basis for the restriction in question. *See* James v. Valtierra, 402 U.S. 137 (1971) (referendum on public housing); Lindsey v. Normet, 405 U.S. 56 (1972) (landlord's right to evict); Village of Belle Terre v. Boraas, 416 U.S. 1

equal protection arguments in the exclusionary context, on the ground that housing is not a "fundamental interest," so that there is no reason to scrutinize such complaints with special care.[21]

To complete the picture, it must be noted that in the state courts, which are far more familiar with zoning law and practice, the anti-exclusionary attitude has continued to spread. In addition to the states mentioned above, recent decisions have made this clear in several other states, particularly in the northeast.[22]

The Potentially Broad Scope of "Regional General Welfare"

The "regional general welfare" was not the only possible rationale for *Mount Laurel*. (The opinion might have been placed more explicitly on equal protection grounds).[23] The reasons for the choice of this rationale are quite understandable, but the fact remains that it opens up a far larger field of potential questions as to the appropriate scope of the judicial function. Once the decision is made that a zoning ordinance must promote the "regional general welfare," the courts thereby undertake to decide a substantial number of

(1974) (number of students who can live together as a family); Warth v. Seldin, 422 U.S. 490 (1975) (standing of non-residents to sue).

21. Acevedo v. Nassau County, 369 F. Supp. 1384 (E.D.N.Y. 1974), *aff'd*, 500 F.2d 1078 (2d Cir. 1974); Mahaley v. Cuyahoga Metropolitan Housing Authority, 355 F. Supp. 1245, 1257 (N.D. Ohio 1973); Warth v. Seldin, 495 F.2d. 1187 (2d Cir. 1974), *aff'd*, 422 U.S. 490 (1975); Ybarra v. Town of Los Altos Hills, 370 F. Supp. 742 (N.D. Cal. 1973).

22. Golden v. Planning Bd. of Town of Ramapo, 30 N.Y.2d 359, 334 N.Y.S.2d 138, 285 N.E.2d 291 (1972); Barnard v. Zoning Bd. of Appeals of Town of Yarmouth, 313 A.2d 741 (Me. 1974); Town of Gloucester v. Olivo's Mobile Home Court, Inc., 111 R.I. 120, 300 A.2d 465 (1973); *and compare* Zelvin v. Zoning Bd. of Appeals of Town of Windsor, 30 Conn. Sup. 157, 306 A.2d 151 (1973), and Bd. of Appeals of Concord v. Housing Appeals Comm. 294 N.E.2d 393 (Mass. 1973). Moreover, the major midwestern states have been moving in the same direction. On Michigan, *see* above; on Illinois, *see* Oak Forest Mobile Home Park, Inc., v. City of Oak Forest, 27 Ill. App. 3d 303, 326 N.E.2d 473 (1975); on Ohio, *see* Forest City Enterprises v. City of Eastlake, 41 Ohio St.2d 187, 324 N.E.2d 740 (1975); on California, *see* Town of Los Altos Hills v. Adobe Creek Properties, Inc., 32 Cal. App. 3d 488, 108 Cal. Rptr. 271 (1973). About a dozen states, including almost all the important states in zoning law, except Maryland and Texas, have thus now spoken on the issue. (1975).

23. Presumably the choice of a "general welfare" rationale was part of the effort to keep away from the United States Supreme Court, which is the normal arbiter of equal protection matters. Another possibility was a "right to travel" rationale; but the court wisely avoided this, since such a right is necessarily personal, and it would have been difficult to combine this with a rationale setting some limits to the amount of housing each town would have to take.

matters of policy which are normally considered to be legislative in nature: the appropriateness of various patterns of distribution of both people and their activities, and also basic questions in growth policy.

What *Mount Laurel* decides is that the predominant recent pattern in both zoning and development—permitting only large single-family houses on large lots on almost all residential vacant land[24]—does not tend to promote the regional general welfare. The opinion goes one step further and states that, in order to promote the "regional general welfare," the strong (though conceivably rebuttable) presumption is that at least the developing municipalities must provide the opportunity, through their land use regulations, for a mix of density levels, building types and incomes.

However, the opinion does indicate that an alternative procedure might be acceptable: since no doubt there are some municipalities where such a mix would not make good planning sense, or at least where the proportions could be varied widely, a rational allocation of housing needs through a regional planning process could conceivably produce a better result than that provided through litigation. (Such an allocation would naturally have to proceed upon criteria which are acceptable to the courts.) This suggestion is of course an open invitation to the legislature, and to local and regional governments, to go to work on legislation, institutions, and processes along these lines.

Additional Questions Opened Up by Mount Laurel

The *Mount Laurel* case suggests a large number of major questions of public policy on metropolitan dynamics, i.e., on the distribution of people and activities. Obviously it would be desirable to have these settled by legislation, in part directly, and in part by delegation to qualified administrative agencies acting under legislative direction. However, if no such legislation is forthcoming, at least some of the questions will need to be decided by the courts in

24. The pattern is spelled out in Williams and Norman, *Exclusionary Land Use Controls: The Case of Northeastern New Jersey*, 22 SYRACUSE LAW REVIEW 475, 480 (1971) and 4 LAND USE CONTROLS QUARTERLY 7 (1970). *See also*, NEW JERSEY DEP'T OF COMMUNITY AFFAIRS, LAND USE REGULATION, THE RESIDENTIAL LAND SUPPLY, (1972).

the course of carrying out their responsibility to provide appropriate remedies where injury to a defined legal right is shown or is likely to result. In this type of situation, the judicial function overlaps with the legislative.

Some of the more important of these questions are as follows: (1) How a region is to be defined for the purpose of determining regional need(s). (2) How to define the extent of the regional need for various types of housing. (3) The criteria for distribution of the regional need for housing, as among the various municipalities within the region.

It is in connection with the third type of question that many of the most difficult and important policy issues arise. In addressing these problems, the courts—in default of legislative action—will necessarily be adopting major policies on (or affecting) the distribution of people and activities throughout the region. This is already apparent from *Mount Laurel*. Some of the policies implicit in that opinion, and henceforth to be enforced (if necessary) by the courts, involve the opportunity for access to decent housing within various cost ranges. In adopting such a policy, the courts can point, as the court did in *Mount Laurel*, to the intent and language of a number of statutes which have set forth housing and land use policies along these lines.

However, *Mount Laurel* represents the adoption, as a constitutional principle, of a quite different policy on the distribution of regional functions—a policy which has no such statutory base: the right of persons to live somewhere near where they work. This principle is necessarily involved in the statement that, if a municipality decides to accept a substantial amount of employment, that decision carries with it the duty to provide the opportunity for appropriate housing.

As the discussion below demonstrates, in order to provide an effective remedy in implementing the decision to bring an end to exclusionary zoning—and particularly in order to do so under a rationale based on regional general welfare—the courts will need to spend a great deal of time on basic questions which normally would be considered legislative in nature.[25]

Definition of a Region

The first and most obvious question, in moving forward from *Mount Laurel*, is how the courts are going to define a region in the absence of definitive legislative or administrative action. On this question, the conceivable possibilities extend over a wide range: from an entire metropolitan New York-New Jersey metropolitan

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25. While this whole matter obviously raises serious questions, there is no reason for either surprise or over-concern; for, in two major fields of constitutional law, the courts have been handling this sort of problem for nearly 20 years—in connection with both the desegregation of schools and the reapportionment of legislative bodies.

The parallel between problems of desegregation and reapportionment, and the problem of the termination of exclusionary land use controls, is a close one. A strong case can be made that, in dealing with the end of exclusionary zoning, the courts should proceed immediately under the procedures established in those two earlier sets of precedents. (The lower court in *Mount Laurel* was convinced by this argument; the appellate court was not.) Moreover, to do so in this type of situation will not provide a precedent for doing so in all sorts of other situations. In a few particularly important and special situations, judicial action can appropriately include both (a) fashioning a remedy and (b) retaining jurisdiction to supervise its implementation. The criteria which will define and delimit these situations may be described as follows:

The first and essential element of the situation is that the legislature is paralyzed and unable to act—because an arrangement which violates basic rights of a substantial minority is eminently satisfactory to a large majority.

Second, in these situations the implementation of the newly-declared right requires some rather elaborate action by governmental agencies other than the court. Such implementation will often require complex reorganization of administrative (or even legislative) arrangements, where the importance of the declared right must be consistently balanced against other considerations—or against intransigent resistance, masked as other legitimate considerations. In such a situation, those who are in charge of the machinery by which the right would normally be implemented are in reality adversary parties; for by implementing the right they would be losing what they regard as substantial personal advantages for themselves and their constituents—jobs for legislators facing reapportionment, zoning protection for segregationists, and tax base enhancement in these zoning situations. It is therefore to be expected that many of them will react by resisting implementation—and the potential means of evasion are plentiful. To put the point bluntly, it is not realistic to depend on the good faith reaction of such people in carrying out implementation of the right.

Third, both the type and the amount of action required in implementation of the right may vary widely between different geographical situations. The point is obvious in connection with desegregation and reapportionment; in connection with zoning, a town with rapidly growing employment and large areas of vacant land zoned for industry is in a completely different situation from a remote rural township where there is almost no employment at all.

Finally, in some instances, what looks like a simple and obvious remedy may in fact accomplish nothing at all. For example, if the attention is focused upon the principle of lot size, a decree that merely authorizes smaller lot sizes is likely to result merely in increased profits for the developer, rather than lower costs for the consumers of the housing. It is also likely to make it more difficult to preserve environmentally-valuable and ecologically-fragile open space, and can encourage the other disadvantageous effects of sprawl.

area at one extreme, to a group of a few towns at the other. There can be no question whatever that such a decision—on what is "the region"—will have a major impact on subsequent decisions as to how much and where housing needs might be met. Naturally, exclusionary towns will argue in favor of minimizing the size of a region and, above all, in favor of excluding from the definition of their region any central city with a substantial low-income and minority population. The housing-civil rights public interest groups will argue in favor of expanding the region, in order to bring together the central city and those municipalities which have substantial vacant land and development potential.

There is, of course, a great deal of literature on what is meant by a "region." The essential point here is that most of the conventional definitions[26] no longer work well in the metropolitan areas of the 1970's.

The widely-deplored (but usually quite undefined phenomenon of "suburban sprawl" has brought about a scatteration of settlements across the open countryside, beyond or near the "suburban fringe" (which latter is no longer a clear-cut concept in many areas). Moreover, the amount of cross-commuting, usually by private car, between adjacent counties or groups of counties has created new and more complex problems.

Despite such problems as those mentioned above, the delineation of a region (large or small) usually does not present insuperable difficulties; the area of continuous settlement usually coincides roughly with the area within which substantial numbers of people commute to work in the old centre, though there are exceptions.[27] The more difficult problems arise in connection with delineating sub-regions within larger metropolitan regions such as New York,

26. Traditionally, the definition of a region has focused on one, or both, of two criteria: (1) an area of continuous settlement which a) is surrounded by vacant land or farms and forest, and b) has substantial amounts of travel to work involved between the outer parts and the center, or around the outer areas; or (2) a watershed.

27. Princeton Junction, New Jersey, is an obvious example; outward expansion from the New York and Philadelphia metropolitan areas has not quite yet met there, and on a travel-time map from central Manhattan it appears as about the equivalent of lower Brooklyn. In fact, people commute from there to three metropolitan areas—New York, Philadelphia, and Trenton.

Chicago and Los Angeles. Agreement on a standard set of sub-regions within such areas would of course be convenient for everyone; yet some experience with this problem suggests that different sub-regions may well be appropriate in connection with the analysis of different types of problems.

In effect, the actual sub-region as defined may depend upon the problem.[28] For example, for water quality purposes the sub-region will naturally be a watershed. For purposes of determining housing needs, the region will be the local area of intensive cross-commuting: the "commutershed," usually ranging from one to three counties, together with some allowance for out-migration from one or more "central cities" which may be more distant.

The problem of defining a region varies widely as among different situations. The essential point is that not all situations are equally difficult; assuming that the *Mount Laurel* type of problem will occur on a nation-wide basis, some definitions will be relatively simple. The obvious case is of a small to medium-size city, surrounded by vacant land, and located within a single county. In that situation, the "region" is self-defining. If a similar city were located near or at a county boundary, with suburbs in both counties, a small additional complication is added; if it were located at a state boundary, the situation would become considerably more complex. Finally, at the other extreme in the case of a large metropolitan area, such as the New York-New Jersey area, the metropolitan region is made up of a series of sub-regions. The entire region is clearly split in three by the Hudson and the East Rivers; on the New Jersey side of the Hudson River there are some instances of rather clear sub-regions,[29] and in other instances the definition is extraordinarily difficult. (As bad luck would have it, *Mount Laurel* arose in Burlington County, which, along with Passaic County, is one of the two counties in New Jersey which are clearly impossible as potential sub-regions. Burlington County includes a substantial strip of the booming Delaware Valley industrial belt, a large area of the Pinelands, and a bit of the Shore.)[30]

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28. Incidentally, while a region almost always has a center, and occasionally may have more than one, a sub-region often does not.

29. Sometimes including Rockland County, and perhaps even Orange County in New York; but, they both also have strong links to Westchester County, across the Hudson.

30. In *Mount Laurel*, the court adopted as the region the area within 20 miles of down-

In such a large metropolitan area, the question of defining sub-regions will undoubtedly raise difficult issues in some situations, and relatively easy ones in others. In general, the guiding principle should be that, in a suit brought against one municipality (or a few), the region normally should include any nearby central city which has a substantial lower-income population.

A particular housing sub-region thus will often cross county lines—including most of one county and half of the next one, for example. Yet, when it comes to thinking about implementation, it may be wise to adjust the eventual estimates of need back to a county basis, at least in those areas where counties are fairly effective units of government,[31] and except in some instances where the county is an impossible unit.

In cases of doubt, it should be remembered that regions have been established for various purposes by official government action(s), and these may be adaptable for use in court. The most obvious case involves the SMSAs adopted by the U.S. Bureau of the Census.[32] An even more convincing case may be made in these situations where, by governmental action and indeed sometimes by interstate compact, regions which have been defined for certain purposes—such as a regional transportation planning body—may (as it has in the New York and Philadelphia regions) have evolved into a general-purpose regional planning commission not attached to any level of government.[33]

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town Camden. This area—the Northern part of Burlington, Camden, and Gloucester Counties—corresponds rather well to that part of the Delaware Valley industrial belt centering on Camden, (and so, close to Philadelphia), which is now under strong development pressure outward from those two cities. In effect, this is the situation of the region around a medium-sized city mentioned above, located at a state boundary and therefore with substantial pressure from the central city across the river (Philadelphia)—but nonetheless fairly easily definable.

31. For example, New Jersey has statutory authorization for county housing authorities.

32. These do have their shortcomings. For example, only in New England do their boundaries deviate from county lines; as a result, both the Mohave Desert and the wilderness area of northern Minnesota are located within SMSA's.

33. No attempt is made there to explore all the permutations and combinations which the courts will run across in attempting to define regions. The mobility of the American population is constantly creating new problems in this regard. For example, a current study of the luxury housing market in Miami Beach has turned up the curious fact that, in considering the demand for such condominiums there, the alternative often considered is not some-

How to Define Housing Need

The criteria for defining the need for housing in a region and/or a local area are relatively clear-cut. The need for low-and moderate-cost housing normally would include the following:

1. All those persons living in substandard housing.
2. All those, in excess of normal occupancy limits, who are living in overcrowded housing.
3. All those living in accommodations where they are forced to pay more than a stated percentage (as 20-25 percent) of their income for rent.
4. For a region, the expected future need for dwelling units, based upon an analysis of future employment (particularly low-wage employment), demographic trends, etc.
5. A percentage of future non-residents, including particularly those who may be working in future low-wage employment in the general area.
6. For a town, those who have been recently forced to move elsewhere because of the absence of suitable housing[34] at prices which they could afford.
7. Usually, for a town, a proportion of the public employees of the particular town in question, and a percentage (perhaps one-half) of all those current non-residents who are in fact working in town.

The Mechanism for Determining Need

Making estimates of present and future housing need is a well-established professional specialty, with significant experience having been accumulated in various contexts.[35] The guiding principle is of course that, in order to make realistic estimates, it is necessary to start with a larger unit, and to proceed from that to smaller units. Specifically, this means that the first estimate should be made for

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thing in Florida, but the cost of an apaetment on Park Avenue in New York. Sternlieb, A Study of Rent Control in the Greater Miami Beach Luxury Housing Market, 1975 (published in report form by Rutgers Center for Urban Policy Research, New Brunswick, N.J.).

34. S. Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 159, 336 A.2d 713, 717 (1975), *appeal dismissed and cert. denied*, 423 U.S. 808 (1975).

35. The preparation of such plans is now a HUD requirement in connection with the recipients of all grants under both the 701 program and the new Housing Act of 1974. See 39 Fed. Reg. 43382-84 §§600.70 and 600.72.

the entire metropolitan region as a whole. If that region is large enough to include sub-regions, the estimate would then be allocated down to the various sub-regions (normally to counties, or to some unit about that size). The allocation procedure then proceeds from the counties to the municipalities.

There is no great difficulty in doing this, although (as indicated above) major policy questions are involved, particularly at the latter step. It was urged before the court in *Mount Laurel* that, following the opinion below, the decree should require the preparation of such a plan by joint action of plaintiffs and defendants, with whatever professional help would be appropriate. The appellate court declined to do so, thus modifying the lower court decree in this respect. Instead, it expressed its faith that Mount Laurel would move on its own to implement the new judicial policy. This is an understandable decision, particularly since the New Jersey legislature has not yet complied with the decree to come up with a new method for financing public schools, as ordered by the New Jersey Supreme Court in *Robinson v. Cahill*.[36]

As indicated in the opinion, there is no great difficulty in gaining access to the required professional expertise for this purpose. Often both regional and county planning boards are in existence, and many of them have done a great deal of work on this problem. Moreover, a court could appoint a special master to work with local officials for this purpose under judicial supervision.

If (as seems likely) at least some towns will continue to stall and resist, the courts may have to take a more active role. The opinion clearly envisaged such a possibility, inviting the plaintiffs to come back if local legislative or administrative relief is not forthcoming.

The Criteria for Allocating Housing—"Fair Share"

A substantial number of county and regional planning agencies in the United States have been (and are) working on the allocation of total housing needs—and particularly for low- and moderate-income housing—as among municipalities within their particular area. Consequently, there has been some experience in choosing the

36. 62 N.J. 473, 303 A.2d 273 (1973), and 63 N.J. 196, 306 A.2d 65 (1973).

criteria to control such distribution.[37]

As indicated above, the selection of such criteria present major policy decisions as to the future of various sorts of towns. The criteria actually utilized often have included the following:

1. The existing need in the town (see above).
2. The amount of employment in the municipality,[38] and the number of non-residents working there.
3. The size of future employment, and in particular the extent of vacant land zoned to encourage such employment.
4. The availability of public services for new development. Obviously, a town with substantial unused school capacity[39] would be a better place for low- and moderate-cost housing than one where all the schools are already overcrowded. Likewise, a town with available vacant land which is already sewered has obvious advantages over a town where sewer construction would be prohibitively expensive. The availability of public transportation would be another important criterion.
5. The availability of vacant land, zoned for residence and suitable for construction of intensive inexpensive housing—that is, land which is relatively flat and dry, which is not prime agricultural land, and which has no special problems deriving from ecological sensitivity.
6. A town's relative wealth—that is, its ability to support additional inexpensive housing. The towns with good vacant land are often the wealthiest ones.
7. A policy of equalizing the distribution of income groups—that is, of encouraging additional inexpensive housing until the amount of such housing reaches the average for the

37. The experience, as of a couple of years ago, has been summarized in BROOKS, LOW-INCOME HOUSING, THE PLANNERS' RESPONSE, an A.S.P.O. publication in 1972. For more recent experience, *see, e.g.* DELAWARE VALLEY REGIONAL PLANNING COMMISSION, REGIONAL HOUSING ALLOCATION PLAN, 1970-2000 (adopted July 25, 1973), and its implementation at the county level in BUCKS COUNTY PLANNING COMMISSION, BUCKS COUNTY HOUSING PLAN (September 1974); Tri-State Regional Planning Commission, DWELLINGS AND NEIGHBORHOODS, THE HOUSING ELEMENT OF REGIONAL PLANNING (September 1974), and the following Tri-State technical staff reports: HOW TO THAW THE ZONING FREEZE IN THE SUBURBS (June 1971) and A RECONNAISSANCE OF SELECTED HOUSING ALLOCATION PLANS (February 1973).

38. In the better studies a further breakdown is made as to present (and future) low-wage employment.

39. Now that the impact of the lower birth rate in the 1970's is being felt in the elementary schools, this is a real possibility, even in some growing areas.

metropolitan area as a whole,[40] and, perhaps, not beyond that. (One possible criterion here, mentioned in Justice Pashman's concurring opinion in *Mount Laurel*, is the question of a "tipping point". . . assuming that such a concept has reality, as for example in the schools.)

8. In some instances, involving outer low-density towns with little employment and not much development pressure, it may be appropriate to take into account varying types of possible contributions to regional needs—either some low- and moderate-cost housing, or alternatively a major (and tax-exempt) regional recreational facility, as a large public park.[41]

9. In those counties where the ratios between employment and population are fairly consistent in most or all towns, that county ratio may be useful in projecting future housing need. Another possible analytic tool worth investigating is the average length of travel to work, varying as among different income categories.

10. If there are officially adopted regional (or state), county, and even local plans which specify or bear upon the local need for housing, they are of course important elements to consider and may, if reasonable, even be found to be controlling.[42]

A specific problem arises on how to deal with the wealthy rural towns, which are often found just beyond the suburban fringe. Since the criteria for allocating housing need from the sub-region to the municipality usually place heavy emphasis on existing and future employment, such towns may resist the growth of employment—and thus the benefits of "good ratables." In such a situation, a locally generated need for low- and moderate-cost housing will be present, but only in token quantities (as for example to provide for the local businessmen's children who wish to stay in town.) The question is to what extent such towns should have to take a substan-

40. The question of how to treat the size of the existing low and moderate income population has been handled in different ways in these allocation schemes. In some, the existence of such a population is regarded as presupposing a need for additional housing within their means; in another, the existence of a large group of this type is held to imply the undesirability of encouraging its growth.

41. Assuming that this is not restricted to local residents.

42. *See particularly* Allen-Dean Corp. v. Township of Bedminster, Somerset County Superior Court (L. Div.) No. L 36896-70 P.W. and L 28061-71 P.W., announced February 24, 1975, an important decision which turns around New Jersey law on the comprehensive plan doctrine, on the basis of more recent statutes.

tial part of the regionally-generated need, for people working elsewhere. Since these tend to be prestige towns, it is reasonable to expect that, if so, the housing will in fact be produced in such areas, though at a higher cost level.

In essence, there are only three choices available, each with some real, but different, disadvantages: (1) To require such towns to zone for substantial amounts of intensive housing. In that case a substantial number of people will have to drive a considerable distance between the places of employment and their residences, which is not necessarily a desirable pattern. (2) To let these towns more or less alone, with the requirement limited to a few units for the locally generated need. Naturally this is likely to be resented in other areas. (3) To impose upon such towns a duty to accept not only employment, but some low-wage employment, in which case it would be appropriate also to require inexpensive housing to go along with it.

Low- and Moderate-Cost Housing

An important question, which is bound to be widely discussed, is to what extent the *Mount Laurel* opinion imposes on developing towns some sort of affirmative duty to take further action to encourage low- and moderate-cost housing—that is, whether the towns' legal duty goes beyond repealing zoning and other restrictions which would preclude such housing.

Obviously, some towns are likely to zone substantial tracts of land for more intensive housing and then sit tight, hoping that no developers will turn up who want to build inexpensive housing (and possibly making this somewhat unpleasant for anyone who does), but taking no additional action. This situation is certain to occur, and the question is what will happen next.

It is now being argued that the *Mount Laurel* decision may be a nullity, since no large-scale government programs are available which would provide the necessary subsidies to permit the creation of low- and moderate-cost housing, and since the courts cannot require the towns to spend their own money for this purpose.

If the courts are actually determined to implement the *Mount Laurel* decision, strictly within accepted concepts of the judicial function, there are ways in which this can be done without costing a single town one cent. One obvious possibility would be to hold the entire zoning ordinance invalid for failure to provide for the needed housing. This was considered and rejected in the *Mount Laurel* opinion, where the lower court's decision to do just that was explicitly reversed. However, in the Northeast Corridor, mobile homes are selling for approximately half the price of a new single-family detached house, and indeed frequently for considerably less. In this situation, in an appropriate lawsuit, a court would be justified in giving the town a choice of two alternatives, either: (1) to find some other way to subsidize some inexpensive conventional housing, or (2) to zone a substantial tract for mobile homes.[43]

Moreover, even though the elaborate housing subsidy programs of the late 1960's were in effect repealed by unilateral Presidential act, it is not true that there are no subsidies at all; at least some token money is available. Some federal subsidies are contemplated under Section 8 of the Housing Act of 1974 in ways that are not entirely clear. In addition, some states, such as New Jersey, have housing finance agencies which can provide some help along these lines. The extent of such aid varies, of course, among the other states.

In addition, other ways are available by which towns can make possible some low- and moderate-cost housing, if they really wish to do so. For the same reasons, therefore, a court is in a position to exert some pressure in this direction, if it wants to. If a substantial development is proposed, it is possible for a developer to provide at least some moderate-cost units, by skewing the rents so as in effect to subsidize these from the more expensive housing. Moreover, inexpensive housing is (in nearly all cases) necessarily more intensive housing, and so a windfall (an increase in land values) is likely to be involved. It may be possible to arrange matters so that the windfall goes not to the pre-existing landowner but to the actual devel-

43. If such a decision becomes frequent, it is not inconceivable that this will lead to increased popularity for housing subsidies. A state-wide building code to ensure good mobile home construction would be appropriate here.

oper, and then can be used in part to provide a subsidy for the less expensive housing.[44] Under such a system, the first step would be to amend the zoning regulations so that some land would be available for development in either of two ways: at low density (1-2 acres) or much more intensively (say five to the acre, gross density)—but the latter density would be available only if a stated percentage of the total dwelling units were in low- and moderate-cost housing.

To put the same point differently, the question is how to make it possible for the developer to buy the land at a price reflecting the previously permitted density. So defined, the problem thus is how to shift bargaining power away from the preexisting landowner and towards the developer. The usual way to think about doing this is by some type of "floating zone," which is intended to encourage competition among land owners to sell to a developer by increasing greatly the number of tracts potentially eligible for higher density development, and thereby keeping down the price of land. The problem with this is two-fold. It may be totally ineffective, i.e., it may or may not work, depending on varying conditions in the local housing market. Moreover, this would abdicate public locational control, and so in effect threaten everyone.

Other methods of accomplishing the same purpose are of course possible, though not much discussed. Under one possible arrangement, a few tracts (the most appropriate ones) are designated on a master plan as appropriate for more intensive housing, with the proviso that if no action ensues within (say) two years, other tracts may be made available, or conceivably the permission may be withdrawn from those first designated. In this situation it is possible to predict with some confidence that, near the end of the two-year period, bargaining power will begin to shift. Such an arrangement would not only be more effective for the stated purpose, but would retain the public locational control.

The Judicial Role in Metropolitan Policy-Making

Once the courts have decided to intervene seriously against

44. This matter has been explored intensively in a report to the Princeton Regional Planning Board in Princeton, New Jersey, by Anthony Downs and his staff at Real Estate Research Corporation, which will be published soon.

exclusionary zoning, the necessary result is that they will be passing upon and deciding major questions of public policy—questions of a sort which are normally considered appropriate for legislative decision, or for administrative decision under legislative guidelines. The *Mount Laurel* court already has done so in several respects and this necessity will recur in future litigation, particularly in connection with the criteria for allocation of regional housing need to particular municipalities.

In some instances the courts thus are actually adopting specific regional development policies as principles of constitutional law; in others, their decisions will have a major impact on other such policies. Among the more important examples of this are the following:

1. There is now a broadly stated, and not precisely defined, right to expect housing of reasonable quality, and at reasonable cost, to be made realistically possible in developing municipalities. Obviously this does not represent an innovation in potics; most states already have adopted such a policy broadly and explicitly in housing legislation and the larger states have done so repeatedly, particularly in legislative findings and statements of purpose.
2. Moreover, such housing must have access to good residential land, suitable for intensive development. Clearly it will not do to map locations for such housing only in undesirable areas, such as industrial or ribbon commercial, or at locations involving special construction difficulties and thus extra-high construction costs. This is implicit throughout *Mount Laurel* and clearly stated in New Jersey case law involving analogous situations, as for example schools.[45] Again, this policy can be derived easily from the enabling legislation for both planning and zoning ("orderly development," "most appropriate use of land," etc.).
3. The majority opinion explicitly adopted a policy, on the constitutional level, in favor of dispersal of low income residents to the outer parts of metropolitan areas, where most of the new jobs are located and where there are better public services and, generally, a more attractive environment.
4. As an accompaniment to the above, the decision explicitly

45. Roman Catholic Diocese of Newark v. Borough of Ho-Ho-Kus, 42 N.J. 556, 202 A.2d 161 (1964).

adopted a policy that people have a right to live near their place of work, if they want to. This passage is phrased in terms of living within the same town (i.e., if a town accepts the benefits of new employment, it must provide for the appropriate housing), but it clearly has implications for other nearby towns for several reasons. In some instances there will not be enough land appropriate for development in one town to take care of the resulting housing, or the most convenient locations for such housing may be in the next town. In all these situations the spillover goes into the distribution of regional need. The question is of course, how near? A great deal turns upon the answer to this question. Not everyone will want to live in the same town where he works, and the difference between 15 minutes and 30 minutes driving time often makes a large difference in the estimate of the housing need. The two policies discussed immediately above are in a completely different situation from the first two, for it cannot really be argued that the legislature has already adopted them, explicitly or even implicitly.[46] They are necessary elements in the implementation of a declared constitutional right, and as such fall into the area of overlap between the appropriate areas for legislative policy-making and for judicial definition of constitutional policy.

5. Implicit in the above is a movement towards equalizing the burden resulting from new development, particularly under the current tax set-up. If the *Mount Laurel* policy is implemented, the result will be a move towards bringing more low income population to the richer towns, which are by definition better able to provide public services for such population.

6. The opinion explicitly provides that towns may use their land use powers to protect ecologically sensitive areas, although this is restricted to only a few really ecologically important areas within each town.[47]

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46. One perhaps might argue the contrary on the level of legislative intent, if one considers the scheme of land use controls realistically as including all governmental actions which have a major impact on land use. The combined impact of the present official land use control system, plus the reliance of local real property taxation (and so on "good ratables") to finance major public services, is to provide financial rewards to the exclusionary suburbs and financial penalties for those which take a more socially-minded view on housing. In a word, this is a system for subsidizing anti-social conduct.

47. It seems probable that in most instances there is no need for a conflict between securing land for low-and moderate-cost housing and protecting land in ecologically sensitive

In other instances, the policies adopted in *Mount Laurel* (on a constitutional basis) will have a major impact upon other major public policies, which involve basic questions regarding metropolitan structure and dynamics. The first and most important of the latter involve the question of the location of employment, which is perhaps the most basic of all questions on regional structure.

In this respect the impact of the decision (and particularly the policy on dispersal of housing) may point in both directions. If more housing is available for lower-income employees in outer areas, this may encourage the dispersal of those categories of employment which include a low-wage component. On the other hand, if such a decision is combined in some states with a basic change in school financing, the result will be to reduce (or to minimize) the importance of ratables; this would tend to reduce the incentive to encourage employment in the outer areas.

All this may in some respects run counter to current thinking on metropolitan structure, which has been focussing along rather different lines. For example, in the New York-New Jersey region much thought is being given to encouraging a concentration of employment in larger centers located throughout the region; both the Tri-State Regional Planning Commission and the private Regional Plan Association have adopted plans along these lines. The impact of *Mount Laurel* upon these policies is not yet clear.

Second, in a closely related matter, it is the pattern of concentration (or dispersal) of employment which will determine the economic feasibility of public transportation systems in the outer parts of the region. Decisions such as *Mount Laurel* therefore may have a substantial impact upon that problem.

Third, with regard to another public problem, the desegregation of schools, the impact of *Mount Laurel* will be clearly favorable.

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areas. Figures on the subject are scarce, but they do exist for New Jersey. Williams and Norman, *supra* note 24. For example, in the state's prime growth area in Middlesex County, there are (or there were in 1970) some 56,000 acres of vacant land which are dry, flat, and zoned for residence. The County Planning Board has estimated the need for low and moderate cost housing at about 23,000 dwelling units—i.e., at 10 to the acre (with an allowance for streets and public facilities); the need is perhaps 3,000 acres. In such instances, there obviously is sufficient room for both.

Under recent trends, suburban schools have been increasingly de facto segregated as middle-income-white; central city schools have been moving in the opposite direction, primarily as a result of residential segregation. (In this situation the highly controversial present practice of bussing in order to promote racial integration is not a very effective attempt to promote such integration, by adopting the only device available for that purpose.) To the extent that *Mount Laurel* will contribute to alleviating this situation, it will be to the good.

Finally, the impact on the central cities must be considered. Much of the rhetorical discussion about exclusionary zoning has been focused on the most overt problem: the low-income blacks locked into the central city slums. *Mount Laurel* does, of course, point in the right direction to provide some relief for this problem. However, it seems probable that the eventual practical results will be to provide more open housing opportunities in the suburbs for middle and moderate income groups, including of course some blacks but consisting primarily of members of various white ethnic groups. To the extent that more of these people will now be able to leave the cities, this may have a considerable effect upon the population structure of those cities, and upon leadership patterns there.

The Need for Legislative Direction

In default of legislation, then, the courts will be handling major policy questions for which most judges have no special expertise, and which are normally considered legislative in nature. The situation obviously cries aloud for legislative intervention in order to deal with some of these. Moreover, since the impact of *Mount Laurel* has been to remove (or at least to make invalid) a large part of the existing system, the situation now is ripe for reconsideration and revamping of that system. To do so will require a high quality of vision and professional skill, plus a large dose of political courage.

If such a re-vamping is undertaken, with special concern for these problems emerging from *Mount Laurel*, the following considerations should be paramount:

1. The most obvious immediate need is to create the necessary machinery to determine overall housing need, and to allo-

cate this to different municipalities. In the absence of such machinery, we must anticipate chaos: to the extent that there is any action at all, each town (or group of towns) will be trying to make a rather low estimate of the extent of its own responsibility, on the basis of different (and probably conflicting) regions, and using different criteria to determine and to allocate such need. Since the latter represent major decisions on policy, they are particularly appropriate for legislative determination, or perhaps rather for detailed spelling-out by a professionally staffed administrative agency acting under broad (but clear) legislative guidelines.

2. The dominant fiscal pressure on land use decisions must be removed, or else one must be prepared to accept the fact that these pressures will remain dominant. Land uses vary widely in their fiscal implications for the municipality in terms of tax revenue brought in and services required. As long as these differences remain important to the municipalities, there is no reason to expect that local officials will ignore such considerations. Several possible courses of action are available here: (a) In order to remove the fiscal influences completely, it would be necessary to abolish the local real property tax, and replace it with other tax revenues—perhaps a combination of an income tax and a lower state-wide property tax, with funds allocated to towns by some formula based upon need. (b) A lesser, and more likely, version of this would be to do the same for the financing of education, the largest single local expense. Neither of these is likely to be politically popular, and there are other lesser measures which could do smaller parts of the job. (c) For example, the state could pay for the extra educational expenses resulting from subsidized housing, thus removing the financial penalty for accepting such housing, on the theory that since the benefits are state-wide, it is reasonable for the state to bear the burden. (This would have an analogy in the federal payments to "impacted" school districts.) (d) Another possible lesser measure is to provide for regional sharing of the benefits of good "ratables," along the lines of the recent legislation in Minnesota.[48]

3. The government has still another powerful weapon to influence land use, and is continually exercising this—the plan-

48. 24 MINN. STAT. 473 (f).01 *et. seq.* (extra session) 1971.

ning and construction of major public works, particularly highways, highway interchanges, and major sewers. As with the tax system, when this factor comes into play, the zoning system tends to operate not as an active force, but rather as a register of decisions made elsewhere and for other reasons. If planning is to be at all effective in the realm of housing, these various governmental powers affecting land use must be consolidated, or at least coordinated more closely.

4. Various statutes and other governmental actions have given a special status to various categories of ecologically sensitive land. A legislative declaration of policy is needed to deal with the potential—but probably unnecessary—conflict between ecological considerations and housing needs.

5. The above considerations have already defined in large part the appropriate roles for state or regional level planning and land use controls. A major part of that role is to indicate in advance the appropriate locations for the two extremes in density—that is, those areas which, primarily for ecological reasons, should be left open or at most receive very low density development, and those areas which, primarily because of their location to human artifacts on the land, are appropriate for concentrations of more intensive activity.[49]

49. This comes close to the system involved in the Hawaiian statewide zoning.